Institute of Judicial Administration

American Bar Association

Juvenile Justice Standards Project

[redacted]

STANDARDS RELATING TO

Schools and Education

Recommended by the
IJA-ABA JOINT COMMISSION ON JUVENILE JUSTICE STANDARDS

Hon. Irving R. Kaufman, *Chairman*

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Preface

The standards and commentary in this volume are part of a series designed to cover the spectrum of problems pertaining to the laws affecting children. They examine the juvenile justice system and its relationship to the rights and responsibilities of juveniles. The series was prepared under the supervision of a Joint Commission on Juvenile Justice Standards appointed by the Institute of Judicial Administration and the American Bar Association. Twenty volumes in the series have been approved by the House of Delegates of the American Bar Association.

The standards are intended to serve as guidelines for action by legislators, judges, administrators, public and private agencies, local civic groups, and others responsible for or concerned with the treatment of youths at local, state, and federal levels. The twenty-three volumes issued by the joint commission cover the entire field of juvenile justice administration, including the jurisdiction and organization of trial and appellate courts hearing matters concerning juveniles; the transfer of jurisdiction to adult criminal courts; and the functions performed by law enforcement officers and court intake, probation, and corrections personnel. Standards for attorneys representing the state, for juveniles and their families, and for the procedures to be followed at the preadjudication, adjudication, disposition, and postdisposition stages are included. One volume in this series sets forth standards for the statutory classification of delinquent acts and the rules governing the sanctions to be imposed. Other volumes deal with problems affecting nondelinquent youth, including recommendations concerning the permissible range of intervention by the state in cases of abuse or neglect, status offenses (such as truancy and running away), and contractual, medical, educational, and employment rights of minors.

The history of the Juvenile Justice Standards Project illustrates the breadth and scope of its task. In 1971, the Institute of Judicial Administration, a private, nonprofit research and educational organi-

zation located at New York University School of Law, began planning the Juvenile Justice Standards Project. At that time, the Project on Standards for Criminal Justice of the ABA, initiated by IJA seven years earlier, was completing the last of twelve volumes of recommendations for the adult criminal justice system. However, those standards were not designed to address the issues confronted by the separate courts handling juvenile matters. The Juvenile Justice Standards Project was created to consider those issues.

A planning committee chaired by then Judge and now Chief Judge Irving R. Kaufman of the United States Court of Appeals for the Second Circuit met in October 1971. That winter, reporters who would be responsible for drafting the volumes met with six planning subcommittees to identify and analyze the important issues in the juvenile justice field. Based on material developed by them, the planning committee charted the areas to be covered.

In February 1973, the ABA became a co-sponsor of the project. IJA continued to serve as the secretariat of the project. The IJA-ABA Joint Commission on Juvenile Justice Standards was then created to serve as the project's governing body. The joint commission, chaired by Chief Judge Kaufman, consists of twenty-nine members, approximately half of whom are lawyers and judges, the balance representing nonlegal disciplines such as psychology and sociology. The chairpersons of the four drafting committees also serve on the joint commission. The perspective of minority groups was introduced by a Minority Group Advisory Committee established in 1973, members of which subsequently joined the commission and the drafting committees. David Gilman has been the director of the project since July 1976.

The task of writing standards and accompanying commentary was undertaken by more than thirty scholars, each of whom was assigned a topic within the jurisdiction of one of the four advisory drafting committees: Committee I, Intervention in the Lives of Children; Committee II, Court Roles and Procedures; Committee III, Treatment and Correction; and Committee IV, Administration. The committees were composed of more than 100 members chosen for their background and experience not only in legal issues affecting youth, but also in related fields such as psychiatry, psychology, sociology, social work, education, corrections, and police work. The standards and commentary produced by the reporters and drafting committees were presented to the IJA-ABA Joint Commission on Juvenile Justice Standards for consideration. The deliberations of the joint commission led to revisions in the standards and commentary presented to them, culminating in the published tentative drafts.

The published tentative drafts were distributed widely to members of the legal community, juvenile justice specialists, and organizations directly concerned with the juvenile justice system for study and comment. The ABA assigned the task of reviewing individual volumes to ABA sections whose members are expert in the specific areas covered by those volumes. Especially helpful during this review period were the comments, observations, and guidance provided by Professor Livingston Hall, Chairperson, Committee on Juvenile Justice of the Section of Criminal Justice, and Marjorie M. Childs, Chairperson of the Juvenile Justice Standards Review Committee of the Section of Family Law of the ABA. The recommendations submitted to the project by the professional groups, attorneys, judges, and ABA sections were presented to an executive committee of the joint commission, to whom the responsibility of responding had been delegated by the full commission. The executive committee consisted of the following members of the joint commission:

Chief Judge Irving R. Kaufman, *Chairman*
Hon. William S. Fort, *Vice Chairman*
Prof. Charles Z. Smith, *Vice Chairman*
Dr. Eli Bower
Allen Breed
William T. Gossett, Esq.
Robert W. Meserve, Esq.
Milton G. Rector
Daniel L. Skoler, Esq.
Hon. William S. White
Hon. Patricia M. Wald, *Special Consultant*

The executive committee met in 1977, 1978, and 1979 to discuss the proposed changes in the published standards and commentary. Minutes issued after the meetings reflecting the decisions by the executive committee were circulated to the members of the joint commission and the ABA House of Delegates, as well as to those who had transmitted comments to the project.

In February 1979, the ABA House of Delegates approved seventeen of the twenty-three published volumes. It was understood that the approved volumes would be revised to conform to the changes described in the minutes of the 1977 and 1978 executive committee meetings. The *Schools and Education* volume was not presented to the House. Of the five remaining volumes, *Court Organization and Administration*, *Juvenile Delinquency and Sanctions*, and *The Juvenile Probation Function* were approved by the House in February

1980, subject to the changes adopted by the executive committee. *Abuse and Neglect* and *Noncriminal Misbehavior* were held over for final consideration at a future meeting of the House.

Among the agreed-upon changes in the standards was the decision to bracket all numbers limiting time periods and sizes of facilities in order to distinguish precatory from mandatory standards and thereby allow for variations imposed by differences among jurisdictions. In some cases, numerical limitations concerning a juvenile's age also are bracketed.

The tentative drafts of the twenty volumes approved by the ABA House of Delegates, revised as agreed, are now ready for consideration and implementation by the components of the juvenile justice system in the various states and localities.

Much time has elapsed from the start of the project to the present date and significant changes have taken place both in the law and the social climate affecting juvenile justice in this country. Some of the changes are directly traceable to these standards and the intense national interest surrounding their promulgation. Other major changes are the indirect result of the standards; still others derive from independent local influences, such as increases in reported crime rates.

The volumes could not be revised to reflect legal and social developments subsequent to the drafting and release of the tentative drafts in 1975 and 1976 without distorting the context in which they were written and adopted. Therefore, changes in the standards or commentary dictated by the decisions of the executive committee subsequent to the publication of the tentative drafts are indicated in a special notation at the front of each volume.

In addition, the series will be brought up to date in the revised version of the summary volume, *Standards for Juvenile Justice: A Summary and Analysis*, which will describe current history, major trends, and the observable impact of the proposed standards on the juvenile justice system from their earliest dissemination. Far from being outdated, the published standards have become guideposts to the future of juvenile law.

The planning phase of the project was supported by a grant from the National Institute of Law Enforcement and Criminal Justice of the Law Enforcement Assistance Administration. The National Institute also supported the drafting phase of the project, with additional support from grants from the American Bar Endowment, and the Andrew Mellon, Vincent Astor, and Herman Goldman foundations. Both the National Institute and the American Bar Endowment funded the final revision phase of the project.

An account of the history and accomplishment of the project would not be complete without acknowledging the work of some of the people who, although no longer with the project, contributed immeasurably to its achievements. Orison Marden, a former president of the ABA, was co-chairman of the commission from 1974 until his death in August 1975. Paul Nejelski was director of the project during its planning phase from 1971 to 1973. Lawrence Schultz, who was research director from the inception of the project, was director from 1973 until 1974. From 1974 to 1975, Delmar Karlen served as vice-chairman of the commission and as chairman of its executive committee, and Wayne Mucci was director of the project. Barbara Flicker was director of the project from 1975 to 1976. Justice Tom C. Clark was chairman for ABA liaison from 1975 to 1977.

Legal editors included Jo Rena Adams, Paula Ryan, and Ken Taymor. Other valued staff members were Fred Cohen, Pat Pickrell, Peter Garlock, and Oscar Garcia-Rivera. Mary Anne O'Dea and Susan J. Sandler also served as editors. Amy Berlin and Kathy Kolar were research associates. Jennifer K. Schweickart and Ramelle Cochrane Pulitzer were editorial assistants.

It should be noted that the positions adopted by the joint commission and stated in these volumes do not represent the official policies or views of the organizations with which the members of the joint commission and the drafting committees are associated.

This volume is part of the series of standards and commentary prepared under the supervision of Drafting Committee I, which also includes the following volumes:

RIGHTS OF MINORS
JUVENILE DELINQUENCY AND SANCTIONS
NONCRIMINAL MISBEHAVIOR
YOUTH SERVICE AGENCIES
ABUSE AND NEGLECT
POLICE HANDLING OF JUVENILE PROBLEMS

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Introduction

In considering the "juvenile justice system," attention is usually directed to the institutions—courts, judges, probation officers, juvenile "homes"—through which the law is applied to children charged with unacceptable behavior. If one shifts the focus to juvenile "justice," attention is directed more broadly to the conditions and circumstances that will bring about fair and decent treatment of children, including the satisfaction of basic human needs for love, care, food, and shelter; the positive models of behavior a child might imitate; the experiences that will prepare a child for adult responsibilities and provide positive attitudes about self; a world in which the child can think favorably about future prospects. Justice for children depends upon the distribution of wealth and opportunities; values that are shared; qualities that are rewarded. A just world for children in American society certainly depends upon the child's family life and his or her life in school.

The school is also an important part of the *system* of juvenile justice. The law in the United States compels children to attend school. A. Steinhilber and C. Sokolowski, *State Laws on Compulsory Attendance* (1966). In school the child is subjected to an extensive body of rules, the violation of which results in various forms of punishment (or "discipline"). Not infrequently a sanction entails exclusion from school—a sentencing to the life of the streets. From there, a child may pursue a course of conduct that will bring him or her within the jurisdiction of the juvenile court. There is a close correlation between children in trouble in school and children in trouble with the law. See H. James, *Children In Trouble* ch. 16 (1970); K. Polk and W. Schafer, *Schools and Delinquency* (1972). School violations also lead directly to the juvenile court when a child is "truant" see, *e.g.*, Del. Code Ann. tit. 14 § 2711 (1975); Mont. Rev. Codes Ann. § 10-1203 (13)(c) (Supp. 1975), or disobedient to the school's authority, see, *e.g.*, Fla. Stat. Ann. § 232.19 (3) (Supp. 1976); Mass. Gen. Laws Ann. ch. 119, § 39E (Supp. 1976). A juvenile court may "dispose" of a child judged to be "delinquent" by requiring that the child attend school. See, *e.g.*, Colo. Rev. Stat. Ann.

§ 22-33-108 (1974). On the other hand, children are sometimes suspended from school because they are charged with or judged to have committed juvenile offenses. See *R.R. v. Board of Education*, 109 N.J. Super. 337, 263 A.2d 180 (1970); *Howard v. Clark*, 59 Misc. 2d 327, 299 N.Y.S.2d 65 (Sup. Ct. 1965); *cf. Bunger v. Iowa High School Athletic Association*, 197 N.W.2d 555 (Iowa 1972).

School has an often dominant involvement in the lives of children, both by contributing to the quality of justice for children and by directly tying into the juvenile justice system. Consequently, it is tempting to assume that schools can perform a critical child-saving function. Although many other once-bright possibilities for juvenile justice have been given up in despair, schools remain objects of hope. We think that hoping for the future of its children is essential to any society's survival and that the schools should share this burden of hope and survival.

But we would temper hope with realism by recalling certain salient features of the evolution of juvenile justice. The existing system of juvenile justice grew out of a concern for the lives of children and a belief that children should not be treated as criminals. See generally Schultz, "The Cycle of Juvenile Court History," 19 *Crime & Delinq.* 457 (1973); M. Lazerson, Book Review, 41 *Harv. Ed. Rev.* 102 (1971). For the harshness of the criminal law and the criminal court, it substituted rehabilitation, helping errant children back to the societal center rather than forcing them to pay for their offenses against society. In place of an adjudication of criminal conduct a determination of "delinquency" was adopted. Characterizing that determination as noncriminal was considered to justify omitting procedural safeguards for accused "delinquents" and stretching the delinquency jurisdiction to include behavior that was unacceptable for children though not unlawful for an adult. Now, very much of this has been either rejected or continued out of inertia with little or no conviction. Juvenile justice currently represents a noble idea that has foundered from lack of resources, hypocrisy, bad faith, racism, lack of commitment, and human limitations. The idea has failed largely at the expense of children, but partly because the conception does not deal satisfactorily with children who appear to be mature in crime though young in years.

Reflecting widely shared views, standards contained in other volumes of the Juvenile Justice Standards Project have rejected, as unfair and unhelpful, the jurisdiction of the juvenile courts to deal coercively with children whose "status offenses" are not outlawed as criminal conduct. See the *Noncriminal Misbehavior* volume. The standards have rejected any approach that would justify coercive

treatment merely for rehabilitative purposes or that would justify any sacrificing of procedural protection on the ground that the objectives of the system are benign. None of these policy judgments is based on an assumption that there are not children seriously in trouble and seriously in need of help. The hope remains strong that schools will somehow succeed where other elements of the juvenile system have failed. If children are kept in school rather than ejected; if school is made more interesting and relevant; if school can be operated in a more humane, sympathetic, child-centered fashion—if all of these things can be done, it is hoped that much of the problem of deviance that has not been solved by the juvenile justice system will be headed off or cured by school.

Certainly, the schools should be encouraged to take some of this responsibility. But the schools have a broad clientele to serve, with limited resources, expertise, and talent. It is important to emphasize that the schools must hire tens of thousands of teachers and administrators to carry out their tasks, and that they must compete for personnel with very modest salary offerings and difficult employment conditions. Those hired, on the whole, are people of average intelligence and capacity, subject to normal human frailty. In short, we doubt that schools are staffed by people so extraordinary, so imaginative, so patient, so dedicated that their dealings with difficult children can be expected to be markedly more successful than those of people who have dealt with these same children in other contexts.

On the other hand, schools have the advantage of dealing with difficult children in a relatively promising environment. Here too there are qualifications of substantial dimensions. First, schools have a primary mission of educating children, and however broadly or narrowly that is defined, performing that primary mission is not likely to be identified in the minds of the school staff members with a course of action most helpful for dealing with difficult students. In fact many students are "difficult" precisely because they bring to school personalities or educational needs not easily reached by the approaches schools are primarily set up to follow. Second, giving schools increasingly broad and diverse mandates with no commensurate increase in resources or training is more likely to strain their capacity to do anything effectively than to facilitate their capacity to do still more. Third, the environmental advantage of schools over other childcare institutions is easily exaggerated. Schools are sometimes chaotic, sometimes violent places, and like other custodial institutions, they have coercive control over children by law.

The reporters of this volume are not "educators" as that term is commonly used, but lawyers with a special interest in the law affect-

ing education. The Juvenile Justice Standards Project is concerned with developing *standards* that will provide a framework of justice for juveniles. The Project has not undertaken to flesh out a program for society's treatment of juveniles in every aspect of their lives. There are widely and fundamentally differing points of view concerning optimum educational policy in the United States. Except on the broadest of grounds, we do not here enter that debate. By eschewing the temptation to resolve educational policy issues, we by no means suggest those issues are unimportant. We avoid consideration of the details of educational policy because we do not believe that we have the answers, because we do not regard doing so as the function of this volume, and because we affirmatively believe that there is no revealed truth on the subject and that what is important is continuing the debate while experimenting in a number of directions.

It is obvious that our specific proposals do represent educational as well as legal judgments. In fact, it is probably a truism that legal standards addressed to educational situations necessarily reflect judgments about educational policy. A great deal of what we propose is either based on or derived from established legal principles. It is now clear, for example, that juveniles may not be deprived of constitutional rights merely because of their status as juveniles. *In re Gault*, 387 U.S. 1 (1967); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); or as students, *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). It has always been true that the power of educators to regulate the lives of students has been limited to matters that can be related to the educational functions of schools. See generally, Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373 (1969). To say that these are settled legal matters is not to say that they do not represent educational policy as well.

We do not confine our standards to what is now legally required. Whether our proposals reflect existing legal doctrine or go beyond it, they are intended to achieve what we regard as a basic principle: the rule of law must prevail within the public schools. It is assumed that schools can perform their educational functions without having unqualified authority and that a high degree of student freedom is consistent with the achievement of educational objectives. Neither of these assumptions, nor the specific standards of this volume, are inconsistent with the further assumption that student "rights" must be shaped and applied with a view to the context and the educational goals of schools. Although these standards do not address themselves

to student responsibility as such, they clearly are intended to operate interstitially in a structure that assumes adult authority and regulation of students' lives. The standards of this volume do not assume that children can be educated, or grow, free of responsibility, but rather that rights and responsibilities define each other. It is our assumption that a just system for children, in school as well as out, requires that the individuality, relative autonomy, and humanity of children be recognized by freeing them from regulation and punishment under arbitrary rules and power. Correspondingly, we assume that children may be governed by reasonable regulations, judged according to fair procedures, and subjected to appropriate sanctions. See Baumrind, "Coleman II: Utopian Fantasy and Sound Social Innovation," 83 *School Rev.* 69, 78–84 (1974).

Whatever the specifics of the educational philosophy and educational program, it is essential that juveniles in public school have an opportunity for success, for a positive experience, and for the chance to develop a positive view of themselves and their future. Making such opportunities available should not be interpreted to mean that schools must lower standards or make everything easy or "fun." Real challenge and high expectations are quite consistent with making school a positive experience for juveniles. In fact, it may be impossible for juveniles to have a positive sense of achievement unless they are required to meet real tests and to develop real competence.

We see nothing in any of the preceding to suggest that all schools must be alike or that any school must be the same for all students. The standards of this volume generally reflect what is probably a paradoxical truth of both American law and American education: all are treated equal because assumed to be equal, yet the individual differences of each must be recognized and protected. A crowning achievement of American education has been its universality. But its very inclusiveness has created many of its problems. In addition to vast numbers, public schools in the United States attempt to educate vastly different types of children. They have different backgrounds, interests, and needs and develop at different rates of speed. The educational challenge that has never been met is to adapt schools to these variations without resorting to an unstimulating blandness or a lowest common denominator. We concede the difficulty of this task, and make no attempt to specify the means. Our inclination is to believe that there is no single means, and we feel confident that there is not yet any proven means. There are hopeful theories and experiments already in existence including "alternative schools" operated within the public school system. See C. Silberman, *Crisis In the Classroom* ch. 8 (1970); Goodlad, *The Conventional and the Alterna-*

tive in Education (1975); Lawrence, "Free Schools: Public and Private and Black and White," 3 & 4 *Inequality in Education* 8 (1970); A. Graubard, *Free The Children* (1973); and "voucher" plans in various forms utilizing both publicly and privately operated schools. See M. Friedman, *Capitalism & Freedom* 85-93 (1962); Center for the Study of Public Policy, *Educational Vouchers* (1970); Coons & Sugarman, "Family Choice in Education: A Model State System for Vouchers," 59 *Calif. L. Rev.* 321 (1971); Levin, "Alum Rock: Vouchers Pay Off," 15 *Inequality in Education* 57 (1973); Areen, "Education Vouchers" 6 *Harv. Civ. Rights—Civ. Lib. L. Rev.* 466 (1971); Arons "Equality, Option, and Vouchers," 72 *Teachers College Record* 337 (1971). Within these broad, though not exhaustive, possibilities, wide variations in the nature and extent of "community" involvement are possible. See *e.g.*, Thomas, "Community Power and Student Rights," 42 *Harv. Ed. Rev.* 173 (1972).

Whatever the particular approach, we think it is essential that steps be taken to assure the greatest possible racial integration. This volume does not include detailed standards concerning school desegregation (although the standards do clearly preclude factors such as race or sex from influencing education decisions; see Standard 1.7). But we assume that a racially segregated system of education cannot be a just system nor can it provide full opportunity for all students to develop their abilities and a positive view of themselves.

It is important to note here that our volume concerns only public schools. See Standard 9.1. We assume that the constitutional right of parents to choose private schools, a right that was recognized in *Pierce v. Society of Sisters*, 268 U.S. 510 (1925), will continue. Many of the standards in this volume will be found to be valuable also to private schools. Yet they cannot automatically be assumed to be so. The standards are addressed to public decision makers in regard to public schools. The existence of different norms for public and private schools concerning many of their aspects is a fundamental feature of our pluralistic educational society. See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Bright v. Isenbarger*, 314 F. Supp. 1382 (N.D. Ind. 1970), *aff'd* 445 F.2d 412 (7th Cir. 1971). It cannot be assumed that private schools are inherently unjust simply because they do not adopt every proposal contained in this volume. That judgment must be made on a much more selective basis. The determination of what is just or unjust will be affected by the element of voluntariness in choosing a private school with knowledge of the specific restrictions that might be applicable at that school. Of course we realize that the choice involved is ordinarily the parent's rather than the student's. We do not assume that parent and student in-

terests are identical, nor that parent-student conflicts must be ignored (see Standard 2.1); but we are unwilling to assume that the juvenile has no influence on parental choice or that it is inherently unfair for a juvenile's rights to be affected by the parent's decision. Nothing that we say here suggests that a state should not, on a selective basis, make the proposed standards of this volume applicable to private schools. See generally G.R. Wankema, *Law & the Non-Public School* (1964); D.A. Erickson, *Public Controls for Non-Public Schools* (1969), nor does it preclude the possibility that the constitution will directly reach private school activities in certain respects, see *e.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973), or that Congress will enact legislation applying constitutional standards to private schools, see *e.g.*, *Runyon v. McCrary*, 96 S. Ct. 2586 (1976). Finally, the line between "public" and "private" is often fuzzy, and we assume that substantial state involvement through financing or regulation should, at some point, subject a school that is private in form to the standards applicable to public education.

It is now desirable to turn more directly to an overview of the standards contained in this volume. In the order indicated by the following part numbers the volume proposes standards concerning: (I) the right to education and compulsory education; (II) the problem of consents or waivers by students and of the allocation of control of student rights between students and their parents; (III) the general regulatory power of schools; (IV) student rights of expression; (V) procedural rights available to students in connection with school discipline; (VI) sanctions appropriate for student misconduct; (VII) interrogation of students; (VIII) searches of students or student-related areas; and (IX) a chapter setting forth definitions used throughout this volume.

Part I proposes standards encompassing the principles that all children have a right to an education and that all children are expected to attend school. The standards in this chapter attempt to focus the responsibility for providing an education on school officials without subjecting those officials to liability for failures that cannot reasonably or fairly be attributed to them. This part adopts standards calling for the implementation of compulsory education through counseling and efforts to eliminate school and nonschool conditions that tend to undermine school attendance. Part I also adopts standards incorporating principles of equal treatment for juveniles similarly situated and of individualization requiring schools to meet the needs of differently situated students with differing educational programs. In connection with these objectives, the standards create a

presumption of comparable treatment and a requirement that different treatment must be justified. Finally, the standards establish procedures to enable students to challenge the appropriateness of the educational decisions affecting them.

Part II sets forth standards that relate to the control and preservation of the rights of students set forth throughout the volume. First, this part accepts the idea that the rights of students will often be controlled by parents, but qualifies this acceptance with the principle that the standards of this volume should be interpreted whenever possible to give the juvenile maximum participation (alone or along with the parents) in controlling rights designed for the juvenile's protection. Second, Part II accepts the possibility that students may validly waive rights or consent to otherwise prohibited conduct, but qualifies this acceptance with elaborate rules for maximizing the reliability of any such consent or waiver.

Part III adopts the broad standard, reflective of current law, that schools are limited-purpose government bodies and that any regulation of student conduct must be justifiable in terms of the regulation's accomplishment of an appropriate school function. The standards in this part also specify that, in the determination of the validity of a student conduct regulation, the educational benefits of a rule must be weighed against countervailing values such as the desirability of educating all students and leaving certain decisions (such as marriage or dress) to private choice. This part also proposes more specific standards, exemplifying the broad standards, to cover such frequently arising situations as school attempts to restrict student access to school activities based on the fact that the student is married, a parent, or pregnant. Part III also sets forth the right of privacy of students and their families as a bar to the power of schools to compel students to respond to tests or otherwise supply information disclosing intimate details of their personal or family life, and as a bar to compelling students to take any drug for the purpose of altering their behavior. It additionally provides for the right of schools to reasonably restrict access to school premises by people who are not students or school personnel and, finally, provides for confidentiality of communications between students and school counselors and, to a lesser extent, between students and other school personnel.

Part IV deals with limitations on school regulatory power that would otherwise exist by reason of fundamental student interests in expression. This Part adopts standards that encompass clearly established constitutional rights and, in addition, resolves, through specific standards, constitutional questions that might fairly be regarded as still open. Although the standards in this chapter are intended to

incorporate existing constitutional decisions, to apply general constitutional principles to specific situations, and to draw vitality from general constitutional doctrine, these standards do not purport to rest exclusively on settled constitutional law.

Parts V and VI attempt to develop standards that govern the application of valid rules, in the light of Parts III and IV, to specific instances of student misconduct. Part V, dealing with student procedural rights, is similar to Part IV in that it starts with but is not limited to settled constitutional law. Part V adopts the clearly established principle that procedural rights are circumstantial. As the jeopardy to the student increases and the disadvantage to any countervailing school interests decreases, the student should be afforded increasingly comprehensive procedural protection. Conversely, as the consequence to the student decreases or the burden on school concerns increases, the claim for full-blown procedural protection diminishes. The standards of Part V apply these general ideas in concrete terms by specifying various procedural safeguards that must be available to students under varying specified circumstances.

Part VI, dealing with sanctions, proposes standards that, to a considerable degree, involve a nexus of the standards from Parts III and IV on the one hand, and V on the other. Somewhat parallel to the sanctions of the criminal law, there is relatively little legal doctrine covering questions concerning sanctions that are appropriate for student misconduct. Part VI adopts a general principle of proportionality (quantitatively and qualitatively). The standards on sanctions are also explicit in stating that exclusion from regular public school must always be minimized and may not be used if any less restrictive sanction is available. Finally, the standards specify that excluding a student from a regular public school does not relieve the school officials from their obligation to educate all students.

Parts VII and VIII deal with problems that arise at the points of intersection between criminal law enforcement and the public schools. These two parts deal with crime investigation in the public schools, respectively, in the form of interrogations and searches and seizures. In both cases, certain common principles are adopted. First, the school context or the student status should not increase or decrease the legal power of the police, with the exception that in-school crime investigation is to be avoided unless there are not other reasonably available opportunities.

Second, interrogations and searches by school officials that produce evidence of criminal conduct are put on the same legal footing as comparable police investigations unless it is clear that such school administrative efforts were not an integral part of a police operation

and were not prompted by crime investigation motives. Third, for certain purposes, no distinction should be drawn between criminal law sanctions and serious disciplinary sanctions such as long suspensions. The standards proposed in these two chapters are based on the premise that serious juvenile misconduct, whether or not school-related, justifies serious sanctions and correspondingly substantial procedural protection. These standards also assume that any resulting impediment to law enforcement (or school discipline) is justified by the protection of individual rights and the preservation of the integrity of the educational process.

Part IX sets forth four key definitions. "Schools" (and related terms such as "school officials") and "parents" (including guardians) are defined terms used throughout the volume. "Disciplinary sanctions" and "serious disciplinary sanctions" are defined terms that play a critical role in connection with the procedural standards of Part V and with the standards concerning interrogations and searches in Parts VII and VIII. These definitions clarify and simplify the statement of the various substantive standards contained in the volume.

A concluding comment is appropriate concerning the audience to which the proposed standards of this volume are addressed. That audience includes legislators, courts, lawyers, educators, parents, students and the general public. For the most part the standards themselves are written in careful and formalistic terms. We realize that they will sometimes seem arcane to any general audience. But we think that disadvantage is more than justified by the need for precision. It is our intention that the standards should be directly susceptible to legislative enactment and useful as broad models from which more detailed legislation could be derived. We intend our commentary both to clarify the meaning of our standards and to be understandable by a lay audience including educators, the general public, and students at the higher levels of public education. We add the suggestion that this material would benefit from public debate in which lawyers and nonlawyers participate and mutually inform each other.

Standards

PART I: RIGHT TO EDUCATION

1.1 Every juvenile who is living within the state and is between the ages of six and twenty-one (or younger or older if so specified by state law) and not a graduate of high school (or higher level specified by state law) should have the right to an education provided at state expense; and education should be so provided by the local school district (or other unit of government specified by state law).

1.2 Without regard to age, the right to at least a high school education (as specified in Standard 1.1) may be acquired in a continuous period or two or more separate periods of attendance.

1.3 The right to education established by Standard 1.1 includes the right to an education that is appropriate for each individual student.

1.4 In the absence of special circumstances affecting or identifying a student's educational needs or educational development, every student should have the right to an education that is:

A. substantially similar in kind to that which is provided other students in the school district; and

B. provided through a substantially equal allocation of educational resources on a statewide basis.

1.5 In the absence of special circumstances affecting or identifying a student's educational needs or educational development, every student should have equal opportunity to select among alternative schools, programs, or courses when such alternatives are provided, subject to minimal restrictions reasonably necessary for efficient administration.

1.6 All students are presumed to be similarly situated for educational purposes in the absence of a particularized determination of

special circumstances affecting or identifying a particular student's educational needs or development.

1.7 A student's race, sex, nationality, or ethnic identity should never be the basis of a determination that a student should be assigned to a particular school, program, or course because that student has unique educational needs or educational development.

1.8 A. A student may be assigned to a particular school, program, or course, or denied access to a particular school, program, or course on the basis of that student's educational needs or educational development.

B. A student assigned or denied access to a particular school, program, or course by reason of the student's educational needs or educational development is entitled to receive, at the student's request, an explanation (in writing, if requested) of the basis for the assignment or denial and a conference to discuss the assignment or denial.

C. If the student believes the explanation of the assignment or denial is based on erroneous factual information, the student should be given a hearing with respect to the claimed factual error or errors consistent with the hearing specified in Part V, subject to the following qualifications:

1. the student should have the burden of establishing that there is reasonable ground to believe that a factual error in assignment or denial has been made;

2. the school should thereafter have the burden of rebutting evidence of factual error or of establishing the existence of educational needs or educational development making the assignment or denial appropriate notwithstanding the factual error;

3. the standard of proof under Standard 1.8 C. 1. and 2. should be the preponderance of the evidence.

D. Without regard to a request for an explanation under Standard 1.8 B. or belief of factual error under Standard 1.8 C., the student should be given a hearing consistent with the hearing specified in Part V, if the assignment or denial involves either:

1. assignment or denial of access to a particular school; or

2. both

a. an assignment or denial of access to a particular program or course; and

b. an assignment or denial entailing segregation from other students, not having the same educational needs or educational development, for more than 30 percent of the average school day.

E. The school should have the burden of proving that one or more

decisions involving an assignment or denial under Standard 1.8 D. would be appropriate on the basis of special circumstances affecting or identifying the student's educational needs or educational development.

1.9 If any student is lacking fluency in the language primarily used for instruction in the school of attendance, that student should receive special instruction to the extent necessary to offset any educational disadvantage resulting from the student's particular language development.

1.10 Juveniles between the ages specified by the state (but in no event older than age sixteen) should be required to attend public school or to receive equivalent instruction elsewhere.

1.11 If a juvenile fails to attend school without valid justification recurrently or for an extended period of time, the school:

A. should so inform the parent by a notice in writing (in English and, if different, in the parent's primary language) and by other means reasonably necessary to achieve notice in fact;

B. should schedule a conference (and separate conferences, if appropriate) for the parent and juvenile at a time and place reasonably convenient for all persons involved for the purpose of analyzing the causes of the juvenile's absences;

C. should take steps

1. to eliminate or reduce those absences (including, if appropriate, adjustments in the student's school program or school or course assignment); and

2. to assist the parent or student to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school; and

D. in the event action taken pursuant to provisions A., B., and C. is not successful in reducing the student's absences, may petition the court for the sole purpose of developing, with the participation of student and parent, a supervised plan for the student's attendance.

1.12 A. Neither school officials nor police officers (nor other officials) should have any power to take a juvenile into custody, with or without a warrant, by reason of the fact alone that a juvenile is absent from school without valid justification.

B. A duly authorized school official may return a student to school if the student is found away from home, is absent from school without a valid justification, and agrees to accompany the official back to school.

1.13 A. A parent's failure to cause a juvenile to attend school should not be the basis of any criminal or other action taken against the parent, except as provided in Standards 1.11 and 1.13 B.

B. A parent's failure to cause a juvenile to attend school should not alone provide a basis for a neglect petition against the parent but, when a neglect petition has been filed on the basis of other evidence, a parent's failure to take reasonable steps to cause a juvenile to attend school may be used as evidence with respect to the question of the appropriate disposition of the neglect petition.

PART II: BASIC CONSIDERATIONS AFFECTING STUDENT RIGHTS: PARENTAL ROLE AND STUDENT CONSENT AND WAIVER

2.1 A. When the rights of a student are specified or implied by a standard in this volume, the standard should be construed in a manner that will be most likely to protect the student's individual interest.

B. When a standard in this volume authorizes or requires a student to take an action or exercise discretion, the reference in the standard to "student" should be construed as if it read "student and/or parent" and, except as provided in this Part, these standards do not provide for the allocation of control of any decision concerning such an action or discretion between student and parent.

C. The student should participate in decisions affecting the student's interests to the extent such participation is appropriate in view of the particular circumstances, the particular interest involved, and the age and experience of the student.

2.2 A. A consent that would validate an otherwise prohibited action of a school official, a police officer, or other government official, or a waiver of any right created by these standards is effective as a consent or waiver only if:

1. the consent or waiver is voluntary in fact;
2. the student is clearly advised
   a. that the consent or waiver may be withheld, and
   b. of any possible adverse consequence that might result from such consent or waiver;
3. the student's parent, except when a reasonable effort to inform the parent is unsuccessful,
   a. is informed of the fact that the student's consent or waiver will be sought,
   b. has the opportunity to be present before the consent or

waiver is given (unless a student over fourteen years of age objects to the parent's presence), and

c. expressly approves of the consent or waiver (unless a student over sixteen years of age has knowledge of the parent's lack of approval and gives or repeats his or her consent or waiver thereafter), and

4. either

a. there is no evidence of coercion, or

b. any evidence of coercion that exists is satisfactorily rebutted.

B. In addition to the requirements specified in Standard 2.2 A., a student who is entitled to counsel (retained or provided) under these standards may give an effective consent or waiver only if the student:

1. is advised of his or her right to counsel;

2. is given an opportunity to obtain counsel; and

3. either

a. makes the consent or waiver through counsel, or

b. waives the right to counsel in accordance with Standard 2.2 A.

C. The burden of proving that a student's consent or waiver meets the requirements of Standard 2.2 A. should be carried by any party relying upon the consent or waiver to establish the validity of an action, the inapplicability of a right, or the admissibility of evidence.

D. In determining whether the consent or waiver was voluntary in fact, each of the following should be considered as evidence tending to indicate that the consent or waiver was involuntary:

1. the student's parent was not informed of the fact that the student's consent or waiver would be sought;

2. the parent was not present when the consent or waiver was given;

3. the parent did not approve of the consent or waiver;

4. the consent or waiver was given in the school building;

5. the consent or waiver was given in the office of the school principal or some other administrative official of the school;

6. the consent or waiver was given in the presence of the school principal or some other administrative official of the school (unless there is unambiguous evidence that the school official acted in a manner that would have been understood by the student as attempting to help the student to make a voluntary choice);

7. the consent or waiver was given without the assistance of counsel;

8. the consent or waiver was requested by a school official, a police officer, or other government official;

9. the consent or waiver was not in writing;

10. the consent or waiver was given by a student under twelve years of age.

E. Standard 2.2 A. applies to any consent or waiver under these standards, including but not limited to:

1. consent to a search otherwise proscribed by Part VIII;

2. consent to interrogation otherwise proscribed by Part VII (except that the prohibition of Standard 7.2 cannot be avoided by consent or waiver);

3. waiver of a right to object to any excludable evidence;

4. waiver of any procedural right provided by Part V; and

5. consent to the administration of any drug, physical test (such as a urinalysis), psychological test, or any other procedure not required of all students by a general rule promulgated pursuant to the school board's authority in accordance with Part III.

F. If the student's opportunity to enjoy any right or privilege otherwise available is conditioned, in whole or in part, upon the student's consent or waiver, the consent or waiver should be conclusively presumed to be invalid.

PART III: SCHOOL REGULATORY POWER

3.1 In the absence of explicit legislative provisions to the contrary, schools should attempt to regulate the conduct or status of students only to the extent that such regulation is reasonably and properly related to educating the students in their charge.

3.2 Regulation of student conduct or status by school authorities is reasonably and properly related to educating school students only if such regulation is reasonably and properly in furtherance of:

A. the education per se function of schools, which consists of the basic function of educating students; or

B. the host function of schools, which consists of protection of persons or property for which the school is responsible and of the integrity of the educational process.

3.3 Schools may regulate student conduct or status based on their educational per se function only where the educational interest involved clearly outweighs the applicable countervailing factors. Schools may regulate student conduct or status based on their host function where such conduct or status also substantially involves significant interests beyond that of the school's, only if there exists a

clear and imminent threat of harm to persons or property for which the school is responsible, or to the integrity of the educational process, which cannot otherwise be eliminated by reasonable means.

3.4 No student should be denied access to any school activity whether or not the activity is denominated "extracurricular," except as provided in these standards.

3.5 Neither the education per se function nor the host function of schools justifies the complete or partial exclusion of a student from any school program or activity solely on the basis of such student's status of being married or being a parent (wed or unwed).

3.6 Neither the education per se function nor the host function of schools justifies:

A. the exclusion of a student from any school activity based solely on the fact that such student is pregnant unless her participation in such activity presents a clear and imminent threat of harm to the student or foetus involved that cannot be eliminated by other means; or

B. the exclusion of a student from school based solely on a student's hair style, unless the relationship between the particular activity involved and the student's hair style is such that the student's participation creates a clear and imminent threat of harm to the student or other persons involved in the activity, or is clearly incompatible with performance of the particular activity involved.

3.7 School authorities should not, without the prior informed consent of the affected students or their parents, obtained pursuant to the terms of Standard 2.2 hereof:

A. compel any student to respond to psychological or other tests, or otherwise supply information, that involves the disclosure of intimate details of a student's personal or family life or the personal or family life of other members of the student's family; or

B. compel any student to take any drug the purpose of which is to alter or control the behavior of the student.

3.8 Schools may reasonably restrict access to school premises by persons who are other than students or school personnel.

3.9 A. No person serving as a school counselor should disclose, or be compelled by any form of legal process or in any proceeding to disclose, to any other person any information or communication by a

student received by such person in the capacity of a counselor unless:

1. such disclosure is required to be made to the student's parent pursuant to any other of these standards; or

2. the privilege of nondisclosure is waived by the student or parent pursuant to Standard 2.2 hereof; or

3. the information or communication was made to the counselor for the express purpose of being further communicated or being made public; or

4. the counselor believes that disclosure is necessary to prevent substantial property destruction or to protect the student involved or other persons from a serious threat to their physical or mental health.

For purposes of this and the following standard a person is deemed to be serving as a school counselor if such person has been designated by the appropriate school authorities to act specially as a counselor for students, regardless of whether such person has been specially certified as a counselor or such person is expected to perform administrative or teaching duties in addition to counseling students.

B. Any professional school employee, other than a school counselor, who receives in confidence information or communication from a student, should not disclose, nor be compelled to disclose, such information or communication unless:

1. such disclosure is compelled by legal process issued by a court or other agency authorized by law to issue process to compel testimony or the production of documents; or

2. such disclosure is required to be made to the student's parents pursuant to any other of these standards; or

3. the privilege of nondisclosure is waived by the student or parent pursuant to the provisions of Standard 2.2 hereof; or

4. the professional school employee believes that disclosure is necessary to prevent substantial property destruction or to protect the student involved or other persons from a serious threat to their physical or mental health.

For purposes of this standard, a professional school employee means a person employed by a school in a teaching or administrative capacity.

PART IV: STUDENT RIGHTS OF EXPRESSION AND PRIVACY

4.1 Subject to the limitations and elaborations set forth in the succeeding standards, a student's right of expression is not affected by

the fact of student status or presence on school premises, except where:

A. particular facts and circumstances make it reasonably likely that the expression will cause substantial and material disruption of, or interference with, school activities, which disruption or interference cannot be prevented by reasonably available less restrictive means; or

B. where such expression unduly impinges upon the rights of others.

4.2 Schools should not restrict student expression based on the content of the expression except as stated in Standard 4.1 and except for student expression that:

A. is obscene; libelous; or

B. is violative of another person's right of privacy by publicly exposing private details of such person's life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities; or

C. advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups.

4.3 Where one or more students are provided by the school with expression privileges not equally shared by all students, with resources not provided to all students, or with special access to fellow students, such expression is subject to the same rights and restrictions as other types of student expression except that schools:

A. should take all necessary action to insure that the student expression does not advocate racial, religious, or ethnic prejudice or discrimination, or seriously disparage particular racial, religious, or ethnic groups; and

B. should take all necessary action to insure that the student privilege, resource, or access do not become vehicles for the consistent expression of only one point of view to the exclusion of others; and

C. if not able to insure the prohibition of subsection A. hereof or the equal access of subsection B. consistent with the continued existence of the student expression involved, may curtail or prohibit the continued existence of such student expression.

4.4 Schools should provide reasonable bulletin board space for the posting of student notices or comments. Where such space is provided, schools may not regulate access based on the content of material to be posted, except in accordance with these standards. School authorities may also enforce reasonable regulations regarding the size and duration of posted student notices or comments.

4.5 School authorities may adopt and enforce reasonable regulations

as to the time, place, and manner of distribution or circulation of printed matter on school grounds and may require prior authorization for the distribution or circulation of substantial quantities of printed matter in school and/or for the posting in school of printed matter provided that:

A. school authorities should not deny such authorization except in writing and except on grounds set forth in these standards; and

B. school authorities have set forth clearly in writing standards for such prior authorization which specify to whom and how printed matter may be distributed, a definite, brief period of time within which a review of submitted printed matter will be completed, the criteria for denial of such authorization, and the available appeal procedures.

4.6 Student conduct that violates otherwise valid regulations that have not been adopted or invoked for the purpose of inhibiting expression and that are designed to achieve substantial interests that cannot reasonably be achieved by alternatives that limit expression substantially less than other alternatives may be subjected to school sanctions even though a student has committed such violation for purposes of expression or incidental to expression.

PART V: PROCEDURES FOR STUDENT RIGHTS AND STUDENT DISCIPLINE

5.1 Any student who is threatened by or subjected to disciplinary sanctions by reason of the student's school-related misconduct is entitled to procedural protection as specified in these standards.

5.2 The extent and nature of procedures available to a student should be commensurate with the seriousness of the disciplinary sanction that might be imposed by reason of the student's misconduct.

5.3 A student who is threatened with a serious disciplinary sanction is entitled to receive the following procedural safeguards:

A. prior to the hearing described in subsection B.,

1. notice in writing that

a. is received long enough before the hearing to enable the student to prepare a defense,

b. factually describes the misconduct charged,

c. identifies the procedural safeguards to which the student is entitled under these standards, and

d. identifies the rule making such misconduct subject to sanction;

2. receipt of a summary of all testimonial evidence to be used against him or her;

3. a right to examine all documents to be used against him or her;

B. a hearing that is private (unless the student expressly requests a public hearing), that is presided over by an impartial hearing officer or tribunal, and at which the student is entitled,

1. to be represented by counsel,

2. to present testimonial or other evidence,

3. to hear the evidence against him or her (or, if presented in the form of affidavits, to see the affidavits),

4. to cross-examine witnesses who testify against him or her (and to challenge adverse affidavits),

5. to make oral and written argument relating to any aspect of the student's position and the case against him or her, and

6. to obtain, at the completion of the proceeding, a record of the hearing proceedings;

C. a decision,

1. concerning the questions whether

a. the student in fact engaged in the conduct charged,

b. a valid rule was violated by that conduct, and

c. the sanction to be imposed is appropriate for that conduct, and

2. that is

a. made by an impartial decision maker or decision making tribunal,

b. based solely on the facts and arguments presented at the hearing, and

c. if against the student, supported by clear and convincing evidence that the student engaged in the misconduct charged and explained in a written opinion; and

D. a right to judicial review within a reasonable time by a court of general jurisdiction to challenge the hearing decision on the ground that the decision is not supported by substantial evidence, is arbitrary and unreasonable, or is contrary to any constitutional or other legal provision.

5.3.1 As used in these standards, the right to be represented by counsel includes:

A. 1. the right to be advised by the presiding officer of

a. the right to counsel and

b. the channels through which counsel might be obtained;

2. the right to be represented by counsel in preparing for and participating in the hearing specified in Standard 5.3 B.; and

3. in the case of a student who is indigent and is threatened with expulsion or a transfer to a school used or designated as a school for problem children of any kind, the right to have counsel provided at state expense.

B. In advising a student of the right to counsel pursuant to Standard 5.3.1 A., it should be the duty of the presiding officer:

1. to use reasonable efforts to obtain and provide information concerning channels through which counsel might be obtained;

2. to refuse to proceed with a hearing until satisfied that the student

a. has voluntarily waived the right to counsel, or

b. (1) in cases within 5.3.1 A. 3. is represented by counsel who has had adequate opportunity to prepare the student's case,

(2) in cases not within 5.3.1 A. 3. has been given adequate notice of the right to obtain counsel but has failed to do so; and

3. in any proceeding at which the student is not represented by counsel, to use reasonable efforts to protect the student from any disadvantage that would result from not being so represented.

C. Nothing in Standard 5.3, 5.3.1 A. or B. should prevent a student from being represented, at the student's option, by a person who is not a graduate of a law school or admitted to the practice of law, but the option to be so represented should have no effect upon the student's right to counsel except insofar as the right to counsel was waived pursuant to the provisions of Standard 2.2.

5.4 In determining whether a student has violated a student conduct rule, evidence of student misconduct obtained in violation of these standards or the student's constitutional rights should not be considered.

5.5 A. To provide a basis for a sanction under these standards, a rule governing student conduct should be:

1. in a published writing describing with specificity

a. the conduct prohibited, and

b. the sanction or sanctions that may be imposed by reason of a violation of the rule; or

2. based on a general understanding, in the light of past practice, with respect to which understanding there is objective evidence that a reasonable student to whom the rule applied under the circumstances involved in the particular case would have been aware of both the rule and the likelihood of a resulting sanction of

comparable nature and degree to that now threatened.

B. In determining whether a written rule is sufficiently specific, considerations tending to indicate the validity of the rule include:

1. a relatively high degree of precision of the words actually used in the written statement,

2. the difficulty of using more precise words,

3. the likelihood that the students who were subject to the rule would understand that the conduct alleged to violate the rule was covered by the rule and that the sanction now threatened might be imposed,

4. the lack of opportunity given to school officials by the rule to apply the rule in a discriminatory fashion,

5. the lack of probability that the rule has in fact been applied in a discriminatory fashion to the student now subjected to the rule or to any other student,

6. the relatively low degree of seriousness of the sanction threatened by reason of the misconduct charged or relative lack of importance of permissible conduct discouraged by the rule,

7. the proportionality of the sanction threatened and the misconduct charged,

8. the fact that reasonable efforts were made to bring to the student's attention the nature and significance of the misconduct covered by the rule in view of the age of the students to whom the rule applies.

C. In determining whether a student conduct rule that is not in writing may be imposed:

1. the presumption should be that

a. unwritten rules are invalid, and

b. rules that do not specify a sanction are invalid for purposes of imposing a serious disciplinary sanction; and

2. in determining whether the presumption has been overcome, consideration should be given to

a. the persuasiveness of the reasons for not stating the rule in writing,

b. the improbability that a student has been prejudiced by reason of the fact that the rule is not in writing, and

c. subsections 3.-8. of Standard 5.5 B.

5.6 A student who is threatened with a disciplinary sanction that is not a serious disciplinary sanction is entitled to procedural safeguards equivalent or comparable to those specified in Standard 5.3 except insofar as lesser safeguards are justified by:

A. the relative lack of severity of the sanctions threatened; and

B. the substantial burden imposed upon the school's interest by reason of making greater safeguards available.

5.7 Unless special circumstances bring the case within Standard 5.8, the hearing and hearing procedures required by this chapter should be provided prior to the imposition of a disciplinary sanction.

5.8 A. Notwithstanding any other provision in these standards, a student may be excluded temporarily from a classsroom or a school prior to the operation or availability of procedures otherwise required if such an exclusion is clearly justified by an imminent danger of harm to:

1. any person (including the student),

2. the educational process of a substantial and continuing or repetitive nature, or

3. property that is extensive in amount.

B. The determination of the existence of an imminent danger of harm may be made in the first instance by a teacher, counselor, administrator, or other school official in a position both to make such determination and to be required to act to protect persons, the educational process, or property.

C. The exclusion authorized under Standard 5.8 should be for the shortest possible time consistent with the circumstances justifying exclusion.

D. 1. As soon as possible after the temporary exclusion, an emergency hearing should be held to determine whether the exclusion may be continued.

2. The sole question to be determined at the emergency hearing should be whether there is substantial evidence to support the exclusion of the student, pending a full hearing in compliance with Standard 5.3, on the ground that readmission would pose a threat of imminent danger or harm as provided in Standard 5.8 A.

E. In addition to the emergency hearing required by Standard 5.8 D. 1., the excluded student is entitled to a preliminary hearing within a reasonable time after requesting it, if:

1. such a hearing can be held substantially sooner than the full hearing required by Standard 5.3;

2. the procedures that could be made available at such a preliminary hearing would be substantially more extensive than those available at the emergency hearing.

F. At the preliminary hearing the student may challenge both the grounds of the exclusion and the determination that the student's presence in school (or the classroom) pending the outcome of the full

hearing would present a threat of imminent danger of harm as provided in Standard 5.8.

G. Both the emergency and preliminary hearings should be conducted by an impartial presiding officer and result in a decision by an impartial decision maker and, to the extent possible, should conform to the requirements of Standard 5.3.

H. A determination adverse to the student in either an emergency or preliminary hearing should not prejudice the student in any way nor preclude the assertion of any of the rights required by Standard 5.3.

I. A student may request judicial review of the decision made at either the emergency hearing or preliminary hearing or both, but such judicial review should be available only at the discretion of the reviewing court.

5.9 Every school should provide a procedure through which a student can initiate and obtain an appropriate resolution of grievances.

PART VI: DISCIPLINARY SANCTIONS

6.1 School disciplinary sanctions against student conduct or status should be imposed only if consistent with the limitations contained in these standards as to a school's authority to regulate student conduct and status, and only to the extent that is reasonably necessary to accomplish legitimate school objectives that cannot otherwise be reasonably effectuated.

6.2 Corporal punishment should not be inflicted upon a student, but school authorities may use such force as is reasonable and necessary:

A. to quell a disturbance threatening physical injury to persons or property, or

B. to protect persons (including school authorities themselves) or property from physical injury, or

C. to remove a pupil causing or contributing to a disturbance in the classroom or disruption of the educational process who refuses to leave when so ordered by the school authority in charge; or

D. to obtain possession of weapons or other dangerous objects upon the person or within the control of a student.

E. Such acts do not constitute corporal punishment.

6.3 A. No student should be permanently excluded from school. No student should be excluded from school for a period in excess of one

school year. No student should be suspended or otherwise excluded from school for more than one school month, unless the student's presence in school presents a clear and imminent threat of harm to students or other persons on school premises, property, or to the educational process, and that threat cannot be eliminated by other, less restrictive, means.

B. Prior to suspending or otherwise excluding a student from school for more than one school month, the student should be provided with a hearing de novo before the state commissioner of education or equivalent officer. In such a hearing the burden of proving that the requirements for exclusion under Standard 6.3 A. have been met should be on the local school authorities.

6.4 A. No student should be suspended from regular school attendance unless the student's continued presence in school presents a demonstrable threat of harm to students, or other persons on school premises, property, or to the educational process, and that threat cannot be eliminated by other, less restrictive means.

B. Suspensions should not exceed in duration the time that is necessary to accomplish the purposes of the suspension.

6.5 When a student is suspended from regular school attendance for any period of time, the school authorities should provide the student with equivalent education during the period of the suspension.

6.6 Academic sanctions should not be imposed on any student where the student's conduct involves a nonacademic disciplinary offense.

PART VII: INTERROGATION OF STUDENTS

7.1 If an interrogation of a student by a police officer concerning a crime of which the student is a suspect occurs off school premises and not in connection with any school activity, the validity of the interrogation should in no way be affected by the student status.

7.2 The interrogation of a student by a police officer for any purpose should not take place in school, or away from school when the student is engaged in a school related activity under the supervision of a school official, except:

A. when it is urgently necessary to conduct the interrogation without delay in order to avoid,

1. danger to any person,
2. flight from the jurisdiction of a person who is reasonably believed to have committed a serious crime, or
3. destruction of evidence; or

B. when there is no other reasonably available place or means of conducting the interrogation.

7.3 A. When, pursuant to Standard 7.2, a police officer interrogates a student who is on school premises or engaged in a school activity and who is suspected of a crime, the student should be advised of this suspicion in terms likely to be understood by a student of the age and experience involved; should be advised of the right to counsel (including state-appointed counsel if the student is indigent), the right to have a parent present, and the right to remain silent; and should be advised that any statement made may be used against the student.

B. If, pursuant to Standard 7.2, a police officer interrogates a student who had not theretofore been suspected of conduct covered by Standard 7.3 A. but during such interrogation information is obtained, either from that student or from any other source, that would lead a reasonable person to suspect the student of such conduct, the interrogation should immediately thereafter be governed by Standard 7.3 A.

7.4 A. If a school official interrogates a student suspected of a crime
1. at the invitation or direction of a police officer,
2. in cooperation with a police officer, or
3. for the purpose of discovering evidence of such conduct and turning that evidence over to the police, the interrogation should be subject to all of the requirements of a police interrogation under Standard 7.3 A.

B. In connection with any interrogation of a student by a school official that leads directly or indirectly to information that results in criminal charges against the student, it should be presumed in the absence of affirmative proof to the contrary that each of the characteristics identified in Standard 7.4 A. 1.–3. applies to the school official's interrogation.

7.5 A. If a school official interrogates a student who is suspected of student misconduct that might result in a serious disciplinary sanction, the student should be advised of this suspicion in terms likely to be understood by a student of the age and experience involved, and should be advised of the right to have a parent or other adult present and the right to remain silent.

B. If, under Standard 7.5 A., the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem juveniles of any kind, the interrogation should be subject to all of the requirements of a police interrogation under Standard 7.3 A.

7.6 Any evidence obtained directly or indirectly as a result of an interrogation conducted in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in the imposition of either criminal or disciplinary sanctions against the student.

7.7 If an interrogation of a student by a school official or police officer is conducted without providing the student the safeguards specified in Standard 7.5 A., evidence obtained directly or indirectly as a result of that interrogation should be inadmissible (without the student's express consent) in any proceeding that might result in the imposition of either criminal or serious disciplinary sanctions against the student so interrogated.

PART VIII: SEARCHES OF STUDENTS AND STUDENT AREAS

8.1 The limits imposed by the fourth amendment upon searches and seizures conducted by police officers are not qualified or alleviated in any way by reason of the fact that a student is the object of the search or that the search is conducted in a school building or on school grounds.

8.2 A search by a police officer of a student, or a protected student area, is unreasonable unless it is made:

A. 1. under the authority and pursuant to the terms of a valid search warrant,

2. on the basis of exigent circumstances such as those that have been authoritatively recognized as justifying warrantless searches,

3. incident to a lawful arrest,

4. incident to a lawful "stop," or

5. with the consent of the student whose person or protected student area is searched; and

B. in a manner entailing no greater invasion of privacy than the conditions justifying the search make necessary.

8.3 As used in these standards, a protected student area includes (but is not limited to):

A. 1. a school desk assigned to a student if

a. the student sits at that desk on a daily, weekly, or other regular basis,

b. by custom, practice, or express authorization the student does in fact store or is expressly permitted to store, in the desk, papers, equipment, supplies, or other items that belong to the student, and

c. the student does in fact lock or is permitted to lock the desk whether or not

(1) any school official or a small number of other students have the key or combination to the lock,

(2) school officials have informed the student or issued regulations calculated to inform the student either that only certain specified items may be kept in the desk or that the desk may be inspected or searched under specified conditions,

(3) the student has consented to or entered into an agreement acknowledging the restrictions described in Standard 8.3 A. 1. c. (1) and (2) above, or

(4) the student has paid the school for the use of the desk;

B. 1. a school locker assigned to a student if

a. the student has either exclusive use of the locker or jointly uses the locker with one or two other students and

b. the student does in fact lock or is permitted to lock the locker whether or not

(1) school officials or a small number of other students have the key or combination to the lock,

(2) school officials have informed the student or issued regulations calculated to inform the student either that only certain specified items may be kept in the locker or that the locker may be inspected or searched under specified conditions,

(3) the student has consented to or entered into an agreement acknowledging the restrictions described in Standard 8.3 B. 1. b. (1) and (2), or

(4) the student has paid the school for the use of the locker;

C. 1. a motor vehicle located on or near school premises if

a. it is owned by a student, or

b. has been driven to school by a student with the owner's permission.

8.4 As used in these standards, a search "of a student" includes a search of the student's

A. body,

B. clothes being worn or carried by the student, or

C. pocketbook, briefcase, duffel bag, bookbag, backpack, or any other container used by the student for holding or carrying personal belongings of any kind and in the possession or immediate proximity of the student.

8.5 The validity of a search of a student, or protected student area, conducted by a police officer in school buildings or on school grounds may not be based in whole or in part upon the fact that the search is conducted with the consent of:

A. a school official, or

B. the student's parent except insofar as the parent's approval is necessary to validate a student consent.

8.6 A. If a school official searches a student or a student protected area:

1. at the invitation or direction of a police officer,

2. in cooperation with a police officer, or

3. for the purpose of discovering and turning over to the police evidence that might be used against the student in a criminal proceeding,

the school official should be governed by the requirements made applicable to a police search under Standard 8.2.

B. In connection with any search of a student or student protected area that leads directly or indirectly to information that results in criminal charges against the student, it will be presumed in the absence of affirmative proof to the contrary that each of the characteristics identified in Standard 8.6 A. 1.-3. applies to the school official's search.

8.7 A. If a search of a student or protected student area is conducted by a school official for the purpose of obtaining evidence of student misconduct that might result in a serious disciplinary sanction, the search is unreasonable unless it is made:

1. under the authority and pursuant to the terms of a valid search warrant, or

2. with the consent of the student whose person or protected student area is searched, or

3. after a reasonable determination by the school official that

a. it was not possible to detain the student and/or guard the protected student area until police officers could arrive and take responsibility for the search and

b. failure to make the search would be likely to result in

danger to any person (including the student), destruction of evidence, or flight of the student, and

4. in a manner entailing no greater invasion of privacy than the conditions justifying the search make necessary.

B. If, under Standard 8.7 A., the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem students of any kind, the search should be subject to all of the requirements of a police search under Standard 8.2.

8.8 Any evidence obtained directly or indirectly as a result of a search conducted in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in either criminal or disciplinary sanctions against the student.

8.9 If a search of a student by a school official is conducted without providing the student the safeguards specified in Standard 8.7 A., evidence obtained directly or indirectly as a result of that search should be inadmissible (without the student's express consent) in any proceeding that might result in the imposition of either a criminal or a serious disciplinary sanction against the student searched.

PART IX: DEFINITIONS

9.1 As used in these standards, the term "school(s)" "school officials," "school authorities," and "school personnel" refer to public educational institutions, or groups of such institutions, other than institutions of post-secondary education. Unless the context of a definition contained in a particular standard indicates otherwise, the term "school(s)" and the terms "school officials," "school authorities," and "school personnel" include any person or group of people authorized to, or apparently authorized to, act on behalf of a school, as defined above.

9.2 As used in these standards the term "parent(s)" includes a guardian or other person having legal custody of a juvenile, as well as a natural parent of a juvenile.

9.3 A. As used in these standards, a "disciplinary sanction" means any action required of a student or any action taken by the school upon or with respect to a student that:

1. would be regarded by a reasonable person in the student's circumstances as substantially painful, unpleasant, stigmatizing, restrictive, or detrimental, or a denial of a substantial benefit; and

2. would not occur but for the misconduct with which the student is charged.

B. Action is not prevented from being a disciplinary sanction because:

1. it is taken (or characterized as taken) in the best interest of the student, or

2. the student is given choices between two or more courses of action, any of which, if the sole option, would be a disciplinary sanction.

9.4 A "serious disciplinary sanction" includes

A. the following specified disciplinary sanctions:

1. expulsion;*

2. suspension for a period that either

a. in the aggregate is in excess of five days during any one academic year, or

b. is of indefinite length by reason of either

(1) the failure of the school to specify the duration of the suspension or

(2) the student's being directed to do or cease doing something when the student desires not to obey that direction;

3. a transfer to a different school;

4. corporal punishment;

5. denial of any opportunity ordinarily available to students to participate in activities or to engage in conduct if

a. the denial extends beyond three weeks and

b. the denial would be regarded by a reasonable person in the student's circumstances as a substantial detriment; or

6. reduction of grade or loss of academic credit in any course, including action that inevitably results in such reduction or loss; or

B. any disciplinary sanction reasonably likely to have consequences for the student comparable to the consequences of any of the sanctions specified in Standard 9.4 A.

*But see Standard 6.3 A. and commentary thereto.

Standards with Commentary

PART I: RIGHT TO EDUCATION

1.1 Every juvenile who is living within the state and is between the ages of six and twenty-one (or younger or older if so specified by state law) and not a graduate of high school (or higher level specified by state law) should have the right to an education provided at state expense; and education should be so provided by the local school district (or other unit of government specified by state law).

Commentary

This standard articulates a general right to education. This right is elaborated in Standards 1.2 to 1.9 and Standards 1.10 to 1.13 deal with obligations concerning school attendance. In very general terms legal standards such as these exist in all states, but legal standards will not necessarily get children in school. In fact, there is considerable evidence that very many children (of school-attending ages) are not in school. See Children's Defense Fund of the Washington Research Project, Inc., *Children Out of School In America* 1-4, 33-53 (1974); The Robert F. Kennedy Memorial and The Southern Regional Council, *The Student Push-Out: Victim of Continued Resistance to Desegregation*, 1-11 (1973).

> According to our analysis of 1970 U.S. Bureau of the Census data on nonenrollment, nearly two million children 7 to 17 years of age were not enrolled in school. Over one million were between 7 and 15 years of age. More than three-quarters of a million were between the ages of 7 and 13.
>
> A closer examination of the Census data indicated a far more serious problem of school nonenrollment than the overall national average of 4.8 percent indicated. *Children Out of School In America*, *supra* at 1.

> Census data, however, do not reveal the real dimensions of the out of school problem in America. What we learned from talking to thousands of parents and children in our survey of over 8,500 households in 30 areas and from hundreds of additional interviews with school officials and community leaders convinces us that the nearly two million children the Census counts as nonenrolled only reflect the surface of how many children are out of school in America. *Id.*

See also Kirp, Buss, and Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 *Calif. L. Rev.* 40, 61-63 (1974) (indicating efforts and results in identifying retarded children out of school in Pennsylvania). Furthermore, it appears that the children who are most likely not to be in school are children who are disadvantaged or different in some way—minority children, poor children, non-English speaking children, rural children, children of unemployed, children who are pregnant, children who are physically, mentally, or emotionally handicapped. See *Children Out of School In America*, *supra*, at 3-4, 17-31, 68-115. Accordingly, the most important function of Standard 1.1 may be to remind the entire community, but especially educational officials at all levels, that all children do have a right to an education and that the burden is on the adult community to implement that right.

This standard is intended to adopt existing practice in the ages specified and, at the same time, to leave it open to a state to expand the right to education to younger children or older adults. When Standards 1.1 and 1.10 are read together, it is clear that juveniles are entitled to a right to education under Standard 1.1 for a longer period than the period during which they are required to attend school under Standard 1.10. This, too, is consistent with existing practice. Compare N.Y. Educ. Law § 3202 (1970); S.C. Code Ann. §§ 21-752 (1962) and 752.1 (Supp. 1975); with N.Y. Educ. Law § 3205 (1970); S.C. Code Ann. § 21-757 (1962). This standard also adopts existing practice by terminating the right to education at the point of graduation from high school. See *e.g.*, S.C. Code Ann. § 21-757.2(a) (Supp. 1975).

This standard avoids (and thus leaves open) several questions that have given rise to litigation in the past. Although Standard 1.1 deliberately talks about "living" rather than residence, that wording will probably not eliminate all issues arising out of the relationship between the place where the child lives and the right to receive an education in a particular state or school district. See *Turner v. Board of Education*, 54 Ill. 2d 68, 294 N.E.2d 264 (1973); *Gentile v. Board of Education*, 56 Misc. 2d 216, 288 N.Y.S.2d 269 (Supreme Court

1968). The wording of the standard should, however, focus attention on the child's physical presence rather than on technical questions about domicile of either the child or the child's parents. The standard does not specify what is embraced by "education," *e.g.*, whether it includes "fees," see *Paulson v. Minidoka County School District*, 93 Idaho 469, 463 P.2d 935 (1970); books, see *Bond v. Public Schools of Ann Arbor School District*, 383 Mich. 693, 178 N.W.2d 484 (1970); transportation, see *Manjares v. Newton*, 64 Cal. 2d 365, 411 P.2d 901, 49 Cal. Rptr. 805 (1966); transcripts, see *Paulson v. Minidoka County School District*, 93 Idaho 469, 463 P.2d 935 (1970); or "personal" items such as clothing, see *Children Out of School In America*, *supra* at 85–86; *cf.* Regulations of DHEW to Title I of the Elementary and Secondary Education Act (20 U.S.C. § 241) (1971), 45 C.F.R. § 116.1(h) (1975).

This standard makes the right to education a legal right and fixes the duty to provide the education on the local school district or other specified agency. The standard explicitly states that the education may be provided either "by" the school district or other unit of government. In accordance with this alternative wording, education may be provided at a "public school" or by contracting out the job of supplying education or by some combination of the two. Although the decision whether to provide education in public owned and managed facilities or through contractual arrangement is to be made by the school district, the school district might provide both alternatives and leave the ultimate choice in whole or in part to students. "Local school district" is probably not a precise term in all states, but it should be understood, generally, to refer to the smallest unit of government assigned comprehensive educational responsibility under any state system.

By articulating the right to education as a legally enforceable right, these standards should not be understood to suggest that principal reliance can be placed upon the courts. On the contrary, it seems clear that the courts are, at best, a last resort. Accordingly, although detailed and sometimes elaborate enforcement provisions are proposed by the standards, the provisions leave considerable discretion to those responsible for education. Implementation, it is assumed, will ordinarily be achieved by those charged with this primary responsibility. Of course, nothing in the guarantee of a right to a publicly provided education precludes students from choosing to attend private schools. See Standard 1.10; *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

1.2 Without regard to age, the right to at least a high school educa-

tion (as specified in Standard 1.1) may be acquired in a continuous period or two or more separate periods of attendance.

Commentary

The prevailing approach in education is that which is incorporated in Standard 1.1: children attend school at state expense through some fixed period of time during their pre-adolescent and adolescent lives, and it is assumed (or hoped) that at the end of this period a "basic education" will have been obtained for all future needs, presumably either work or further formal education. But this conventional approach may not be adequate for all children. Some persons would profit much more if the right to education applied (at least in part) at a later stage of life, when the need for education is more apparent to them and may be, in fact, more relevant to their lives. Correspondingly, for students who find school meaningless at the stage of their lives at which it is now available, school is likely to be viewed as a burden rather than a benefit. It is doubtful whether such students will profit much from the education provided. Furthermore, if education, the primary justification of schools, is drained of meaning, the custodial function of schools may seem without purpose and, as a consequence, students are likely to feel confined and antagonistic to the authority responsible for their lack of freedom. See J. Coleman, *Youth: Transition to Adulthood* 137–39 (1974). See also 83 *School Review* 5-138 (1974) (critical response to *Youth: Transition to Adulthood*).

The basic purpose of Standard 1.2 is to take the emphasis off the conventional lock-step patterns of education for people of certain ages. Standard 1.2 is drafted as a distinct provision so that its adoption or rejection would not affect Standard 1.1. In fact, it is clear that Standard 1.2 qualifies (or provides an alternative to) Standard 1.1.

Standard 1.2 casts the right to education in terms of *total* education, rather than ages or consecutive years. Consistent with Standard 1.1 the total is defined in terms of high school equivalence (which is assumed to conform to the present twelve-year pattern), but, also consistent with Standard 1.1, the high school level could be extended at a state's discretion. Of course, the standard should not be read to mean that each state in which a person resides must provide that person with twelve years of education, but that each state must provide education to its residents up to a cumulative total of twelve years, including education obtained both within and without that state. Through recordkeeping practices already generally used, a

state (and its local districts) could limit education to those entitled to it on this basis with minimal inconvenience. Details such as these could be included in a statutory provision adopting this standard or in implementing regulations. It should be noted that no exception is included here for "expelled" children, and no exception is intended. See Part VI on sanctions. See generally McClung, "The Problem of the Due Process Exclusion: Do Schools Have A Continuing Responsibility to Educate Children with Behavior Problems?" 3 *J. Law and Ed.* 491 (1974).

1.3 The right to education established by Standard 1.1 includes the right to an education that is appropriate for each individual student.

Commentary

By requiring an "appropriate" education for "each individual student," Standard 1.3 requires the responsible educators to individualize the education provided. Of course that does not mean that each student's educational program is different from every other student's. Rather, it means that the particular educational needs of each student must be considered and that what happens to a student educationally must be a reflection of what will be appropriate to meet that student's educational needs.

Standard 1.3 does not assume that educators are guarantors of particular educational results; nor does the standard suggest that a perfect decision of appropriateness can be guaranteed. Standard 1.3 mandates a reasonable, good faith effort to provide each student an appropriate education in the light of the state of existing knowledge and available resources. The lack of resources should not, however, be regarded as an excuse for failure to make a reasonable, good faith effort. On the contrary, the required effort should include an effort to obtain the funds necessary to provide an appropriate education and a careful judgment allocating available resources to achieve that end. Similarly, the required effort should include an effort to acquire and use wisely the available knowledge relevant to any particular decision concerning appropriate education.

Standards 1.3 and 1.1 together probably create the basis of an "educational malpractice" suit. See Abel, "Can A Student Sue the Schools for Educational Malpractice?" 44 *Harv. Ed. Rev.* 416 (1974); Note, 124 *U. Pa. L. Rev.* 755 (1976). Whether a malpractice approach is a useful and desirable means of improving the education of children is debatable. The danger is that experimentation and

good teachers will be driven from the public schools. On the other hand, even though an action for malpractice may not be well designed to provide adequate relief for the failure to provide an appropriate education, occasional liability for damages for extreme inexcusable failures and the threat of more widespread judicial intervention may have some salutary deterrent effect. But it is a crude instrument and should be employed sparingly.

Several qualifying factors built into these standards should discourage reckless resort to malpractice litigation. A. Under Standard 1.1 any liability would fall directly upon school districts, not administrators or teachers or other school employees. At least in the absence of truly gross or intentional departure from accepted educational practice, individual liability seems inappropriate. In placing this burden on school districts the standards assume that governmental immunity will not nullify their substantive content. The standards, however, leave to specific legislation any detailed treatment of pre-existing governmental immunity. See generally Davis, "Tort Liability of Governmental Units," 40 *Minn. L. Rev.* 750 (1956). B. Standard 1.3 creates a right of "appropriate"—not "effective"—education. Whether a particular student is receiving a beneficial effect from his or her education is relevant to the appropriateness of what is being provided, and substantial lack of beneficial effect surely ought to trigger inquiry. But the state of educational and pedagogical knowledge has not advanced to the point at which, generally speaking, one can fairly or reasonably fix blame on a particular school system or school or school employee for general or particular failures to reach certain levels of achievement. This is not to say that it is the student's fault, but that the causal factors are too numerous and complex to filter out. See J. Coleman, *Equality of Educational Opportunity* (Office of Education 1966); Jencks and Brown, "Effects of High Schools on Their Students," 45 *Harv. Ed. Rev.* 273 (1975). C. As already indicated, Standard 1.3 imposes a duty of reasonable, good faith effort, but does not demand what cannot be provided within available knowledge and resources. It should be stressed that Standards 1.1 and 1.3 (and other related standards) apply to *all* juveniles. There are no exceptions for so-called "special" or "exceptional" students with special or exceptional educational needs. Thus, students who are "retarded" or "emotionally disturbed" or "learning disabled" or "physically handicapped"—or fall into any other identifiable category, well established or new—have a "right" to an "appropriate" education provided "by" the local school district. As this and other standards in this chapter will make clear, these "special" students may sometimes be entitled to or precluded from certain programs, assignments, or schools by reason of their

educational needs or educational development, but under these standards all students start presumptively entitled to what other students receive, and receive educationally distinct treatment only to the extent made appropriate by particular educational needs and development. See generally 1 and 2 N. Hobbs, *Issues In The Classification of Children* (1975).

1.4 In the absence of special circumstances affecting or identifying a student's educational needs or educational development, every student should have the right to an education that is:

A. substantially similar in kind to that which is provided other students in the school district; and

B. provided through a substantially equal allocation of educational resources on a statewide basis.

Commentary

"Educational needs" and "educational development" are very nearly two sides of the same coin. "Needs" focuses on what the student must have in order to progress educationally. "Development" focuses on what can be effectively used in view of the student's educational progress to date. The term "development," rather than "capacity" or "ability," is used in these standards to underline the facts that widely differing factors influence a child's educational performance at a particular time and that, in general, the standards do not depend on pinpointing the reason why a student is at a particular stage of educational development. Furthermore, "educational development" is used to underline the fact that the student's development in other respects (*e.g.*, emotional or physical) is irrelevant except insofar as these other developmental aspects directly cause educational consequences.

Although Standard 1.1 places the right to education burden on the school district, Standard 1.4 makes resource equalization statewide. The decision to require equalization of resources on a statewide basis is a fundamental policy choice, and the choice is a debatable one. Standard 1.4 would seem to take the financing of education out of local control and make educational finance directly a state responsibility. Standard 1.4 is clearly inconsistent with *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973), in which the Supreme Court rejected a constitutional argument that statewide equalization was required and rejected that argument, in part, because of the appropriateness of leaving educational financing to local control. This standard has declined to follow the *Rodriguez* position because the state's interest in delegating financial control to local school

districts does not seem to justify gross disparity in per pupil educational expenditures from school district to school district, usually as a direct result of inequality of wealth from district to district. If local control over educational financing (which is the usual present pattern) is determined to be essential, subsection B. of Standard 4.1 could be amended to read: "B. Provided through a substantially equal allocation of educational resources throughout the school district (or larger unit specified by state law)."

Because the standard (whether or not amended as above) is framed in terms of *educational* resources, it should be understood to mean that equalization should be carried out with a view to such problems as "municipal overburden" in a manner that makes real equalization of educational resources possible. See Kirp and Yudof, Book Review, 6 *Harv. Civ. Rts.—Civ. Lib. L. Rev.* 619, 625 (1971). If necessary, the standard can be further refined to facilitate equalization in light of special educational burdens of particular schools or school districts, such as might result from an unequal distribution of children having educational needs that are expensive to meet. See *e.g.*, Iowa Code Ann. § 281.9 (Supp. 1976). See generally J. Coons, W. Clune, and S. Sugarman, *Private Wealth and Public Education*, 245-54 (1970).

It is probably ironic that, as now drafted, Standard 1.4 is also inconsistent with the position advocated by the plaintiffs in the *Rodriguez* case. Unlike Standard 1.4, which mandates statewide equalization, the *Rodriguez* plaintiffs argued that district-by-district inequality could be permitted but the inequality could not be a result of interdistrict wealth inequality. Accord, *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241 96 Cal. Rptr. 601 (1971). According to this position, which is commonly called "district power equalizing," educational expenditures are left to local determination, but the power of local school districts to raise educational revenues is equalized by divorcing it from the taxable wealth located in the district. See Coons, Clune, and Sugarman, *Private Wealth and Public Education* (1970). Whether district power equalizing is the best possible financial scheme is debatable; but there is no reason to believe that the present educational ills that result from inadequate financing are attributable to such a scheme. See generally, "Symposium: Future Directions for School Finance Reform," 38 *Law & Contemp. Prob.* 293-581 (1974). District power equalizing would be authorized if Standard 1.4 were amended by adding at the end the phrase: "Except insofar as between-school-districts inequality of educational resources resulted from individual school district decisions and was totally unaffected by between-school-districts inequality of taxable wealth."

Along with a *statewide* approach to *resource* equalization, Standard 1.4 proposes *districtwide qualitative* comparability. Requiring similar treatment only on a districtwide basis may be justified on several grounds. First, the only obvious alternative would centralize all education decisionmaking. Second, especially with resources equalized, it is desirable to encourage experimentation in educational program. Third, the primary purpose of the standard is to prevent unfair inequalities. For purposes of educational program, unfair inequality is most likely to result from the decisions made by the persons primarily charged with the making and implementing of educational policy. Since these decisions are made primarily at the school district level or lower, requiring comparable treatment at the district level should eliminate the most likely source of unequal treatment.

1.5 In the absence of special circumstances affecting or identifying a student's educational needs or educational development, every student should have equal opportunity to select among alternative schools, programs, or courses when such alternatives are provided, subject to minimal restrictions reasonably necessary for efficient administration.

Commentary

When Standards 1.4 and 1.5 are read together, they indicate that one form of equal treatment (under 1.4) is equal opportunity to choose (under 1.5). That is, the two standards together reveal that similarly situated students may sometimes receive different educational treatment because they have, on an equal basis, made different educational choices. Standard 1.5 assumes that providing a choice will sometimes be regarded as educationally desirable, but it leaves the decision whether and when to provide such choices completely in the hands of the educational decisionmakers.

Generally, Standard 1.5 assumes adequate quantity of everything for everyone. What is "reasonably necessary for efficient administration" is, of course, somewhat open ended. It is assumed to include at least: A. everything need not be available every year; B. supply may be based upon past demand with some catching-up adjustment period; and C. where resources are scarce at particular times, allocation may be made on a first come, first served basis.

Equal opportunity to select should include notice to students and parents concerning the alternatives that are available, counseling to clarify the choices and their advantages and disadvantages, and other assistance appropriate to make the opportunity meaningfully equal.

1.6 All students are presumed to be similarly situated for educational purposes in the absence of a particularized determination of special circumstances affecting or identifying a particular student's educational needs or development.

Commentary

As used in Standard 1.6 two students are "similarly situated" when there are no special circumstances affecting or identifying the educational needs or development of either student. It should be noted that Standard 1.3 requires an "appropriate" education for each student, but Standard 1.6 creates a presumption that students are similarly situated. No doubt there is some tension between these two standards, one looking toward individualized treatment and the other looking toward undifferentiated treatment. But the tension should not be exaggerated. Taken together, the two standards (along with others) require that different treatment be afforded where there are real differences but that the differences be determined to exist on the basis of actual circumstances rather than assumptions or gross categorizations. The requirement of Standard 1.6 for "a particularized determination" does not impose an insuperably difficult barrier to finding special circumstances, but it does indicate that such a finding be based on something concrete. In this sense the two categories both underline the idea that different education is appropriate only to the extent of any difference in educational needs or educational development. Of course, the general requirement of similar treatment would not prevent teachers from responding to the endlessly varying individual responses of individual students on a day in, day out basis.

Standard 1.6 (along with Standards 1.4, 1.5, and 1.8 A. to 1.8 D.) says, in effect, that students of different ages are to be presumed alike, educationally, in the absence of grounds for establishing differences. This aspect of the standard seems defensible, despite the prevailing pattern of age-grade differentiation, for three related reasons. First, notwithstanding the conventional pattern, there is no clear or obvious consensus about how to group children by ages. Second, creating a blanket age exception might at least discourage "ungraded" approaches; it seems preferable to let age differentials be deliberately chosen and justified. Third, although different treatment cannot be justified automatically by reason of age, age-related educational differences (in terms of educational needs and development) should be reasonably easy to justify. It should be noted in this respect that there is no absolute bar to considering age as a proxy for

educational needs and developments as there is for race, sex and the like. See Standard 1.7.

Standard 1.6 would also require a justification for either failing to promote or double promoting a student. Here again the different treatment must be explainable in terms of educational need and development, and that would require more than a conclusory statement.

1.7 A student's race, sex, nationality, or ethnic identity should never be the basis of a determination that a student should be assigned to a particular school, program, or course because that student has unique educational needs or educational development.

Commentary

This standard conclusively presumes that the group identifications listed may not be used as a basis for determining educational need or development. For the most part, Standard 1.7 is obvious and straightforward. Nevertheless, attention should be directed to certain important and difficult questions not directly covered by the standard.

Religion is not included among the prohibited types of group characteristics because in some situations a student's religion should be a justification for exemption from certain school assignments. Those situations should be rare, however, and in no event should religion be a factor in educational assignment without some indication from the student or parent that a religious belief or practice would preclude an otherwise appropriate school assignment.

The standard itself clearly prohibits *de jure* segregation. Although it does not attempt to resolve the question of so-called *de facto* segregation, it deliberately leaves open two possible grounds for dealing with that problem. First, it leaves open the possibility that assignment policies having a segregative impact will be treated as if they were made on the basis of race. See *Keyes v. School District*, 413 U.S. 189 (1973); *cf. Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). See generally Dimond, "School Segregation in the North: There Is But One Constitution," 7 *Harv. Civ. Rts.—Civ. Lib. L. Rev.* 1 (1972). Second, even without a determination that an assignment was made on a racial basis, a determination might be made that the assignment had the effect of treating similarly situated students differently despite the absence of special circumstances affecting educational needs or development.

Compensatory education or affirmative action to remedy de jure

segregation would not run afoul of this standard. Compensatory education might be correlated with race or ethnic identity under some circumstances but educational needs (possibly caused in part by previous educational deprivation), not race nor ethnic identity, would be the activating cause. Somewhat more difficult is the remedial order that takes race into account. Particularly in view of cases such as *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), such remedial assignments should not be treated as "made by reason of race," but by reason of previous unlawful segregation and the need to take corrective action thereupon. Still more difficult, in terms of the proposed standard, would be an assignment of students to achieve "racial balance" where there is no claim or evidence of prior unlawful segregation. It is the intention of this standard that under such an assignment policy, the education provided would be substantially similar in kind in that all children would be assigned to integrated schools. If necessary for clarification, however, the standard could be revised to provide an exception in favor of racially (and possibly other ethnically) based assignments having the purpose and effect of achieving racially balanced (or integrated) schools. Even with this explicit (or implicit) qualification, the standard, intentionally, would provide a basis for challenging school assignment policies designed to bring about racial integration if the implementation of such a policy treated black and white children unequally by placing disproportionate busing or other burdens on one group.

In some instances, children of different races or national origins may be treated differently by reason of language-related educational needs or development. But, in such instances, different treatment would not stem directly from a student's race or national origin but from language requirements. The situation is directly covered by Standard 1.9, *infra.* Moreover, when Standards 1.7 and 1.9 are read together, it is clear that children with special English language needs are treated differently *only* by getting appropriate supplemental instruction and are otherwise to be treated without distinction. Of course it is possible that such children will acquire other educational needs or developmental shortcomings by reason of their language disadvantage; again, the main thrust of Standards 1.3, 1.7, and 1.9, together, is that such children will be treated distinctly only insofar and as long as necessary.

In two respects, this standard may raise special questions concerning sex-based assignments. First, insofar as marriage, pregnancy, or childbirth create special educational needs, it is these *needs* and not the sex of the student (or the condition of being married, pregnant,

or giving birth to a child) that justifies any different treatment. In line with this observation, it is essential that any special needs related to these conditions be actually determined to exist rather than simply assumed. *Cf. Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). See also standards in Part III. Second, in some circumstances separate athletic programs for girls may seem to require sex-based assignments. In such situations, however, it is not the fact of sex but sex-related physical characteristics that would justify any different treatment. Consistent with these standards, only narrowly and factually based distinctions of this kind should be permitted. At most, sex-related physical characteristics should be used only where there is: A. a substantial privacy interest affected as a direct result of the athletic activity; or B. the male-female physical differences are, 1. substantial, 2. characteristic of virtually all members of both sexes, and 3. clearly and substantially significant in the performance of the athletic activity in question. In addition (but not as an alternative), every effort should be made to permit voluntary decisions to be made concerning participation by the student whose sex-related interest appears to justify protective restrictions. See 20 U.S.C. §§ 1681-1686 (Supp. IV 1974); HEW Reg. 45 CFR § 86 (1975); Note, 61 *Iowa L. Rev.* 420 (1975).

1.8 A. A student may be assigned to a particular school, program, or course, or denied access to a particular school, program, or course on the basis of that student's educational needs or educational development.

B. A student assigned or denied access to a particular school, program, or course by reason of the student's educational needs or development is entitled to receive, at the student's request, an explanation (in writing, if requested) of the basis for the assignment or denial and a conference to discuss the assignment or denial.

C. If the student believes the explanation of the assignment or denial is based on erroneous factual information, the student should be given a hearing with respect to the claimed factual error or errors consistent with the hearing specified in Part V, subject to the following qualifications:

1. the student should have the burden of establishing that there is reasonable ground to believe that a factual error in assignment or denial has been made;

2. the school should thereafter have the burden of rebutting evidence of factual error or of establishing the existence of educational needs or educational development making the assignment or denial appropriate notwithstanding the factual error;

3. the standard of proof under Standard 1.8 C. 1. and 2. should be the preponderance of the evidence.

D. Without regard to a request for an explanation under Standard 1.8 B. or belief of factual error under Standard 1.8 C., the student should be given a hearing consistent with the hearing specified in Part V, if the assignment or denial involves either:

1. assignment or denial of access to a particular school; or
2. both
   a. an assignment or denial of access to a particular program or course; and
   b. an assignment or denial entailing segregation from other students, not having the same educational needs or educational development, for more than 30 percent of the average school day.

E. The school should have the burden of proving that one or more decisions involving an assignment or denial under Standard 1.8 D. would be appropriate on the basis of special circumstances affecting or identifying the student's educational needs or educational development.

Commentary

Standard 1.8 A. merely states directly what is clearly implied by Standards 1.3 to 1.7. Standard 1.3 requires that every student be given an "appropriate" education, and Standard 1.8 A. indicates that an appropriate education will sometimes entail specific assignments by reason of a particular student's educational needs or educational development. Standards 1.4 to 1.7 create a presumption in favor of treating all students alike in the absence of special circumstances affecting or identifying a particular student's educational needs or development, and Standard 1.8 A. states affirmatively that different treatment can be based upon such needs or development. When all of these standards are read together, they indicate that education is to be provided according to a student's individualized needs, but that this individualization is not to be the basis of unique educational treatment of any student except to the extent necessary to provide the education that is most appropriate for that student's educational needs or development.

The standard permits a challenge to the school's assignment decision (not covered by 1.8 D.) only if it is based on a *factual* error. Although the line between "factual" information and the exercise of judgment based on that information cannot be fixed with precision, the standard is constructed on the assumption that wide latitude

must be left for educational judgments and that courts are competent to review only the factual bases of such judgments (in the absence of claimed violations of legal rights, including rights based on the standards in this volume). Of course even within the range of permissible education judgment, educators are expected to make decisions consistent with the spirit of the standards concerning appropriate education for individual students and like educational treatment for similarly situated students.

Standard 1.8 C. 1. places the initial burden of proof on the student to establish a "reasonable ground to believe" that a factual error exists. That is not as demanding a burden as a requirement to prove factual error. As drafted, the standard demands no more than that, considering the evidence from the student's point of view, a reasonable person could believe the decision was premised on a factual error. In meeting this minimal burden of proof the student would be aided by the explanation provided by the school under Standard 1.8 B. and by any evidence of record obtained through exercise of the discovery rights established under Part V (and incorporated here by reference). If the student meets the initial burden, the burden of proof shifts to the school to rebut the "evidence of factual error." Obviously, the school's burden will be light or heavy depending upon the strength of the case made by the student. Alternatively, the school can meet its burden of proof by showing that its decision was correct on other grounds even though the original ground of decision had been influenced by factually erroneous information. Under this alternative approach, the school will be called upon to establish the correctness of its decision, not to rebut the student's challenge. Consistent with all of Standard 1.8 and the preceding commentary, this alternative would not require proving the rightness of the educational judgment but only that such a judgment is supportable by factually accurate information.

Standard 1.8 D. carves out of 1.8 C. those assignment decisions likely to carry the most serious consequences for the student. Generally speaking, the decisions covered by Standard 1.8 D. and E. are those involving "special education" students, such as students who are regarded as "mentally retarded." It should be noted, however, that only those decisions that result in substantial segregation of students by reason of their educational needs or development come within Standard 1.8 D. Thus, even though a student might be stigmatized by being labeled as "mentally retarded," see Kirp, "Schools As Sorters: The Constitutional and Policy Implications of Student Classification," 121 *U. Pa. L. Rev.* 705 (1973), Standard 1.8 D. would

not apply if the student's educational needs were provided primarily within the "main stream" of other students.

The procedural rights of students affected by decisions falling under Standard 1.8 D. and E. are different from those of students affected by other assignment decisions in several respects. See generally *Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257, 1260-61 (E.D. Pa. 1971); 343 F. Supp. 279, 303-05 (E.D. Pa. 1972); *Mills v. Board of Educ.*, 348 F. Supp. 866, 880-83 (D.D.C. 1972); Kirp, Buss & Kuriloff, "Legal Reform of Special Education: Empirical Studies and Procedural Proposals," 62 *Calif. L. Rev.* 40 115-55 (1974). The hearing requirements come into play automatically without any initial requirement that a student first request an explanation of the decision and then challenge the factual basis of the decision. Similarly, there is no preliminary burden of proof imposed on the student before any burden of justification is placed on the school. The standard of proof applicable to 1.8 D. and E. cases is "clear and convincing evidence" as provided in Part V for student discipline cases (see 5.3 C. 2. c.); by contrast, assignment decisions not under 1.8 D. and E. are governed by the less demanding "preponderance of evidence" standard of proof provided in Standard 1.8 C. 3.

Special attention should be given to Standard 1.8 E., which not only places the burden of proof on the school but describes what it is that the school must prove. Consistent with other aspects of 1.8, 1.8 E. singles out factual information, not educational judgment, as the critical issue. Moreover, Standard 1.8 E. does not require that the precise assignment decision be justified but rather that *some* decision that would fall under 1.8 D. can be supported. Consequently, the critical question under 1.8 D. and E. will be whether the special circumstances affecting or identifying educational needs or educational development of the student are sufficiently extreme to warrant a decision that appropriate education for that student may require substantial segregation from other students. Requiring proof that the particular assignment is the correct one would often be practically impossible. (It should be noted, however, that the particular assignment could be challenged under Standard 1.8 C. because 1.8 D. adds to but does not subtract from the rights created under 1.8 A. to 1.8 C.)

Even if there is no factual basis for challenging the school's decision, it will often be desirable to give the parent the right to a conference concerning disagreements about the decision. The right to such a conference is provided in Standard 1.8 B.

Standards 1.8 C. and 1.8 D. require only that procedures be "con-

sistent with" those applicable to discipline cases. Minor differences in detail may result because the focus here is on facts underlying educational judgments (and related factors such as student need and state of development) rather than on alleged student misconduct. But see *Greenhill v. Bailey*, 519 F.2d 5 (8th Cir. 1975).

The various subsections of Standard 1.8 leave the school with considerable discretion in making educational assignments while, at the same time, giving the student a meaningful opportunity to affect the outcome of decisions of potentially great educational significance. It seems reasonable to expect that these standards would lead to some increase in the number of educational decisions challenged. The cost of an increase in such challenges cannot be totally discounted, but any such disadvantage is partially offset by the beneficial effect of precipitating more parent-child involvement in the planning of the child's education.

1.9 If any student is lacking fluency in the language primarily used for instruction in the school of attendance, that student should receive special instruction to the extent necessary to offset any educational disadvantage resulting from the student's particular language development.

Commentary

Standard 1.9 is a specific example of providing an appropriate education or of making a particular assignment by reason of the student's educational needs or development. The basic idea of treating a language disadvantage as the basis for special educational efforts seems unexceptional. See *Lau v. Nichols*, 414 U.S. 563 (1973); Bilingual Education Act, 20 U.S.C. §§ 880b–880b-13 (Supp. IV, 1974).

By requiring special instruction "to the extent necessary" this standard makes no attempt to determine which method or methods should be used. For example, it does not choose between providing the basic educational program in the student's native language and teaching English as a second language. Nor does Standard 1.9 exclude, under all circumstances, letting a student struggle through the language problem for reasonably short periods of time. Here, as elsewhere, what is required is an educational judgment made and implemented in the light of available knowledge and resources. Like the general requirement to provide "appropriate" education, this standard should be construed not only to require that every effort be made to obtain needed funds, books, instructional aids, and per-

sonnel, but also to require that the supplementary instruction program be carried out as far as possible under the circumstances.

Standard 1.9 does not address itself to bilingual education beyond the narrow framework of its possible use to respond to educational needs nor does this standard encompass the broader sphere of bicultural education. Although bilingual and bicultural education seem highly desirable and may in some instances contribute directly to a student's overall educational development, see *Serna v. Portales Municipal Schools*, 351 F. Supp. 1279 (D. N. Mex. 1972), these standards have not attempted to identify any circumstances in which such education should be legally mandated. See generally Harvard Center for Law & Education, "Bilingual/Bicultural Education," 19 *Inequality in Education* 1-53 (1975).

1.10 Juveniles between the ages specified by the state (but in no event older than age sixteen) should be required to attend public school or to receive equivalent instruction elsewhere.

Commentary

Although the ages covered by this compulsory education standard are left up to the state, an upper age limit is set that is generally consistent with present practice. The standard thus reflects judgments that: A. raising the upper limit beyond this point cannot be justified, but see The Lawyers' Committee for Civil Rights Under Law, *A Study of State Legal Standards for the Provision of Public Education* 27 (1974); B. lowering the upper age limit may be justified; C. either raising or lowering the starting age may be justified. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). See generally C. Beireiter, *Must We Educate* (1973); E. Friendenberg, *The Dignity of Youth and Other Atavisms* (1965); A. Gartner, C. Greer, and F. Riessman, *After Deschooling What?* (1973); P. Goodman, *Compulsory Miseducation* (1964); I. Illich, *Deschooling Society* (1970); M. Katz, *Class, Bureaucracy and Schools* (1971).

This standard avoids the question of defining equivalency. But consistent with these standards throughout, equivalency should be determined strictly in educational, not social, terms. Accordingly, nothing in Standard 1.10 precludes nonschool instruction from being equivalent. Compare *Stephens v. Bongart*, 189 A.131 (N.J. Juv. and Dom. Rel. Ct. 1937), with *State v. Massa*, 95 N.J. Super. 382, 231 A.2d 252 (1967).

1.11 If a juvenile fails to attend school without valid justification recurrently or for an extended period of time, the school:

A. should so inform the parent by a notice in writing (in English and, if different, in the parent's primary language) and by other means reasonably necessary to achieve notice in fact;

B. should schedule a conference (and separate conferences, if appropriate) for the parent and juvenile at a time and place reasonably convenient for all persons involved for the purpose of analyzing the causes of the juvenile's absences;

C. should take steps

1. to eliminate or reduce those absences (including, if appropriate, adjustments in the student's school program or school or course assignment); and

2. to assist the parent or student to obtain supplementary services that might eliminate or ameliorate the cause or causes for the absence from school; and

D. in the event action taken pursuant to provisions A., B., and C. is not successful in reducing the student's absences, may petition the court for the sole purpose of developing, with the participation of student and parent, a supervised plan for the student's attendance.

Commentary

Standard 1.11 calls for the enforcement of compulsory education by means of parental notice, conferences, counseling, and as a last resort, a judicially supervised plan. Under this standard, one conference may not be adequate; on the contrary, conferences should be held (after one or more periods of absence) as long as they give any promise of achieving a reduction of school absences. On the other hand, interminable conferences need not be held after they have clearly proved to be unsuccessful.

The triggering terms "recurrently" and "extended" leave some room for interpretation, but the general idea that Standard 1.11 is triggered by a practice or pattern of absences or a very long absence, rather than merely occasional or brief absences, seems clear enough.

The *requirement* that parents be notified only after recurrent or extended absence in no way suggests that parents may (or should) not be notified about every absence. Similarly, conferences might be scheduled on the basis of more occasional or briefer absences. But the point of this standard is to deal with absences that might reasonably be thought of as "truancy" or "habitual truancy."

Standard 1.11 contemplates that the school will take steps within its own control to reduce student absences and will also assist the parents in obtaining "supplementary services" beyond the school's power to provide. Action by the school might include something as

simple as scheduling a study hall first thing in the morning, providing transportation services to school, or requesting a parent to change the time of the student's performance of a home chore. It might include minor or major changes in the student's educational program. "Supplementary services" would include actions beyond school and parental control, such as assistance in providing proper clothing, or help in taking care of younger siblings. The school responsibility is cast in terms of assisting the parent or student to obtain the needed service.

When all else fails to get results, the school is authorized to petition the court for a judicially supervised attendance plan. This last-stage action is based on the premise that the dignity and authority of the court might provide an atmosphere in which more determined efforts to eliminate or reduce absences will be made by all concerned. Standard 1.11 D. does not, however, bring "truancy" back to juvenile court through the rear door. On the contrary, the standard provides explicitly that the *sole* purpose of the judicial involvement is to develop a supervised plan of attendance. The coercive powers of the court under this standard are to be used to obtain the participation of the parties in working out a plan, but the standard does not authorize judicial removal of a child from the home nor contempt nor other sanctions for nonattendance or failure to comply with the plan.

It is frequently suggested that if schools were made more interesting, students would not stay away. See *e.g.*, Bazelon, "Beyond Control of the Juvenile Court," 21 *Juv. Judges J.* 42 (1970). This volume embraces the idea that students will be more likely to stay in school if school is more interesting and more carefully tailored to their particular interests, abilities, needs, and ambitions. Nevertheless, any suggestion that making schools interesting or relevant will eliminate student absence (or other forms of antisocial student behavior) seems entirely too glib. In fact, it seems likely that there are substantial numbers of children (by no means all of them regular absentees) who will not find school interesting or meaningful no matter how imaginatively and variedly the school packages education (within limits that conform with reasonable acceptability and contemplation). The problem for these children is not to make school appealing but to find alternative useful, or at least harmless, things for these children to do with their lives outside the school—or at least outside the entity or concept that is conventionally thought to be embraced by the term "school." See generally Fitzgerald, "Coleman II: Telltale Aloft," 83 *School Rev.* 27, 30-31 (1974); Behn, Carney, Carter, Crain, and Levin, "School Is Bad: Work Is Worse," 83 *School*

Rev. 49 (1974). (Of course, for many of them, a realistic opportunity to acquire the missed educational benefits at a later time when these benefits are more appreciated and meaningful may be very important as well. See Standard 1.2, *supra.*) The limited response of Standard 1.11 to school absences is not based on an extremely optimistic view that all students can be attracted back to school, but on a sober judgment that coercive alternatives, on the whole, are more counterproductive than benign. The Introduction stressed and the standards of this chapter contemplate alternative approaches to education as one way of making schools more meaningful to students. Beyond alternative schools and schooling, beyond conferences, counseling, attempts to get at the "bottom" of the problem, and court-supervised attendance plans, it does not seem desirable to go. Beyond this, in short, is the juvenile home (or truant school etc.), the theory of coercive rehabilitation for noncriminal conduct, and the view that schools must be made increasingly coercive if need be—but the child will be schooled! Contrary to this tried and failed approach, the view adopted by this standard is that such escalated coercion cannot be justified. See generally the *Noncriminal Misbehavior* volume; Children's Defense Fund of the Washington Research Project, Inc., *Children Out of School in America* 62-68 (1974). After describing the abuses and ineffectiveness of the present truancy/compulsory education system, *Children Out of School in America* made a number of recommendations, including the following:

> [T]ruancy should be decriminalized. It should be treated as a school problem for which a variety of school and other social services may be required, but not as a law enforcement problem. Incarceration of children, and fine or imprisonment of their parents, is too harsh a punishment for the offense. It does not serve the child's best interests and makes no educational sense. States should amend their compulsory attendance laws to require investigation of truants by school or social workers and remediation of the causes of truancy through supportive services.

1.12 A. Neither school officials nor police officers (nor other officials) should have any power to take a juvenile into custody, with or without a warrant, by reason of the fact alone that a juvenile is absent from school without valid justification.

B. A duly authorized school official may return a student to school if the student is found away from home, is absent from school without a valid justification, and agrees to accompany the official back to school.

Commentary

Standards 1.12 A. and 1.12 B. together, take the position that physical force is not to be used in returning a student to school. These standards are thus consistent with the general approach of stopping short of coercion and incarceration as the means of enforcing the school attendance requirement. Standard 1.12 B., however, makes it possible for a student found on the street to be walked or driven back to school as long as force or the threat of force is not used. It should be noted that this standard deliberately uses the term "agrees" rather than "consents" in order to avoid the incorporation of the very demanding provisions in the consent/waiver safeguards. (See Standard 2.2 A. to 2.6.) This choice of terminology, of course, means a somewhat greater likelihood that the student's acquiescence in returning to school in the company of the official will not be wholly voluntary. But any threat to a student's rights resulting from this confrontation with authority seems comparatively slight and the importance of getting the student back to school seems sufficiently great to warrant a risk that the student will act in response to some pressure. As the standard authorizes only returns by "school officials," neighborhood groups would have to receive official sanction to come within this standard. Such sanction might be received, for example, if the court-supervised plan contemplated under Standard 1.11 D. provides for community-based escort services. Without such authority any community action would have to rely upon private arrangements and parental approval.

It is important that this standard, in particular, be read in connection with the treatment of noncriminal misbehavior in the *Noncriminal Misbehavior* volume. The standards in that volume cover minimal custodial treatment of children who are in danger themselves or are endangering others. Obviously, a child who is impermissibly absent from school and who also is in danger of causing danger to others should be subject to some form of at least limited custodial treatment. But school absence alone, without any aggravating circumstances, does not present circumstances justifying coercive treatment. It would, of course, be preferable for a child to be in school when required to be there. Very extensive efforts should be made to locate children who should be in school but are not, and very extensive efforts should be made to get children back to school by conferring with them and their parents, by changing school when that is indicated, and by changing any environmental conditions triggering school absence when that is indicated and possible.

1.13 A. A parent's failure to cause a juvenile to attend school should not be the basis of any criminal or other action taken against the parent, except as provided in Standards 1.11 and 1.13 B.

B. A parent's failure to cause a juvenile to attend school should not alone provide a basis for a neglect petition against the parent but, when a neglect petition has been filed on the basis of other evidence, a parent's failure to take reasonable steps to cause a juvenile to attend school may be used as evidence with respect to the question of the appropriate disposition of the neglect petition.

Commentary

These standards continue to build on the basic premise that school attendance requirements should not be enforced through the criminal law and coercive devices. Here, attention is focused upon the parent, rather than the child. But Standards 1.13 A. and 1.13 B. do not reflect a view that the child may be permitted to suffer because of the failures of the parent. It is a fact, of course, that children do pay for parental failures, intentional or otherwise. These standards do not celebrate that fact but, rather, reflect a judgment that the child will seldom be helped by criminal prosecution of the parent or by transferring the child's custody to a foster parent or the state by reason of poor school attendance. To a lesser extent, these standards also reflect a judgment that the parent's responsibility for the child's failure to attend school cannot be assumed—especially for older children—and is often difficult to prove. If there are other grounds for a neglect petition, however, Standard 1.13 B. provides that the parent's failure to cause a child to attend school may be taken into account insofar as school absences result from the parent's failure to take reasonable steps to cause the child to attend school. It is assumed that one possible disposition with respect to which this evidence would be relevant is separation of the child from the parent. See the *Abuse and Neglect* volume.

PART II: BASIC CONSIDERATIONS AFFECTING STUDENT RIGHTS: PARENTAL ROLE AND STUDENT CONSENT AND WAIVER

2.1 A. When the rights of a student are specified or implied by a standard in this volume, the standard should be construed in a man-

ner that will be most likely to protect the student's individual interest.

B. When a standard in this volume authorizes or requires a student to take an action or exercise discretion, the reference in the standard to "student" should be construed as if it read "student and/or parent" and, except as provided in this Part, these standards do not provide for the allocation of control of any decision concerning such an action or discretion between student and parent.

C. The student should participate in decisions affecting the student's interests to the extent such participation is appropriate in view of the particular circumstances, the particular interest involved, and the age and experience of the student.

Commentary

The role of the parent in controlling and asserting the rights of children raises problems that are not unique to this volume. Nevertheless, it is important to recognize those problems explicitly and to provide what guidance is possible in dealing with them. Standard 2.1 A. points out that it is the student's, not the parent's, interest that is being treated and protected in this volume. See *Merriken v. Cressman*, 364 F. Supp. 913, 918-19 (E.D. Pa. 1973). In particular situations, the parent's and the student's interests might conflict, see *e.g.*, *Wisconsin v. Yoder*, 406 U.S. 205, 241-49 (1972) (Douglas, J., dissenting in part); Note, 88 *Harv. L. Rev.* 1001, 1018-20 (1975), and, in such a case, Standard 2.1 A. would require that the applicable standard be applied in a way that would favor the student's interest.

It is more likely, however, that conflicts of interest will arise in connection with decisions about the exercise of student rights, and Standard 2.1 B. states that the standards in this volume treat the control of student rights as a family matter. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). Although this standard expressly disclaims any general intention to resolve or affect differences within the family concerning the exercise of the student's rights, provisions allocating control of the student's right would not be inconsistent with these standards.

In two respects, these standards do speak to allocation of control of students' rights. First, Standard 2.1 C., in essentially exhortative terms, provides that students' participation in controlling

their own rights should be facilitated to the extent appropriate. See *Haziel v. United States*, 404 F.2d 1275, 1281 (D.C. Cir. 1968). This, of course, will not answer specific questions—except by suggesting relevant criteria—but it does adopt a principle of participation. Second, with respect to the crucial question of consent or waiver, the remaining standards in this Part are very explicit in allocating control between student and parent. See also Standard 8.5 B.

2.2 A. A consent that would validate an otherwise prohibited action of a school official, a police officer, or other government official, or a waiver of any right created by these standards is effective as a consent or waiver only if:

1. the consent or waiver is voluntary in fact;
2. the student is clearly advised
   a. that the consent or waiver may be withheld, and
   b. of any possible adverse consequence that might result from such consent or waiver;
3. the student's parent, except when a reasonable effort to inform the parent is unsuccessful,
   a. is informed of the fact that the student's consent or waiver will be sought,
   b. has the opportunity to be present before the consent or waiver is given (unless a student over fourteen years of age objects to the parent's presence), and
   c. expressly approves of the consent or waiver (unless a student over sixteen years of age has knowledge of the parent's lack of approval and gives or repeats his or her consent or waiver thereafter); and
4. either
   a. there is no evidence of coercion, or
   b. any evidence of coercion that exists is satisfactorily rebutted.

B. In addition to the requirements specified in Standard 2.2 A., a student who is entitled to counsel (retained or provided) under these standards may give an effective consent or waiver only if the student:

1. is advised of his or her right to counsel;
2. is given an opportunity to obtain counsel; and
3. either
   a. makes the consent or waiver through counsel, or
   b. waives the right to counsel in accordance with Standard 2.2 A.

C. The burden of proving that a student's consent or waiver meets the requirements of Standard 2.2 A. should be carried by any party relying upon the consent or waiver to establish the validity of an action, the inapplicability of a right, or the admissibility of evidence.

D. In determining whether the consent or waiver was voluntary in fact, each of the following should be considered as evidence tending to indicate that the consent or waiver was involuntary:

1. the student's parent was not informed of the fact that the student's consent or waiver would be sought;

2. the parent was not present when the consent or waiver was given;

3. the parent did not approve of the consent or waiver;

4. the consent or waiver was given in the school building;

5. the consent or waiver was given in the office of the school principal or some other administrative official of the school;

6. the consent or waiver was given in the presence of the school principal or some other administrative official of the school (unless there is unambiguous evidence that the school official acted in a manner that would have been understood by the student as attempting to help the student to make a voluntary choice);

7. the consent or waiver was given without the assistance of counsel;

8. the consent or waiver was requested by a school official, a police officer, or other government official;

9. the consent or waiver was not in writing;

10. the consent or waiver was given by a student under twelve years of age.

E. Standard 2.2 A. applies to any consent or waiver under these standards, including but not limited to:

1. consent to a search otherwise proscribed by Part VIII;

2. consent to interrogation otherwise proscribed by Part VII (except that the prohibition of Standard 7.2 cannot be avoided by consent or waiver);

3. waiver of a right to object to any excludable evidence;

4. waiver of any procedural right provided by Part V; and

5. consent to the administration of any drug, physical test (such as a urinalysis), psychological test, or any other procedure not required of all students by a general rule promulgated pursuant to the school board's authority in accordance with Part III.

F. If the student's opportunity to enjoy any right or privilege otherwise available is conditioned, in whole or in part, upon the student's consent or waiver, the consent or waiver should be conclusively presumed to be invalid.

Commentary

These standards attempt to deal with very basic questions: Should a consent or waiver by a minor ever be permitted? If so, when and under what circumstances? What is the role of the student's parent (and counsel) in determining the voluntariness of any consent or waiver? The answers provided by these standards are premised on the assumption that a consent or waiver will sometimes be desirable (partly to make otherwise exacting standards workable) and that a reasonably meaningful consent or waiver by a minor is possible. *Cf. In re Gault*, 387 U.S. 1 (1967). Recognizing that there is a high risk of overreaching by officials and of involuntary consent or waiver, see *Haley v. Ohio*, 332 U.S. 596, 599 (1948), the standards attempt to build in a variety of safeguards including advising the student of his or her rights, see *In re Gault*, 387 U.S. 1, 41–42 (1967); involving the parent and counsel, see *Gallegos v. Colorado*, 370 U.S. 49, 54 (1962); *Haley v. Ohio*, 332 U.S. 596, 600 (1948); and allocating the burden of proof to those alleging the consent or waiver. The safeguards provided in these standards will make it quite difficult to obtain usable consents or waivers.

However, the safeguards included do not constitute any guarantee against involuntariness. A strong case can be made for alternative solutions in various respects. For example, it would be possible to authorize consent for some purposes, such as in-school drug administration, but not others, such as police searches of the student's person, on the theory that it is more likely that a student will be benefited by reason of a consent that makes a drug available through the school than by a consent that authorizes the police to search the student.

Several detailed comments may help to clarify the standards. The student ages used here are necessarily somewhat arbitrary. Different ages are used because of the different objectives being achieved. Fourteen is used as a point at which the student's privacy and independence are sufficiently developed to permit the student to choose to deal with a consent/waiver situation without the parent's presence and without necessarily succumbing to any coercive pressure. Sixteen is used as a point at which the student might have sufficient independence to resist any coercive pressure even when acting contrary to a parental judgment. It is certainly arguable that the presence of the student's parent and the parent's approval are always essential conditions precedent for any student waiver or consent. See *In re K.W.B.*, 500 S.W.2d 275, 281–83 (Mo. Ct. App. 1973). But see *Thieriault v. State*, 66 Wis. 2d 33, 36–37; 223 N.W.2d 850, 852–53 (1974). In this

respect it should be noted that, although Standard 2.2 A. does not make either parental presence or approval an absolute condition precedent to a valid consent or waiver by children of the specified ages, Standard 2.2 D. continues to treat lack of parental presence or approval as *evidence* that the consent or waiver was involuntary. See *In re Gault*, 387 U.S. 1, 55 (1966); *Commonwealth v. Jones*, 328 A.2d 828, 832-33 (Pa. Super. 1974). For these evidentiary purposes, Standard 2.2 A. should be interpreted to reflect a view that parental disapproval is stronger evidence than parental absence that the student's consent or waiver is involuntary. On the same subject, notice to the parent and, consequently, lack of parent presence or approval is excused if a "reasonable but unsuccessful effort" to reach the parent is made. Apart from requiring an attempt to reach the parent at obvious places—such as home, work, friends—this provision should be interpreted to invalidate any consent or waiver if there was no overriding need to obtain the consent or waiver before further efforts to reach the parent could have been made.

Standard 2.2 D. 6. makes the presence of a school administrator a factor tending to indicate involuntariness unless there is clear evidence that the administrator attempted to "help the student to *make a voluntary choice*"; attempting to help the student for any other purpose will not rebut the evidentiary tendency of such presence.

Standard 2.2 F. makes any waiver or consent involuntary if it is given as a condition precedent to the student's access to a right or privilege that would otherwise be available. This standard states a result that would probably be assumed in the absence of a specific standard. Standard 2.2 F. does not apply if the student's loss of a privilege or right stems from a condition that might be removed as a result of a consent or waiver but that would, in any event, provide a valid basis for elimination or modification of the privilege or right. For example, suppose a student has a physical condition that would justify removal from a regular class. In addition, suppose this condition can be altered by taking a certain drug. If the drug is taken (and the condition altered) removal of the student from the regular class would not be permitted. Yet the student cannot be required to take the drug. If the student does agree to the administration of the drug under circumstances otherwise satisfying the provisions of Standard 2.2 A. to 2.2 E., the consent is valid. The voluntariness of this consent is in no way negated by Standard 2.2 F. because failure to take the drug (and to alter the condition) would have resulted in removal from the regular class.

PART III: SCHOOL REGULATORY POWER

3.1 In the absence of explicit legislative provisions to the contrary, schools should attempt to regulate the conduct or status of students only to the extent that such regulation is reasonably and properly related to educating the students in their charge.

Commentary

This standard sets forth the basic premise of the standards in this Part: schools are special-purpose organizations, all the regulatory activities of which must necessarily be related to the special purpose for which they exist, which purpose is that of educating the students in their charge. See Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Non-constitutional Analysis," 117 *U. Pa. L. Rev.* 373, 377-384 (1969). *Guerreri v. Tyson*, 147 Pa. Super. 239, 24 A.2d 468 (1942). This standard thus rejects the proposition that school officials may be viewed as general legislators for juveniles who happen to be students in their schools. Such a proposition would be at clear variance with the proper view of the power that society has delegated to schools regardless of whether one views that authority as derived from parental authority under the doctrine of *in loco parentis* or from a school system's position as a governmental agency. See Goldstein, *supra* at 377-384, 386. Either view leads to the conclusion that, in the absence of explicit legislative provisions to the contrary, there is no justification for schools to enact coercive rules that are not reasonably and properly related to the educational function of the schools.

The following standards in this Part are directed at further refining this standard's limitations of a school regulation to that which is reasonably and properly related to educating its students.

3.2 Regulation of student conduct or status by school authorities is reasonably and properly related to educating school students only if such regulation is reasonably and properly in furtherance of:

A. the education per se function of schools, which consists of the basic function of educating students; or

B. the host function of schools, which consists of protection of persons or property for which the school is responsible and of the integrity of the educational process.

Commentary

This standard sets forth school functions that are included within the prior standard's limitation of school power to that which is reasonably and properly related to educating the school students. It is self-evident that the educative function of the school board includes the authority to promulgate rules aimed directly at educating students, *i.e.*, the education *per se* function. Thus, rules whose immediate purpose is education are within school board functional authority. As used in these standards the term "education" refers to "[t]he aggregate of all the processes by means of which a person develops abilities, attitudes, and other forms of behavior of positive value in the society in which he lives." *Dictionary of Education* (C. Good ed. 1959).

In addition to the education *per se* function, the educative function of the school board necessarily and properly includes that rule-making authority aimed at protecting the physical premises in which the educational process takes place, along with the well-being of students and others who may be on the premises. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373, 403–406 (1969). Similarly, this authority includes regulations aimed at preventing disruption of the educational process.

It should be noted, however, that, as set forth in the following standard, the fact that a given school rule is within the school's functional authority is a necessary, but not necessarily a sufficient condition to its validity.

3.3 Schools may regulate student conduct or status based on their educational per se function only where the educational interest involved clearly outweighs the applicable countervailing factors. Schools may regulate student conduct or status based on their host function where such conduct or status also substantially involves significant interests beyond that of the school's, only if there exists a clear and imminent threat of harm to persons or property for which the school is responsible, or to the integrity of the educational process, which cannot otherwise be eliminated by reasonable means.

Commentary

Although a school rule to be valid must serve an educational purpose, it is not always sufficient for it to do so. In other words,

serving a valid educational purpose is a necessary, but not sufficient, condition for the validity of a school regulation of students' conduct or status. This is true even when a school is acting pursuant to its basic, positive function of education *per se*. Basic to our societal and governmental structures is the assumption that certain areas of conduct, if subject to any governmental regulation at all, should be regulated by the legislature. Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373, 387-89 (1969). These are usually areas, such as juvenile marriage, discussed in Standard 3.5, that require a delicate balancing of complex societal values. This does not mean that the legislature can never delegate to subordinate bodies the authority to regulate these areas. It does mean, however, that broad, vague, statutory grants of power to such bodies should not be interpreted as including such a delegation of authority. The presumptions of our societal and governmental systems often require that these delegations be explicit. A. Bickel, *The Least Dangerous Branch* 156-169 (1962); Goldstein, *supra* at 388 n. 60.

Furthermore, broad statutory grants of rulemaking power to schools should not be read as legislative permission to promulgate any and all rules related to the functioning of the educational structure regardless of the effect that such rules might have on other societal interests. School boards that make and enforce rules do not operate in isolation, and, particularly at the fringe of school board authority, school rules may collide with those of other decisionmakers, public and private. When this occurs, a school board rule cannot be found valid simply because it serves an educational function. The contrary rule of the other decisionmaker may also serve a purpose appropriate to its function. It therefore becomes necessary to determine which has primacy in each particular case. In the absence of a specific legislative directive as to primacy, the determination must be made through an examination of the total statutory scheme (not just the education code) and the background of societal traditions against which the legislature has enacted this scheme.

In some types of regulation, schools do not act in furtherance of their positive education *per se* function, but rather, in furtherance of their interest in the protection of the school premises, protection of students or others on the premises, or peaceful continuity of the educational process itself. In such cases the problems are those of determining the nature of those threats against which schools can act, and the requisite test for such action where the school's regula-

tion will involve significant interests other than those of the educational structure.

This standard views the valid exercise of this type of school board authority extending only as far as it is necessary to protect school premises, students, or others on the premises, or the educational process, from articulable dangers that proximately threaten some serious harm. Where other than education interests are involved, the clear and imminent danger test is designed to allow appropriate school action while disallowing the extension of board power beyond its necessary, and therefore justifiable, limits.

Protection against various kinds of harm are properly included within the host function. The most common are those threatening the physical premises, or physical wellbeing of students. A school has, under this standard, the legitimate authority to control a student who presents a clear and imminent threat of destruction of school property for as long a time as such a threat exists. Similarly, it would be a valid exercise of school authority to exclude a carrier of a contagious disease who presents a clear and imminent threat of infecting other students. The courts have generally agreed. See Goldstein, *supra* at 404, and cases cited therein. They have, conversely, refused to allow the exclusion of an unvaccinated child absent danger of contagion or express legislative direction. *Ibid.*

It should be noted that in order to justify regulation under the host function, the requirement of a clear and imminent threat of harm to persons or property for which the school is responsible or to the integrity of the educational process, that cannot otherwise be eliminated by reasonable means, applies only to those situations in which the student conduct or status to be regulated involves to a substantial degree significant interests beyond that of the schools. Examples of such interests are marriage and parenthood, addressed in Standard 3.5 hereof. Where such interests are not involved, this standard does not restrict school regulatory power. Thus, normal "housekeeping" rules of a school which are reasonably required to promote, for example, the efficient use of time or space or the decorum conducive to a sound educational atmosphere, are not restricted by this standard.

Standards 3.5, 3.6, and 3.7 represent applications of this standard to specific, recurring types of school regulations sought to be justified under either or both the education per se or host functions.

3.4 No student should be denied access to any school activity whether or not the activity is denominated "extracurricular," except as provided in these standards.

Commentary

This standard explicitly rejects the concept that students may be denied access to certain school activities, usually denominated "extracurricular," because access to such activities is a "privilege" and not a "right." See *e.g.*, *Starkey v. Board of Education*, 14 Utah 2d 227, 381 P.2d 718 (1963); Van Alstyne, "The Demise of the Right-Privilege Distinction in Constitutional Law," 81 *Harv. L. Rev.* 1439 (1968). Such a dichotomy between "right" and "privilege" has been rejected in other areas of the law, see *id.*, and should not be employed in determining access to school activities. Whether participation in extracurricular activities is termed a right or a privilege, the opportunity for such participation is an integral part of the education that a school offers its students. Students should not, therefore, be excluded from such activities except for reasons consistent with the state's legal structure viewed as a whole and the place of school regulation of student conduct and status within that system. Therefore, students' access to all school activities should be governed by the standards for access to education set forth in Part I of these standards.

This standard does not preclude, however, choosing participants for some activities, *e.g.*, varsity athletic teams, on a nondiscriminatory, competitive basis.

The trend of recent case law is in accord with the approach of this standard. See *Moran v. School District No. 7, Yellowstone County*, 350 F. Supp. 1180 (D. Mont. 1972); *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972); *Dunham v. Pulsifer*, 312 F. Supp. 411 (D. Vt. 1970). See generally *Bowman v. County School Board*, 293 F. Supp. 1201 (E.D. Va. 1968).

3.5 Neither the education per se function nor the host function of schools justifies the complete or partial exclusion of a student from any school program or activity solely on the basis of such student's status of being married or being a parent (wed or unwed).

Commentary

This standard is an application of Standards 3.1 to 3.4 to married students or students who are parents. Schools have attempted to justify the practice of excluding married students from school as part of their education *per se* function of instructing students as to the undesirability of early marriage or on some host func-

tion theory that contact with married students may present a danger to the other students. This standard rejects both rationales as applied to the situation of married students.

It is acknowledged that schools do have a legitimate interest in value inculcation. See commentary to Standard 4.2 hereof, and Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373, 387-389 (1969) and cases cited therein, and it would appear that such an interest would include dissuading students from early marriage. This educative interest, however, is not solely attainable through the imposition of coercive exclusionary rules; the alternative of indoctrination through persuasion is available to the schools. The only unique advantage that might result from addressing the goal through coercion is short run deterrence, *i.e.*, a stopgap while the process of persuasive indoctrination is taking place. Despite this possible educational interest, juvenile marriage is usually legal with parental consent, and the imposition of sanctions on this relationship by the schools would do violence to the legislatively established distribution of public and private decisionmaking. Goldstein, *supra* at 393. Direct sanctions by the school force a choice between marriage and education and thus intrude into a legislatively approved zone of private decisionmaking. Additionally, the sanction usually employed by schools in response to juvenile marriage, exclusion from school generally or from particular school activities, is contrary to the basic right to an education, both as expressed in these standards (see Standards 1.1 to 1.9), and as expressed in the current law of all states (see commentary to Standards 6.3 A. to 6.5 *infra*). Clearly a school's marginal interest in imposing coercive rules in this area does not overbalance the aforementioned competing considerations.

Similar reasoning would apply to invalidate attempts by schools to impose sanctions on students who are married parents as part of their education *per se* function. Sanctions imposed on students who are unwed parents present a slightly different problem, however. In such a case, the legislature never expressly delegated to the private realm the decision of whether to attain the status of parent out-of-wedlock, and may in fact make the prerequisite conduct illegal, Goldstein, *supra* at 398. It is relevant to note, however, that even when promiscuity is made illegal, states often institute programs designed to give assistance to unwed mothers, *ibid.*, thus allowing the inference that the state did not intend the social ostracism of an unwed mother, but rather her adjustment to society. Moreover, the complex of laws designed both to discourage premarital sex and out-of-wedlock

births, and yet help unwed parents and illegitimate children, suggest the existence of a legislatively determined balance in this area, which the imposition of additional sanctions by schools might upset. Finally, just as with married students and married parents, the sanction of exclusion of unwed parents from schools runs counter to the right of all students to an education. Based on the above, this standard concludes that a school rule precluding a student who is a parent, wed or unwed, from any school activity does not meet the test of Standard 3.3 requiring the school's educational interest to clearly outweigh the countervailing factors, and such a rule thus cannot be justified by a school's education *per se* function.

Nor can these rules be justified by a school's host function. As stated in Standard 3.4 and the commentary thereto, a school's host function includes that of protecting the students in its charge from harm by fellow students. It has been argued that this includes not only protecting students from danger to their physical health but also from danger to their moral health, in terms of what might be called "moral pollution." Goldstein, *supra* at 405–409. Yet, even if this view is accepted, the inquiry as to the validity of the school regulations addressed in this standard is not ended. As has already been discussed in this commentary, school regulation of this area clearly involves impositions on significant nonschool interests. Thus Standard 3.3 limits regulations based on a school's host function to the situation of a clear and imminent threat of "moral pollution" of other students or of disruption of the educational process. Standard 3.5 is based on the conclusion that no such serious and imminent threat can be demonstrated due to the presence of married students or juvenile parents (wed or unwed) in a school or in any particular school activity.

A standard similar to the one proposed herein was applied by the Kansas Supreme Court in invalidating, on state law grounds, a school board's exclusion of a girl who had conceived a child out of wedlock, married prior to the child's birth, and separated from her husband shortly thereafter. *Nutt v. Board of Education*, 128 Kan. 507, 278 P. 1065 (1929).

In addition, several federal courts have reached the conclusion recommended by this standard, by applying a constitutional analysis, and have invalidated school decisions excluding unwed mothers as violative of the fourteenth amendment, *Ordway v. Hargraves*, 323 F. Supp. 1155 (D. Mass. 1971); *Perry v. Grenada Municipal Separate School District*, 300 F. Supp. 748 (D. Miss. 1969).

Based on the reasoning set forth above as to the exclusion of married students from school generally, and the provisions of Stan-

dard 3.4, this standard prohibits exclusion of married students from extracurricular activities or from any other school program or activity.

The courts have generally agreed with the provisions of this standard as far as complete exclusion of married students from school is concerned, but have until recently accepted rules authorizing exclusion of married students from extracurricular activities. See Goldstein, *supra*, at 78, 396, and cases cited therein. However, a number of recent federal court decisions have arrived at conclusions in complete accord with the proposed standard. See *Holt v. Shelton*, 341 F. Supp. 821 (M.D. Tenn. 1972); *Moran v. School Dist. No. 7*, 350 F. Supp. 1180 (D. Mont. 1972); *Davis v. Meek*, 344 F. Supp. 298 (N.D. Ohio 1972). In reaching this result, the *Moran* opinion uses an analysis quite similar to that of this standard.

3.6 Neither the education per se function nor the host function of schools justifies:

A. the exclusion of a student from any school activity based solely on the fact that such student is pregnant unless her participation in such activity presents a clear and imminent threat of harm to the student or foetus involved that cannot be eliminated by other means; or

B. the exclusion of a student from school based solely on a student's hair style, unless the relationship between the particular activity involved and the student's hair style is such that the student's participation creates a clear and imminent threat of harm to the student or other persons involved in the activity, or is clearly incompatible with performance of the particular activity involved.

Commentary

This standard is a particularization of the general Standards 3.1 to 3.4 as applied to the situations of rules concerning pregnant students and hair length.

The analysis of the general application of the education per se and host function standards to pregnant girls is quite similar to the unwed parents analysis discussed in the commentary to Standard 3.5.

There is one additional factor involved in this situation, however: the possibility of danger to the student herself or to the foetus by the student's continued presence in school during pregnancy being a justification of her exclusion from school. This argument was the

primary basis for the upholding by an Ohio lower court of a school rule requiring pregnant students "to withdraw from school attendance immediately upon knowledge of pregnancy." *State v. Chamberlain*, 12 Ohio Misc. 44, 175 N.E.2d 539 (Ohio Ct. Com. Pl. 1961).

However, in *Ordway v. Hargraves*, 323 F. Supp. 1155, 1158 (D. Mass. 1971), a federal district court determined on the basis of expert testimony that "no danger to [the pregnant student's] physical or mental health resultant from her attending classes during regular school hours has been shown," and therefore ordered her readmitted to the regular school program. While recognizing the legitimacy of a school's interest in not wanting its services to constitute a threat to the physical health of a pregnant girl or a foetus, see Goldstein, "The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373, 414-419 (1969). Standard 3.1 is in accord with the *Ordway* decision in requiring that the threat be clear and imminent. See also *Cleveland Board of Educ. v. LaFleur*, 414 U.S. 632 (1974), concerning pregnant teachers.

Two other considerations should be noted. First, if there is a clear and imminent threat of serious harm to the physical health of a pregnant student or a foetus from certain school activities, such as physical education, this would justify excluding such a student only from those activities, not from school entirely.

Secondly, a number of schools have adopted special programs for pregnant students dealing with both prenatal and postnatal problems, as well as regular school subjects. For example, the Wisconsin Special Education Act, ch. 89, Laws of 1973, provides that children with "exceptional education needs" are entitled "to receive education at public expense which is tailored to their needs and capacities and that special assistance, services, classes, or centers shall be provided wherever necessary," and includes pregnant students among the students with exceptional education needs. The statute also provides: "Preference is to be given, whenever appropriate, to education of the child [with exceptional educational needs] in classes along with children who do not have such needs." A number of school systems, without specific legislation, have also adopted special programs for pregnant students. For example, in 1967 the Maryland State Board of Education adopted a bylaw providing for special programs for pregnant girls. The bylaw specifically stated that participation in the special program was voluntary on the part of the student and that a pregnant student may not be involuntarily excluded from her regular high school program. See generally *Time* Magazine, Feb. 10, 1967 at 63-64, for a description of some special programs for pregnant stu-

dents; Berl, "An Interim School Program for Unwed Mothers," *Child Welfare*, January 1960, at 22. While the availability of these programs is a desirable policy (consistent with the general view of these standards that alternative educational programs be made available to students, see Standard 1.3 *supra*), Standard 3.6 A. requires that, unless the clear and imminent danger test is met, a pregnant student's participation in such a program in lieu of her regular school program must be completely voluntary. See also Standard 2.2 on consent and waivers.

Standard 3.6 B. also rejects the education *per se* function as a justification for school rules regulating hair length and narrowly restricts host function justification to particularized situations. A school may, indeed, have a legitimate education *per se* interest in teaching good grooming. This can, however, be furthered by the teaching process. Moreover, an individual's hair length and style are ordinarily left to private decisionmaking in our society and a restriction on a student's hair length while the student is in school is a significant invasion of that private decisionmaking. Thus a school is not justified in attempting to inculcate values of good grooming through coercive rules. For the same reasons, the use of a school's host function to regulate student hair length or style would have to be based on the instance of a clear and imminent threat of harm to person or property for which the school is reponsible or the integrity of the educational process which cannot otherwise be eliminated by reasonable means.

Schools have sought to justify rules regulating a student's (invariably male) hair length because of an alleged threat of disruption to the educational process. This standard is based on the conclusion that, although concern for preventing disruption of the educational process is quite legitimate, Standard 3.3's requirement of a clear and imminent threat that cannot be otherwise eliminated by reasonable means cannot be demonstrated in terms of a student's general participation in school. Where a threat of disruption is caused by other students reacting to long-haired students, Standard 3.3's requirement of eliminating the threat by other reasonable means, requires the school to use reasonable efforts to control the conduct of the active reactors before attempting to control the passive action of a student with long hair. Compare *Crews v. Clong*, 432 F.2d 1259 (7th Cir. 1970).

Standard 3.6 B. concludes that, on the basis of present evidence, it cannot be demonstrated that students with long hair present a clear and imminent threat to the integrity of the educational process in general. Nor is there any other basis to restrict in general the length or style of a student's hair.

Standard 3.6 B. does, however, recognize that there may be particular school activities that require some restrictions on the hair length or style of participants. Examples may be certain sports, such as wrestling, where long hair may not only impede the performance of the student with the long hair but might adversely affect the competition in other ways, and a shop class where a student's long hair may present a safety hazard. It should be noted, however, that Standard 3.6 B. is also subject to the requirement of the use of less restrictive means, such as wearing hair nets, special caps, or tying the hair back to eliminate the problem, where such means are reasonably available.

3.7 School authorities should not, without the prior informed consent of the affected students or their parents obtained pursuant to the terms of Standard 2.2 hereof:

A. compel any student to respond to psychological or other tests, or otherwise supply information, that involves the disclosure of intimate details of a student's personal or family life or the personal or family life of other members of the student's family; or

B. compel any student to take any drug the purpose of which is to alter or control the behavior of the student.

Commentary

This standard is another specific application of Standards 3.1 to 3.3. In the situations with which this standard is concerned the school's education *per se* or host function interests are overwhelmed by the interest in privacy of the students and parents involved.

Standard 3.7 A. is based on a determination that the limited education *per se* or host function interests of a school in requiring students to take psychological or other tests, or otherwise supply information that involves the disclosure of intimate details of a student's personal or family life (or the personal or family life of other members of the student's family) is clearly overwhelmed by the effect of such tests on the important interests of students and their families in privacy. Thus, such tests cannot be required without the informed and voluntary consent obtained pursuant to the terms of Standard 2.2 hereof. Standard 3.7 is in accord with the decision in *Merrimen v. Cressman*, 364 F. Supp. 913 (E.D. Pa. 1973), which held that a school could not require eighth grade students to answer questionnaires concerning intimate family relations as part of a program that attempted to identify potential drug abusers, unless the school obtained truly informed and voluntary prior consent of the parents.

The standard is also consistent with the Russell Sage Foundation, *Guidelines for the Collection, Maintenance & Dissemination of Pupil Records* (1969) which, at page 34, states that prior written consent of a parent must be obtained before a school psychologist or counselor may administer a standardized personality inventory test to a student who is experiencing difficulty in getting along with classmates.

Standard 3.7 B. also is based on the determination that, absent consent, a school's interest in controlling student behavior through the use of drugs does not prevail over the interests of a student and parents in controlling this very important aspect of privacy and family autonomy. There is currently a vigorous dispute in medical and legal circles concerning the efficacy of the use of drugs to control the behavior of "hyperactive" or "hyperkinetic" children. For a review of the literature in this area see "Special Reports: Drugs, Discipline and Disruption," 8 *Inequality in Education* 3-24 (1971) and sources cited therein; "Federal Involvement in the Use of Behavior Modification Drugs on Grammar School Children in the Right to Privacy Inquiry: Hearing Before a Subcommittee of the House Committee on Operations," 91st Cong., 2nd Sess. (1970).

Standard 3.7 B. does not attempt to resolve the medical issues involved in this controversy. Rather, it states that these issues are to be resolved by the voluntary choice of children and their parents and not by coercion of the school authorities. As stated in a report that is generally receptive to drug treatment for hyperkinetic children where appropriate:

> Under no circumstances should any attempt be made to coerce parents to accept any particular treatment. As with any illness, the child's confidence must be respected. The consent of the patient and his parents or guardian must be obtained for treatment. It is proper for school personnel to inform parents of a child's behavior problems, but members of the school staff should not directly diagnose the hyperkinetic disturbance or prescribe treatment. The school should initiate contact with a physician only with the parents' consent. When the parents do give their approval, cooperation by teachers, social workers, special education and medical personnel can provide valuable help in treating the child's problem.

"Conference on Stimulant Drugs for Disturbed School Children, Report," 8 *Inequality in Education* 14, 18 (1971).

Under Standard 3.7 B. a child may not be excluded from any school activity or otherwise be subjected to sanctions based on the fact that his or her parents have refused consent to drug therapy to

control the student's behavior. This does not mean, however, that school actions cannot be taken, where otherwise permissible under these standards, against a student, based on his or her continuing misbehavior, if the student's parents have refused drug therapy in relation to that misbehavior. The school action, however, must be based on the misbehavior involved, not the fact of the parental refusal of drug therapy. See also Commentary on Standard 2.2 F.

3.8 Schools may reasonably restrict access to school premises by persons who are other than students or school personnel.

Commentary

This standard is a corollary of Standards 3.1 and 3.2, as a school's power to regulate the education of students in its charge must necessarily include the power reasonably to restrict access by outsiders to school premises. This power is necessary both to the school's education *per se* and host functions. A school's power to restrict access to school premises, however, may not be exercised arbitrarily. It must be exercised in a manner consistent with a school's education *per se* and host functions as well as with other generally recognized restraints on arbitrary governmental action, such as constitutional prohibitions of deprivation of liberty without due process of law and of denial of equal protection of the laws. Standard 3.8 is also not intended to restrict the right of parents to inspect school records as provided for in the *Records and Information* volume.

3.9 A. No person serving as a school counselor should disclose, or be compelled by any form of legal process or in any proceeding to disclose, to any other person any information or communication by a student received by such person in the capacity of a counselor unless:

1. such disclosure is required to be made to the student's parent pursuant to any other of these standards; or

2. the privilege of nondisclosure is waived by the student or parent pursuant to Standard 2.2 hereof; or

3. the information or communication was made to the counselor for the express purpose of being further communicated or being made public; or

4. the counselor believes that disclosure is necessary to prevent substantial property destruction or to protect the student involved or other persons from a serious threat to their physical or mental health.

For purposes of this and the following standard a person is deemed to be serving as a school counselor if such person has been designated by the appropriate school authorities to act specially as a counselor for students, regardless of whether such person has been specially certified as a counselor or such person is expected to perform administrative or teaching duties in addition to counseling students.

B. Any professional school employee, other than a school counselor, who receives in confidence information or communication from a student, should not disclose, nor be compelled to disclose, such information or communication unless:

1. such disclosure is compelled by legal process issued by a court or other agency authorized by law to issue process to compel testimony or the production of documents; or

2. such disclosure is required to be made to the student's parents pursuant to any other of these standards; or

3. the privilege of nondisclosure is waived by the student or parent pursuant to the provisions of Standard 2.2 hereof; or

4. the professional school employee believes that disclosure is necessary to prevent substantial property destruction or to protect the student involved or other persons from a serious threat to their physical or mental health.

For purposes of this standard, a professional school employee means a person employed by a school in a teaching or administrative capacity.

Commentary

Standards 3.9 A. and 3.9 B. are addressed to issues of confidentiality and privilege of communications to school counselors and other professional school employees. Standard 3.9 A. creates what is generally termed a "privilege" for student communications to school counselors. This is termed a privilege because, with the exceptions stated, under Standard 3.9 A. a counselor is exempt from the usual requirement of giving testimony in judicial, administrative, or other legal proceedings when subpoenaed or otherwise compelled by legal process to do so. Standard 3.9 B., which applies to professional school employees who are not counselors, creates, under certain circumstances, duties of nondisclosure and immunity from compelled disclosure, but does not give such people a privilege from giving testimony in judicial, administrative, or other legal proceedings when compelled to do so by subpoena or other legal process.

Standards 3.9 A. and 3.9 B. impose both duties not to disclose and immunity from disclosure as to certain communications. The standards differ in two regards. As to professional employees who are not acting as counselors, the provisions only apply to information or communications that were received from a student *in confidence.* However, 3.9 A. applies to all information or communications received by a counselor in the capacity of a counselor, subject only to the provision of 3.9 A. 3. as to communications made for the express purpose of being further communicated or being made public. This difference in treatment is reflective of the different roles being performed by counselors as distinguished from other school employees. By the nature of their counseling functions there is a strong presumption that all communication made to counselors are made in confidence. On the other hand, teachers and administrators engage in many discussions with students that are clearly not thought by anyone to be in confidence. Thus 3.9 B. only applies to those that are, in fact, made in confidence. This does not mean that the student must explicitly request that the communication be in confidence for 3.9 B. to apply. Whether or not a communication is given in confidence depends on the totality of the circumstances involved. When in doubt, however, a teacher or administrator may be well advised to ask the student whether or not the student was speaking in confidence. Of course, neither 3.9 A. nor 3.9 B. protects from disclosure all confidential communications and neither school counselors nor other professional employees should indicate to students that their communications will be kept in greater confidence than in fact will be the case.

The other difference between Standards 3.9 A. and 3.9 B. is even more significant. Standard 3.9 B., while creating a duty of nondisclosure and immunity from disclosure under certain circumstances, does not provide that confidential communications to others than counselors are immune from compelled disclosure by a subpoena in a legal proceeding. Standard 3.9 A., on the other hand, creates, for school counselors, a privilege of immunity from the usual requirement to give testimony in judicial or other legal proceedings. Thus, it is a true testimonial privilege.

The decision to create such a testimonial privilege requires, as with decisions on all testimonial privileges, a determination of the proper balance between the desire to obtain the truth in judicial proceedings through full testimony, and the desire to foster a particular relationship by immunizing the confidence of that relationship from compelled disclosure.

Dean Wigmore, in his monumental treatise on evidence, lists the following four necessary conditions to the establishment of a testimonial privilege:

> (1) The communications must originate in a confidence that they will not be disclosed.
>
> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
>
> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation. 8 *J. Wigmore, Evidence* § 2285, at 527 (McNaughton Rev. 1961).

Traditionally, privileges have been extended to communications between husband and wife, attorney and client, physician and patient, and priest and penitent. A number of states also grant privileges to the psychologist-patient relationship. Among other professions that have sought, and, in some cases obtained, testimonial privileges are social workers, registered nurses, accountants, and marriage counselors. See generally Robinson, "Testimonial Privilege and the School Guidance Counselor," 25 *Syracuse L. Rev.* 911, 912-918 (1974).

Despite a modern tendency against the expanding of testimonial privileges because they conflict with the desire for disclosure so as to aid the truth-finding process, see C. McCormick, *Evidence* 156-160 (1972), a number of authorities have made persuasive cases for the granting of testimonial privileges to school counselors. See Rezny & Dorow, "Confidential Information and the Guidance Program," 54 *J. Educ. Research* 243 (1961); Robinson, *supra;* Shevlin, "Privileged Communication and the Counselor," 65 *Cath. Educ. Rev.* 176 (1967); Comment, "Testimonial Privilege and the Student-Counselor Relationship in Secondary Schools," 56 *Iowa L. Rev.* (1971).

The argument is essentially based upon the four Wigmore principles quoted above. As stated by Dr. William P. Robinson III, a certified guidance counselor himself:

> The first criterion is seemingly the most difficult to satisfy, since it would be a function of the privilege if the privilege existed. A communication will most likely originate in a confidence that it will not be disclosed when a counselee has reason to believe that it will not be. The pre-existence of the privilege would be such a reason, and perhaps the strongest of all.

Nevertheless, there are features of a counseling session which would lead a counselee to believe that his communications during such a session would not be disclosed, and which therefore would support a conclusion that such communications do arise in a confidence that they will not be disclosed. That the session is conducted individually in the counselor's private office, for example, lends an official and confidential air to the relationship. Moreover, most counselors would probably agree that much of what the counselee communicates is private and personal indeed, and that the counselor intends to hold these communications confidential and that the counselee expects him to. It should be kept in mind, too, that even if satisfaction of this first criterion were "open to dispute," the clear and unquestioned satisfaction of the remaining three conditions would nevertheless probably justify extending a privilege to the school counselor-counselee relationship.

With respect to the second criterion, numerous authorities in the field confirm the common sense belief that there can be no full and complete counseling relationship without total openness and that such openness is possible only if the counselee can be assured that his confidence will not be violated. For example, L. Tyler, the author of a leading test in the field of counseling theory, states: "[T]he client must be able to have confidence in the counselor, to feel safe with him. It is this requirement that makes what is called confidentiality so important. If a person is going to relax his defenses and think out loud about weaknesses as well as strengths, he needs to be sure that these weaknesses will never under any circumstances be held against him because he has revealed them here."

As for the third of Wigmore's criteria, whether the relation is one which the community would sedulously foster, it would be difficult to overemphasize the community's felt need for additional psychotherapeutic intervention at all levels. Friedenberg attests to this need: "The incidence of serious emotional disturbance in American life is high among adolescents. . . .

The anxieties of modern life have certainly not made adolescence any easier and a large proportion of individual boys and girls do need professional help with problems of emotional development. The school is the logical place to give such help."

The crucial condition of the four set down by Wigmore is the fourth. It is essentially a question of balancing: Is the proposed privilege of more value to society than compliance with the general duty of the citizen to testify? Because of the need for complete confidentiality for a fully effective counseling relationship, and because of the enormously beneficial role which counseling can play for the individual and for society, it is strongly suggested that the balance weighs heavily in favor of extending the privilege to counselors. (Footnotes omitted.) Robinson, *supra*, at 924-927.

Presently, thirteen states (Connecticut, Idaho, Indiana, Maine,

Michigan, Montana, Nevada, North Carolina, North Dakota, Oklahoma, Oregon, Pennsylvania, and South Dakota) accord a statutory privilege to school counselors, although the statutes vary widely in terms of the people to whom they apply and the scope of the privilege provided. For an excellent analysis of the statutes as well as their texts, see Robinson, *supra.* None of the statutes provides for a privilege operative under all circumstances. This is in the nature of the delicate balance involved in a privilege: preservation of a particular confidential relationship as against the public good involved in a given disclosure. Such a balancing operation exists as to all privileges and ethical duties of nondisclosure. Thus even an attorney is relieved of his or her duty of nondisclosure and may even be under a duty to disclose information provided by a client in confidence where disclosure of that information is necessary to prevent the commission of a serious crime. See ABA, *Code of Professional Responsibility* DR 4-101 (c) (3) (1969); ABA Opinion 155 (1936); ABA Opinion 156 (1936); ABA Opinion 314 (1965); ABA, *Standards Relating to the Prosecution Function and the Defense Function*, Standard 3.7 (Approved Draft 1971).

The exceptions to nondisclosure provided for in Standard 3.9 A. would not appear to need substantial commentary. Standard 3.9 A. 1. is a necessary corollary of the provisions requiring disclosure to parents contained in the IJA-ABA, *Standards Relating to Rights of Minors* and IJA-ABA, *Standards Relating to Records and Information.* Standard 3.9 A. 2. provides that the privilege is one that can be waived pursuant to Standard 2.2 *supra* on waivers and consent. Standard 3.9 A. 3. applies to the rare case in which there was no desire on the student's part for confidentiality at the time the information or communication was received as it was made for the express purpose of being further communicated or being made public. Note, however, that this does contemplate the rare case and requires the purpose of disclosure to be *express.* The normal expectation of students when dealing with counselors is one of confidentiality. Finally, 3.9 A. 4. presents the most difficult issue of balancing, and the standard is premised on the view that the prevention of substantial property destruction or the physical or mental health of the student involved or of other persons in a given situation is more important than the gain to the counseling process that would be obtained by nondisclosure in such situations.

Standard 3.9 B. 1., as discussed above, expressly limits the protection of confidential communication to professional employees other than counselors, so as not to extend the privilege from testifying in a court or other legal proceeding where testimony is compelled by subpoena or other legal process. The difference in treatment between

counselors and other professional school employees in this regard is premised on a difference in their roles in relation to students and the greater need for nondisclosure in the counselor-student relationship. It should be noted that for purposes of these standards school counselors are those people who are expressly appointed to act specially as counselors for students but who do not have to have special certification and can also serve part-time as administrators or teachers.

Subject only to this difference as to compelled testimony by subpoena or other legal process, however, other school employees have the same duty not to disclose, and immunity from compelled disclosure as to information or communications received in confidence from students as do counselors. Typically, school disciplinary hearing bodies do not have the power to compel testimony by subpoena or other legal process and thus 3.9 B. would require teachers and administrators not to disclose in such hearings, as well as in less formal circumstances, confidential information or communications from students, subject to the other exceptions of 3.9 B.

This limited "privilege" is based on the premise that when students do disclose things in confidence to a teacher or administrator, that confidence should be respected, except in the limited circumstances contained in 3.9 B. See generally M. L. Ware, *Law of Guidance & Counseling* 12–17 (1964).

Standards 3.9 A. and 3.9 B. would also preclude school authorities of any other body from disciplining or otherwise penalizing any professional school employee, including counselors, for adhering to the obligations of nondisclosure imposed on them under these standards.

PART IV: STUDENT RIGHTS OF EXPRESSION AND PRIVACY

4.1 Subject to the limitations and elaborations set forth in the succeeding standards, a student's right of expression is not affected by the fact of student status or presence on school premises, except where:

A. particular facts and circumstances make it reasonably likely that the expression will cause substantial and material disruption of, or interference with, school activities, which disruption or interference cannot be prevented by reasonably available less restrictive means; or

B. where such expression unduly impinges upon the rights of others.

Commentary

This standard is taken directly from the landmark Supreme Court decision in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969), which upheld the first amendment rights of students in that case to wear black armbands during a moritorium day as a protest against the war in Vietnam. Although the theoretical basis of the *Tinker* decision is not completely clear, see S.R. Goldstein, *Law and Public Education* 304–308 (1974), the decision must be the starting point for the creation of more detailed standards concerning student expression in school. As of this writing, the Supreme Court has not decided any expression cases concerning students below the college level since the 1969 *Tinker* decision. Thus the detailed standards set forth below are necessarily attempts to apply and amplify the *Tinker* test in a variety of different circumstances.

In *Tinker* the Supreme Court emphatically stated that "First Amendment rights, applied in the 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." 393 U.S. 503, 506 (1969). In so holding the Court recognized the basic values embedded in our nation's commitment to freedom of expression as applied to education, at least at the higher levels: "a simple humility about the insignificance of one's learning coupled with a tolerance, and indeed a desire, for the novel and contrary . . . [and the fact that] tolerance of beliefs—even those we despise—does have a role to play in our continuing education and must not be stifled." Kaufman, "A Free Speech for the Class of '75," *N.Y. Times*, June 8, 1975, § 6 (Magazine), at 36, 42.

The right of school authorities to curtail student expression based on a prediction that the expression is reasonably likely to cause material and substantial disruption of, or interference with, school activities, requires that such predictions be based not on mere conjectures about adverse consequences to the educational structure, but on hard facts. See generally Goldstein, *Reflections on Developing Trends in the Law of Student Rights*, 118 *U. Pa. L. Rev.* 612, 617–619 (1970).

The need for this hard data was well stated by the District Court in *Breen v. Kahl*, 296 F. Supp. 702, 709 (W.D. Wis.), *aff'd*, 419 F.2d 1034 (7th Cir. 1969):

> With respect to the "distraction" factor the showing in this record consists of expressions of opinion by several educational administrators

> that an abnormal appearance of one student distracts others. There is no direct testimony that such distraction has occurred. There has been no offer of the results of any empirical studies on the subject by educators, psychologists, psychiatrists or other experts. Even in the opinions which have been received in evidence, there has been no amplification with respect to what portion of the students are susceptible to such distraction, how frequently susceptible students are likely to be distracted for this reason, how quickly or slowly high school students accommodate to individual differences in appearance, or how the distraction actually manifests itself in terms of the behavior of the distracted students in various learning situations. From the testimony of the educational administrators, it appears that the absence of such amplification is not accidental; it arises from the absence of factual data which might provide the amplification.

The standard also requires that the disruption or interference be "substantial."

> The public school system tolerates many and varied disruptions during the course of a school year. It is not unusual for students to be dismissed from school early to go to football games, or to be sent from class to go to the lavatory, the principal's office, or to take a note to another teacher. They are constantly moving and talking in the halls while switching classes, going to lunch, and so forth. Furthermore, students occasionally leave school early for vacations and return late for no more significant reason than their parent's convenience. All these disruptions and more are commonly accepted by the school system. Thus, it is not surprising that a court questions the validity of a presentation in which the school administration portrays the school as an island of pristine calm and precision in which long hair, or the absence of a child on a demonstration day, is seriously disruptive. The challenge to education, as it has been traditionally recognized, is not to eliminate all disruptions, but to use them creatively. Goldstein, 118 *U. Pa. L. Rev.*, *supra* at 616.

Nor may the "disruption" or "interference" required to restrict student expression under this standard be predicated on the assertion that the failure to punish student conduct that violates an invalid school rule will result in the principal or other school authority losing face, which would itself disrupt or impede appropriate school functions.

As the district court stated in *Breen*, *supra:*

> The point made about discipline seems to be that the disciplinary powers of the school authorities will be diminished if this Board regula-

> tion is not upheld and these expulsions and threatened expulsions are not vindicated by the court.
>
> Obviously the relationship of students, faculty, administrators, and school board will be affected in some degree by a judicial declaration of invalidity of a school board regulation. But if the regulation is fairly found to violate the Constitution, responsibility for these consequences rests with the agency which promulgated the regulation. So far as education of young people in obedience is concerned, it is important for them to appreciate the present vitality of our proud tradition that although we respect government in the exercise of its constitutional powers, we jealously guard our freedoms from its attempts to exercise unconstitutional powers. . . .
>
> There is a significant distinction between disruption which may be caused by the wearing of long hair, on the one hand, and disruption which may be caused by the very fact that a student has violated any Board rule, on the other. That disruption of the latter type may occur obviously affords no support for constitutionality of the regulation itself. *Breen v. Kahl*, 296 F. Supp. 702 at 708, n.8 (W.D. Wis. 1969).

See also *Griffin v. Tatum*, 300 F. Supp. 60, 63 (M.D. Ala. 1969) *modified*, 425 F.2d 201 (5th Cir. 1970): "In this case, it was the school officials who created what Judge Tuttle . . . accurately described as 'something of a tempest in a teapot' and it is they who must accept responsibility for the consequences."

Standard 4.1 also requires that student expression cannot be restricted based on a prediction of disruption or interference unless such disruption or interference cannot reasonably be avoided by less restrictive means. A basic issue to which this part of the standard is addressed is that of disruption or interference caused not directly by the expression, but by students reacting to the expression, *i.e.*, the "hostile audience" problem. This standard is in accordance with those first amendment principles that generally preclude government punishment of an expressor "because his neighbors have no self-control and cannot refrain from violence." Z. Chafee, *Free Speech in the United States* 151, 152 (1941). See also *Gregory v. Chicago*, 394 U.S. 111 (1969); *Terminiello v. Chicago*, 337 U.S. 1 (1949).

Since the Supreme Court in *Tinker* did not find that the school authorities had a valid basis to predict the requisite disruption or interference, it did not have to address the issue of such disruption or interference resulting from hostile reactors. The language of the opinion, however, seems to suggest that disruption or interference resulting from hostile reactors would be a proper basis for curtailing student expression, and the majority of lower federal courts have so interpreted *Tinker*. See *e.g.*, *Melton v. Young*, 465 F.2d 1332 (6th

Cir. 1972), *cert. denied*, 411 U.S. 951 (1973); *Guzik v. Dubus*, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Wise v. Savens*, 345 F. Supp. 90 (E.D. Pa. 1972), *aff'd*, 481 F.2d 1400 (3rd Cir. 1973). A few courts, however, have held that school authorities may not curtail expression based on disruption or interference caused by reaction of others to the expression "unless school officials have actively tried and failed to silence those persons actually engaged in disruptive conduct." *Crews v. Cloncs*, 432 F.2d 1259, 1265 (7th Cir. 1970). See also *Richards v. Thurston*, 304 F. Supp. 449, 454 (D. Mass.), *aff'd*, 424 F.2d 1281 (1st Cir. 1970).

The problem is one of striking a balance between two conflicting interests. A student expressing himself should not be unreasonably restricted because of hostile reactions from others that the student is not deliberately or otherwise unreasonably provoking. Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942). On the other hand, a school is limited by its resources in its ability to control hostile reactors.

Even more significantly, the type of atmosphere created by extensive policing exerted against hostile reactors may be worth the cost in the streets, but is highly undesirable in a school. Standard 4.1 requires school authorities to attempt to restrain hostile reactors rather than the expressor if this can reasonably be done in light of a school's resources and retention of the appropriate educational atmosphere. Since this is an exception to the basic principle of the right of student expression, school authorities should have the burden of showing their inability to restrain reactors under this test, if they seek to use this exception as a basis for restraining a student expressor who was not deliberately or otherwise unreasonably attempting to provoke hostile reactions.

Where a student does deliberately or otherwise unreasonably provoke others, such as by the use of "fighting words," the expression can, of course, be curtailed by school authorities. Compare *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

Another situation to which the portion of Standard 4.1 requiring the use of less restrictive means would apply is one in which schools attempted to prevent students from circulating materials on the grounds that the students who receive them would litter. Standard 4.1 would require the school authorities to make all reasonable efforts to prevent the student recipients from littering, which would seem to be capable of accomplishment through the provision of adequate waste baskets and rules against littering, before acting to prevent distribution of the materials. Compare *Lovell v. Griffin*, 303 U.S. 444 (1938).

The *Tinker* restriction as to expression that unduly impinges upon the rights of others has not been amplified by any substantial lower court decisions and is, indeed, only cryptically stated in *Tinker* itself. It would clearly support the curtailment of student expression that is over aggressively, or otherwise offensively, forced on other students, teachers, or administrators. The concept also serves as a basis for the further limitations on student rights of expression contained in Standards 4.2 and 4.3 *infra.*

4.2 Schools should not restrict student expression based on the content of the expression except as stated in Standard 4.1 and except for student expression that:

A. is obscene; libelous; or

B. is violative of another person's right of privacy by publicly exposing private details of such person's life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities; or

C. advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups.

Commentary

Standard 4.2 permits, but does not require, school restriction on certain kinds of student expression. Obscenity is traditionally not within the scope of the first amendment's protection of speech, see *e.g., Miller v. California,* 413 U.S. 913 (1973), and is invariably restricted in codes of student expression, both model and actual. See generally the city school district codes, the four statewide policy statutes, and the model codes contained in Harvard Center For Law & Education, *Code Governing Rights and Conduct of High School Students* (1971). Equally restricted in such school codes is expression that is libelous in nature. *Ibid.* See also American Civil Liberties Union, *Freedom in the Secondary Schools* 71–72 (ed. 1971).

Standard 4.2 B. which permits, but does not require, restriction of student expression that is violative of another person's right of privacy by publicly exposing details of such person's life, the exposure of which would be offensive and objectionable to a reasonable person of ordinary sensibilities is more unique. Possible analogues in codes of student conduct might be found in the New York City School District's *Code of Rights and Responsibilities of High School Students* (1970), that, *inter alia,* prohibits the distribution by students of literature that involves "the defamation of character." Har-

vard Center For Law & Education, *supra* at 96. See also the Seattle School District's *Statement of Rights and Responsibilities* that, *inter alia*, prohibits "personal attacks" by students, either verbally or in writing. *Id.*, at 67.

To the extent that the expression referred to by Standard 4.2 B.'s privacy provision and the New York and Seattle Codes involve "fighting words" that are likely to cause material and substantial disruption, Standard 4.1 allows their restriction. To the extent that the expression is libelous, 4.2 A. allows its restriction, as indeed do the libel provisions of the Seattle and New York Codes. Yet Standard 4.2 B. (and, perhaps, also the New York and Seattle Codes) recognizes that the "fighting words" and libel restrictions are not sufficient to include all situations in which a person unjustifiably injures another through expression. The "fighting words" doctrine is a part of the disruption doctrine and is predicated on a real threat of violence. Libel is closer to the privacy protection afforded by Standard 4.2 B. but to be libelous a statement must be false. The view that a person's right "to be let alone" is violated, *inter alia*, by publicly exposing private details of a person's life in a way that would be seen as offensive and objectionable to a reasonable person of ordinary sensibilities even if these details are true, has given rise to the development of the tort of the invasion of privacy.

Since its first clear enunciation in the famous law review article by Samuel D. Warren and Louis D. Brandeis, "The Right of Privacy," 4 *Harv. L. Rev.* 193 (1890), the tort of invasion of one's right of privacy has now been accepted in all but a very few jurisdictions. See W. L. Prosser, *Torts* 802–804 (4th ed. 1971). Standard 4.2 B. is taken directly from the definition of this aspect of the tort of invasion of privacy. See Prosser, *supra* at 809–815.

In recent years, the Supreme Court has held that the first amendment's protection of freedom of press imposes constitutional limits on the traditional tort of libel. See *New York Times Co. v. Sullivan*, 376 U.S. 255 (1964); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). These limitations apply primarily to public figures, see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), and are directed at freeing the press from inhibitions that might restrain public debate on public issues. See *Monitor Patriot Co. v. Ray*, 401 U.S. 265 (1971). The cases have not generally involved the application of the first amendment to the type of invasion of privacy contained in Standard 4.2 B. Thus, it is difficult to state with assurance the general constitutional status today of such a provision. Yet, even if the school context of 4.2 B. were to be disregarded, it would still seem that under current law, Standard 4.2 B. would be constitutional, at

least in many of its applications. First, many applications of Standard 4.2 B. will not involve expression that has the preferred constitutional status of "freedom of the press," on which the cases cited above are based. Secondly, many will not involve public figures. Finally, even where public figures are involved, Standard 4.2 B. protects not facts relevant to public debate about public figures, but rather facts concerning the *private details of a person's life, the exposure of which would be offensive and objectionable.* Compare *Monitor Patriot Co. v. Ray*, 401 U.S. 265 (1971).

Moreover, it is most important to recognize that Standard 4.2 B. is not one for general application as to expression, but rather to student expression in school. Schools are places where students, teachers, and administrators must work side by side on a daily basis. Standard 4.2 B. type expression, particularly where it is directed at another member of the school community, might be quite harmful to the type of relationships required for this daily contact. Compare *Pickering v. Board of Education*, 391 U.S. 563, 569-570 (1968); Van Alstyne, "The Constitutional Rights of Teachers," *Duke L.J.* 841, 850-854 (1970). Even more significantly, schools, to which Standard 4.2 B. is directed, exist for the purpose of educating juvenile students. The significance of this fact is related both to Standard 4.2 B. and to 4.2 C. The following discussion of Standard 4.2 C. thus also has application to 4.2 B.

Standard 4.2 C. permits school authorities, if they choose to do so, to prohibit student expression which advocates racial, ethnic or religious prejudice or discrimination, or which seriously disparages particular racial, religious, or ethnic groups. It is similar to a provision of the New York City Code of Rights and Responsibilities of Students which provides that nothing "advocating racial or religious prejudice shall be permitted to be distributed within the school." New York City School District's *Code of Rights and Responsibilities of High School Students* § 4(c), Harvard Center For Law & Education, *supra* at 96. See also the draft legal code produced by the Michigan Legal Services Assistance Program which in § 3(c) provides that "no publication whose main thrust, that is, taken in toto, is defamatory of a racial or ethnic minority shall be published or distributed." *Id.*, at 249, 251-252.

It has long been recognized that moral indoctrination and socialization are valid and important parts of the educative function of schools. See *e.g.*, J. Dewey, *Democracy and Education* (1961). It is clear that the promotion of student attitudes antithetical to racial or religious prejudice or discrimination is an important part of the function of American public education. See *e.g.*, *Brown v. Board of Education*, 374 U.S. 483 (1954) and subsequent cases.

Indeed, state authorities may be constitutionally prohibited from engaging in, or significantly supporting activities that promote racial or religious prejudice or discrimination. See *e.g.*, *Norwood v. Harrison*, 413 U.S. 455 (1973); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974).

On the other hand, it may be argued that none of the types of expression with which this standard is concerned should be a subject of school restriction and school restriction of student expression should be limited to the exceptions in Standard 4.1. Under this view the fact that the types of expression considered in this standard are not constitutionally protected and, therefore, may give rise to civil or criminal liability, is of no concern to the school. Rather, the school should allow the other societal mechanisms of the civil or criminal law to handle these problems. This view may be reenforced by the fact that the determination of whether or not certain expression meets the criteria of this standard may, at times, be quite difficult.

Moreover, an individual's first amendment rights of expression, subject to qualifications such as discussed above concerning obscenity, libel, and privacy, cannot generally be restricted because of the content of the message, no matter how abhorrent that content. In *Papish v. Board of Curators of Univ. of Mo.*, 410 U.S. 667 (1973), the Supreme Court applied this general principle in the university context in holding that it was unconstitutional for a state university to dismiss a graduate journalism student for distributing on campus an issue of a newspaper which the court described as follows:

> First, on the front cover the publishers had reproduced a political cartoon previously printed in another newspaper depicting policemen raping the Statue of Liberty and the Goddess of Justice. The caption under the cartoon read: "... With Liberty and Justice for All." Secondly, the issue contained an article entitled "M_____ f_____ Acquitted," which discussed the trial and acquittal on an assault charge of a New City youth who was a member of an organization known as "Up Against the Wall, M_____ f_____." *Id.* at 667.

In so holding, the court stated that "it is clear that the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency,'" and that "the First Amendment leaves no room for the operation of a dual standard in the academic community with respect to the content of speech." *Id.* at 670–71. The Court in *Papish* reached its result over the dissents of Chief Justice Burger, and Justices Blackmun and Rhenquist, who argued that even if the state could not prohibit generally the dissemination of this

newspaper, it could prevent its distribution on a college campus. Justice Rhenquist argued:

> It simply does not follow under any of our decisions or from the language of the First Amendment itself that because petitioner could not be criminally prosecuted by the Missouri state courts for the conduct in question, that she may not therefore be expelled from the University of Missouri for the same conduct. A state university is an establishment for the purpose of educating the State's young people, supported by the tax revenues of the State's citizens. The notion that the officials lawfully charged with the governance of the university have so little control over the environment for which they are responsible that they may not prevent the public distribution of a newspaper on campus which contained the language described in the Court's opinion is quite unacceptable to me and I would suspect would have been equally unacceptable to the Framers of the First Amendment. This is indeed a case where the observation of a unanimous Court in *Chaplinsky* that "such utterances are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" applies with compelling force. *Id.* at 673.

Chief Justice Burger added:

> In theory, at least, a university is not merely an arena for the discussion of ideas by students and faculty; it is also an institution where individuals learn to express themselves in acceptable, civil terms. We provide that environment to the end that students may learn the self-restraint necessary to the functioning of a civilized society and understand the need for those external restraints to which we must all submit if group existence is to be tolerable. *Id.* at 672.

If the *Papish* rule applied to schools below the college level, it might be some authority against the constitutionality of Standard 4.2 C. although, as discussed below, this standard might still be upheld since it is more narrowly drawn and directed at a more specific and very substantial evil, than was the case in *Papish*. See also *Beauharnais v. Illinois*, 343 U.S. 250 (1952). However, it would seem that the *Papish* rule should not be applied below the college level.

The Supreme Court has recognized that states may restrict the sale of pornographic material to minors to a greater extent than they might do in regard to sales to adults, *Ginsberg v. New York*, 390 U.S. 629 (1967); see also *Prince v. Massachusetts*, 321 U.S. 158 (1944). The impressionable nature of public school students has also been recognized by the Court in cases forbidding prayers and Bible reading

in public schools. See *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962). See also *McCollum v. Board of Educ.*, 333 U.S. 203, 212, 227 (1948) (Frankfurter, J. concurring).

Indeed, in those cases that invalidated governmental aid to sectarian elementary and secondary schools, but upheld governmental aid to sectarian colleges, a distinction was drawn between the two levels of students based upon their relative states of impressionability and upon the normal circumstance and societal aim of moral indoctrination of students in primary and secondary schools which is not nearly as strong on the college level. Compare *Lemon v. Kurtzman*, 403 U.S. 602 (1971), with *Tilton v. Richardson*, 403 U.S. 672 (1971).

As Justice Stewart stated in his concurrence in *Ginsberg*, and repeated in his concurrence in *Tinker:* "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 of First Amendment guarantees." *Ginsberg v. New York*, 390 U.S. 629, 649-650 (1967); *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503, 515 (1969). See also *Eisner v. Stamford Board of Educ.*, 440 F.2d 803, 809 n. 6 (2d Cir. 1971).

Indeed a student in an elementary or secondary school is both a minor and thus "like someone in a captive audience" and literally is someone in a captive audience. The captive audience nature of such students in the second sense is much different from the status of their older siblings in college. First, compulsory school laws legally compel most students to attend an elementary or secondary school. Secondly, financial limitations may limit the choice of such schools to public schools, and, thirdly, rules based on residence or other factors seriously limit a student's choice of schools within the public school system. Compulsion to attend some high school even distinguishes those schools from colleges as to students who are beyond the compulsory school age due to the greater felt practical need for a high school education than for a college education. See generally *Brown v. Board of Education*, 374 U.S. 483 (1954). Once a student, even one over the compulsory school age, feels this need to attend some high school his or her range of choices becomes as narrowly limited as that of younger siblings below the compulsory school age, which range is much narrower than that available at the college level. Furthermore, a student in a public school is more easily confronted with the expression of others in a typically closed, school building environment than a student would be on a large university campus, as in the *Papish* case.

The Supreme Court has recognized that the privacy interest, even of adults, acts as a countervailing interest to those of an expressor and, under some circumstances, therefore, justifies limiting expression aimed at a captive audience. See *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974); *Rowan v. Post Office Dept.*, 397 U.S. 728 (1970); *Kovacs v. Cooper*, 336 U.S. 77 (1949). See also *Public Utilities Comm'r v. Pollak*, 343 U.S. 451, 467 (1952) (Douglas, J. dissenting). But see *Ernoznik v. City of Jacksonville*, 422 U.S. 205 (1975); *Cohen v. California*, 403 U.S. 15 (1971).

For these reasons, Standard 4.2 C. is believed to be constitutional and, as a matter of policy, should be available to a school system that chooses to use it. It should be noted that the standard is limited to specifically offensive material that advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups, and thus it is narrowly drawn to alleviate some of the first amendment concerns that still exist in law or policy. *Cf. Beauharnais v. Illinois*, 343 U.S. 250 (1952). In order to be restricted the material must *advocate* (not just be conducive to, or otherwise tangentially promote) racial or religious or ethnic prejudice or *seriously disparage particular* racial, religious, or ethnic groups. It must also be emphasized that this standard permits, but does not require, school restriction of the types of expression covered by the standard. In implementing this standard, it might well be appropriate for the authorized school authorities to use the discretion afforded by this standard, according to their views as to the ages and maturity levels of their students. Thus, for example, this standard might be implemented by greater restriction of student expression at the elementary school level than at the high school level.

Finally, it should be noted that Standard 4.2 C. is not based on the argument that student expression in school to an audience of fellow students that the state has "captured" for them constitutes "state action" and is, therefore, prohibited by the fourteenth amendment. Such a theory would constitutionally require the state to prohibit such speech. Under such an approach to the conflicting demands of the first and fourteenth amendments, respectively, an attempt is made to find that point at which the constitution stops requiring the state to allow the expression and starts precluding the state from allowing it. See *e.g.*, *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *National Socialist People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972); *Smith v. St. Tammany Parish School Board*, 316 F. Supp. 1174 (E.D. La. 1970); *aff'd*, 448 F.2d 414 (5th Cir. 1971); *Panarella*

v. Birenbaum, 32 N.Y.2d 108, 296 N.E.2d 238 (1973), 343 N.Y.S. 2d 333. *Cf. Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974).

Such an approach is too rigid, and it is not, therefore, surprising that the courts have produced no clear constitutional doctrine. At least in terms of student expression that does not have the support of unique school authority, economic resources, or access to fellow students, see Standard 4.3 *supra*, it would seem that the Constitution neither requires nor forbids schools to utilize Standard 4.2 C.

4.3 Where one or more students are provided by the school with expression privileges not equally shared by all students, with resources not provided to all students, or with special access to fellow students, such expression is subject to the same rights and restrictions as other types of student expression except that schools:

A. should take all necessary action to insure that the student expression does not advocate racial, religious, or ethnic prejudice or discrimination, or seriously disparage particular racial, religious, or ethnic groups; and

B. should take all necessary action to insure that the student privilege, resource, or access do not become vehicles for the consistent expression of only one point of view to the exclusion of others; and

C. if not able to insure the prohibition of subsection A. hereof or the equal access of subsection B. consistent with the continued existence of the student expression involved, may curtail or prohibit the continued existence of such student expression.

Commentary

Primary examples of the type of "sponsored" student activities to which Standard 4.3 is addressed are such things as a student council or a school-sponsored newspaper. It might also, however, apply to such things as a school drama society, or an athletic team, or a group in charge of inviting guest speakers to the school. The basic principle of Standard 4.3 is that such student expression has the same rights and limitations in terms of student freedom from school administration restrictions as unsponsored student expression, except as provided in subsections A., B., and C. Most of the cases in this area have involved college student newspapers. The basic approach of Standard 4.3 is consistent with the prevailing court view that school-sponsored student newspapers should be viewed as independent *student* publications with school administration restraints on their content viewed

as outside governmental censorship, rather than as school publications with school authorities exercising control of the newspaper as its publisher. See *e.g.*, *Panarella v. Birenbaum*, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973); *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973).

There may be good reasons to question the correctness of the view that the Constitution requires school newspapers to be viewed as student and not school publications. A constitutional theory that would preclude a school from determining that the newspaper it is sponsoring is an institutional product under faculty administrative control with the students having no greater rights than do other types of reporters seems quite difficult to justify. See S.R. Goldstein, *Law and Public Education* 411-412 (1974). This appears even more true in relation to high school newspapers where the student editors are not generally selected by their fellow students and where the funding comes from general school funds, than is true in some college situations where the student editors are selected by their fellow students and where special student fees may support the newspaper. *Ibid.* Standard 4.3 accepts this view of student newspapers, however, as sound policy, although not necessarily required constitutional law. *Cf. Zucker v. Panetz*, 299 F. Supp. 102 (S.D.N.Y. 1969). The sponsored nature of this student expression, however, does create problems that are addressed in subsections A., B., and C. Clearly, the problem of school sponsorship of such expression substantially increases the problem of student expression that advocates racial, religious, or ethnic prejudice or discrimination or seriously disparages particular racial, religious, or ethnic groups, as described in the commentary on Standard 4.2, *supra.* It is for this reason that, in contrast with Standard 4.2 C., which permits but does not require schools to prohibit this type of expression, Standard 4.3 A. does require such a prohibition as to school-sponsored expression.

Indeed, there is authority that a school-sponsored high school newspaper does constitute state action, *Zucker v. Panitz*, *supra*, at 105, n. 4. Such a position might then constitutionally require the school to prohibit such sponsored student expression. *Cf. Smith v. St. Tammany Parish School Bd.*, 316 F. Supp. 1174 (E.D. La. 1970) *aff'd*, 448 F.2d 414 (5th Cir. 1971); *Gilmore v. City of Montgomery, Ala.*, 417 U.S. 556 (1974); *Norwood v. Harrison*, 413 U.S. 455 (1973). Yet, as discussed in the commentary on Standard 4.2, a strict dichotomy between an equal protection compulsion on the school to restrict certain types of student expression and a first amendment compulsion on the school to allow the expression, with an attempt

to find that single point where one becomes the other is too rigid an approach. Thus, it is not surprising that the law in this area is unclear. Compare all the cases cited *supra* on this point in the commentary on Standard 4.2 as well as *Williams v. Eaton*, 468 F.2d 1079 (10th Cir. 1972). Thus, Standard 4.3 A. is not premised on a constitutional obligation of schools; rather it is based on views of sound policy in this area. Compare *Williams v. Eaton*, *supra*.

Standard 4.3 B. presents a similar type of analysis. Where special sponsorship is not provided to student expression, concepts of "equal access" or "equal time" are irrelevant. These concepts become significant, however, in the circumstances covered by this standard. Here again it can be argued that such a concept, *i.e.*, "equal access," is constitutionally compelled. In *Zucker v. Panitz*, 299 F. Supp. 102 (D.N.Y. 1969), the court held that school authorities may not prevent a high school newspaper from publishing a student sponsored paid advertisement opposing the war in Vietnam where the court found that the newspaper had traditionally been open to the free expression of ideas in the news and editorial columns as well as in letters to the editor, although it had not previously run paid advertisements. The student editors in *Zucker* wanted to print the advertisement but had been overruled by the school administration. Thus, the case could be viewed as the court upholding the right of a student editor against school administration "censorship." The language of the opinion, however, suggests an alternative analysis. Under this alternative, the real issue was equal access to a state-run newspaper and thus neither the student editors nor school authorities would have been free to refuse the advertisement. But see *Joyner v. Whiting*, 477 F.2d 456 (4th Cir. 1973); *Panarella v. Birenbaum*, 32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973).

Zucker is, of course, only a district court opinion. The analysis of the opinion suggested above has also been appreciably weakened by recent Supreme Court decisions. *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974), and *Columbia Broadcasting v. Democratic National Comm.*, 412 U.S. 94 (1973), both of which dealt with political advertisement, cast serious doubt on the proposition that "equal access" is constitutionally compelled in any public forum. See also *Veed v. Schwartzhopf*, 353 F. Supp. 149 (D. Neb. 1973), *aff'd*, 478 F.2d 1407 (8th Cir. 1973), *cert. denied*, 414 U.S. 1135 (1974), in which the court dismissed a suit by a student at the University of Nebraska to obtain a refund for the portion of his student fee that was used for activities, including the college newspaper, that supported political or religious philosophy he found repugnant.

In addition, in a system in which it is accepted as legitimate for a

school to attempt to inculcate values in its students, it is doubtful that a constitutional norm of "neutrality" concerning school-sponsored student expression should be imposed on school authorities. But see *West Virginia State Board of Educ. v. Barnett*, 319 U.S. 624 (1943). Because of the above considerations, Standard 4.3 C. is not based on the view that it is constitutionally compelled, but rather, as with Standard 4.3 B., that it is sound policy. Compare *Red Lion Broadcaster Co., Inc. v. FCC*, 395 U.S. 367 (1969) with *Miami Herald Publishing Co. V. Tornillo*, 418 U.S. 241 (1974). For further discussion of the issues involved in this standard, see generally S.R. Goldstein, *Law and Public Education*, 355–414 (1974).

4.4 Schools should provide reasonable bulletin board space for the posting of student notices or comments. Where such space is provided, schools may not regulate access based on the content of material to be posted, except in accordance with these standards. School authorities may also enforce reasonable regulations regarding the size and duration of posted student notices or comments.

Commentary

It is generally accepted that schools are not constitutionally compelled to provide bulletin board space for the posting of student notices or comments, and nothing in *Tinker* or any other case would indicate otherwise. This standard, however, recommends such provision of space by schools as a matter of policy. Where such space is provided, school authorities are required by Standard 4.4 to adhere to the general rule of Standard 4.1 as to restrictions based on content. Standard 4.3 would apply if a student group controlled access to the bulletin board. The noncontent restrictions, which allow for reasonable rules based on the fact that bulletin board facilities may be limited, are similar to the time, place, and manner restrictions of Standard 4.5.

4.5 School authorities may adopt and enforce reasonable regulations as to the time, place, and manner of distribution or circulation of printed matter on school grounds and may require prior authorization for the distribution or circulation of substantial quantities of printed matter in school and/or for the posting in school of printed matter provided that:

A. school authorities should not deny such authorization except in writing and except on grounds set forth in these standards; and

B. school authorities have set forth clearly in writing standards for such prior authorization which specify to whom and how printed matter may be distributed, a definite, brief period of time within which a review of submitted printed matter will be completed, the criteria for denial of such authorization, and the available appeal procedures.

Commentary

The preceding standards have considered the kinds of expression that may or should be regulated by school authorities. Standard 4.5 sets out the extent to which school authorities may regulate the time, place, and manner of distribution or circulation of printed matter on school grounds, and provides for the review of printed matter before it is distributed or circulated in substantial quantities or posted in the school.

The basic authorization for time, place, and manner rules is an amplification of Standard 4.1. It would permit, for example, a rule forbidding the distribution or circulation of printed matter during class time. Reasonable time, place, and manner rules have been uniformly upheld by the courts. See *e.g.*, *Papish v. Board of Curators of University of Mo.*, 410 U.S. 667 (1973), and are invariably permitted to school authorities under student rights codes. See Harvard Center for Law & Education, "Codes Governing Student Rights and Conduct of High School Students" (1971).

The review of materials before circulation or posting is more controversial. Although the constitutionality of prior approval rules such as contained in Standard 4.5 has not been resolved definitively by litigation, the provisions of Standard 4.5 have more support than opposition. See *Shanley v. Northeast Ind. School Dist., Bexar County, Texas*, 462 F.2d 960 (5th Cir. 1972); *Eisner v. Stamford Board of Educ.*, 440 F.2d 803 (2d Cir. 1971); *contra*, *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972). See also *Friedman v. Maryland*, 380 U.S. 51 (1964).

Standard 4.5 allows schools to require the submission of written material to school authorities before circulation or posting, for the purpose of determining whether the material may be or should be prohibited in school. Standard 4.5, consistent with strong judicial authority, insists, however, that strict procedural safeguards be incorporated into prior approval rules in order to minimize any possible infringement of first amendment rights.

In order to come within a prior approval or authorization screening procedure, the distribution or circulation must be of a substantial

quantity of material. Thus, it is clear that one student passing a note, newspaper, or magazine to another student does not come within this standard. See *Eisner v. Stamford Board of Educ.*, *supra*, at 811. The requirement that the procedures be spelled out clearly in writing prior to the employing of a screening procedure and the requirement that the screening be done within a brief period of time are essential safeguards for freedom of student expression. Any unnecessary delay in allowing protected expression may dilute the meaningfulness of dissent or protest, and the limiting of student expression rights by the delay involved in a prior screening provision can only be justified insofar as that delay is necessary.

The standard does not attempt to quantify the period of time allowed for screening in terms of an exact number of days, as this is best left to the decision of people who are familiar with the local situation involved. But, the principle of a definite, brief period of time is clear as the cases above indicate. Ordinarily, a period of no longer than two days would seem reasonable; however, what is "reasonable" in a given context will vary with the circumstances involved.

Equally clear is the need for a written statement of the criteria for disallowing distribution, circulation, or posting as a means of protecting against administrative arbitrariness in the process. If appeal procedures are available within the school system, these should also be set forth in advance. Finally, although not explicitly recommended by Standard 4.5, as this standard is addressed to internal school operations, the availability of state judicial review without undue delay is an important, further protection of first amendment rights. See *Freedman v. Maryland*, *supra*.

4.6 Student conduct that violates otherwise valid regulations that have not been adopted or invoked for the purpose of inhibiting expression and that are designed to achieve substantial interests that cannot reasonably be achieved by alternatives that limit expression substantially less than other alternatives may be subjected to school sanctions even though a student has committed such violation for purposes of expression or incidental to expression.

Commentary

Standard 4.6 is a reflection of the basic constitutional doctrine that:

> A government regulation is sufficiently justified if it is within the con-

stitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is not greater than is essential to the furtherance of that interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

It must be emphasized, however, that Standard 4.6 requires that the regulation in question must not have been promulgated or invoked in the case at hand in order to stifle expression. Further it must be designed to achieve substantial interests that cannot reasonably be achieved by less restrictive means. Compare Standard 4.1 and the commentary thereto. For the application of such a standard as a basis for school sanctions against a concerted student boycott of classes see *United States v. O'Brien*, 391 U.S. 367, 377 (1968).

PART V: PROCEDURES FOR STUDENT RIGHTS AND STUDENT DISCIPLINE

On January 22, 1975, in a 5 to 4 decision, the Supreme Court of the United States held that a student suspended from public school for up to ten days is entitled to procedural due process. *Goss v. Lopez*, 419 U.S. 565 (1975). The court's opinion resulted in the affirmance of a three-judge federal court decision requiring that students subjected to ten-day suspensions receive notice of the charges and evidence against them and an opportunity to answer such charges. Although the standards in this Part are not limited by the scope of the *Lopez* decision or the developing constitutional law in this area generally, they do rest on some of the assumptions that have influenced the application of the Fourteenth Amendment to student discipline cases. See generally Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 *U. Pa. L. Rev.* 545 (1971); Friendly, *Some Kind of Hearing*, 123 *U. Pa. L. Rev.* 1267 (1975); Harvard Center for Law & Education, *The Constitutional Rights of Students: Analysis and Litigation Materials for the Student's Lawyer* 217–98 (March 1976).

One basic assumption is that the student has various vital interests implicated in student discipline matters of sufficient magnitude to trigger a requirement that procedural safeguards be available before disciplinary sanctions are imposed. See *Goss v. Lopez, supra; cf. Board of Regents v. Roth*, 408 U.S. 564 (1972); *Perry v. Sindermann*, 408 U.S. 593 (1972).

A second basic assumption is that the determination of which particular safeguards are to be available is subject to variable influences such as the possible benefit of providing such procedures, the interest of the student in avoiding discipline, and the burden to the school that would result from requiring elaborate procedures. See *e.g.*, *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 155 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Press v. Pasadena Independent School District*, 326 F. Supp. 550, 562 (S.D. Tex. 1971); *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974). See generally Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 *U. Pa. L. Rev.* 545, (1971); Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1286, 1288, 1303 (1975).

The importance of education in the United States is indisputable. See *e.g.*, *Epperson v. Arkansas*, 393 U.S. 97 (1968); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Meyer v. Nebraska*, 262 U.S. 390 (1923). There is evidence of a strong correlation between years of schooling and income. Schools in America have the paramount task of preparing students to be informed participants in public affairs and to enable them to protect their self-interest by competing on fair terms for positions in the job market or for college admission. Similarly, because of the dominant role of schools in the United States, a child's sense of "identity" with his society may be impaired, possibly imperiling his mental and emotional growth, if he is estranged from the schools and the students attending them. See E. Erikson, *Childhood and Society* (2d ed. 1963).

Apart from prison and the military, nothing in American society compares to public schools in establishing state-imposed control over a person's life. This enforced attendance is the starting point for extensive regulation of students' school-related life. Although compulsory attendance laws have been uniformly held to be constitutional because of the state's paramount interest in an educated citizenry, see *e.g.*, *State v. Hoyt*, 84 N.H. 38, 146 A. 170 (1929); *Stephens v. Bongart*, 15 N.J. Misc. 80, 189 A. 131 (1937), the fact that school discipline is an infringement of liberty built upon an infringement of liberty requires full procedural protection to reduce the possibility of repressive regulation.

Humiliation, embarrassment, and loss of status are the inevitable and probably intentional results of disciplinary punishment. See *Goss v. Lopez*, 419 U.S. 565, 574 (1975); *Warren v. National Ass'n of Secondary School Principals*, 375 F. Supp. 1043, 1048 (N.D. Tex.

1974). With respect to in-school restraints, disciplinary sanctions are especially galling because they grow out of the compelled attendance context. Much "misconduct" would not occur but for the physically confining conditions or the educational pressures forced upon all students without regard to their individual capacity or temperament. Compulsory attendance also gives exclusion from school a special sting. Sacrificing the benefits of school voluntarily is quite different from being forced to stay away, especially when others continue to attend. The student is told through expulsion that he is unfit to be where society has determined all acceptable citizens of his age should be. Furthermore, the stigma and humiliation attaching to the expulsion may be "lifelong." See *Sweet v. Child*, 507 F.2d 675, 681-82 (5th Cir. 1975) (Brown, C.J., dissenting); *Vought v. Van Buren Pub. Schools*, 306 F. Supp. 1388, 1392-93 (E.D. Mich. 1969).

The school's most obvious interest in limiting the procedural complexity of disciplinary proceedings lies in maintaining the integrity of the educational process: the conditions necessary for educating must be preserved. Students must be brought to a single location in large numbers; teachers must be available; books and other equipment must be provided; appropriate physical conditions such as warmth, light, chairs, rest rooms, and quiet must exist to facilitate reading, writing, lecturing, discussing, and experimenting. Providing procedural protection in school disciplinary proceedings may affect these conditions by drawing off resources or the time of education personnel. See *Banks v. Board of Public Instruction of Dade County*, 314 F. Supp. 285, 291 (S.D. Fla. 1970), *aff'd mem.*, 450 F.2d 1103 (5th Cir. 1971), *vacated and remanded* (so a fresh decree might be entered from which a timely appeal to Fifth Circuit could be taken) 401 U.S. 988 (1971); *Rumler v. Board of School Trustees for Lexington County Dist. No. 1*, 327 F. Supp. 729, 744 (D.S.C. 1971). Additionally, the school has an interest in protecting the welfare of the other students who, no less than the accused, are required by law to attend school. See *Cooley v. Board of School Commissioners of Mobile County*, 341 F. Supp. 1375, 1378-79 (S.D. Ala. 1972); *cf. Flaherty v. Conners*, 319 F. Supp. 1284, 1288 (D. Mass. 1970); *Paine v. Board of Regents of the University of Texas System*, 355 F. Supp. 199, 204-05 (W.D. Tex. 1972). In like fashion the school must protect teachers to enable them to carry out the school's educational functions. See *Marzette v. McPhee*, 294 F. Supp. 562, 569 (W.D. Wis. 1968); *Cooley v. Board of School Commissioners of Mobile County*, 341 F. Supp. 1375, 1378, 1379 (S.D. Ala. 1972). As a lesser concern, the school has an interest in preventing damage to or loss of the physical property of the school and of the members of the school

community. See *Marzette v. McPhee*, 294 F. Supp. 562, 569 (W.D. Wis. 1968); *Stricklin v. Regents of University of Wisconsin*, 297 F. Supp. 416, 420 (W.D. Wis. 1969), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970). The cost of supporting discipline proceedings cannot be dismissed lightly by contrasting its "economic" character to the "human" dimension represented by the threat to the student's liberty, for the economic costs of fairer disciplinary procedures necessarily result in a shifting of scarce resources from the purposes to which they otherwise would be put.

Akin to cost and efficiency is the possible effect upon the academic atmosphere. Disciplinary proceedings could intrude upon the rhythms of the life of the school in ways more elusive (but perhaps more fundamental) than taking up the time of teachers and administrators or the money allocated for books. If disciplinary proceedings are frequent or lengthy, and if they are conducted publicly or sensationally, students and their teachers are likely to be distracted from other pursuits and thoughts. School interests are also affected in a different way if the procedural system utilized for discipline proceedings consistently fails to prevent misconduct either because the procedural protection exonerates those who have in fact engaged in misconduct or because the procedures are so burdensome that condoning misconduct may seem more convenient to those involved than invoking the procedures.

Even a strong adverse effect on the school's interests would not justify disciplining a student whose punishment is questionable by reason of either the lack of minimal opportunity to establish innocence or the inappropriateness of the particular sanction. Furthermore, as in society at large, legitimate fear for the interests of the majority does not justify disregard of the rights of the minority. Moreover, the school's interests are not always significantly jeopardized by making procedural safeguards available to students. For example, the school's interest is only minimally affected when only minimum procedures are required by considerations of fairness. Or, even when elaborate procedures are required, the effect on the school is minimal if the misconduct leading to disciplinary procedures occurs only infrequently. Similarly, a general requirement of procedural safeguards is of little consequence to the school if practical considerations (such as the futility of using procedures when misconduct is clear and sanctions fair) are likely to induce students not to use available procedures. Finally, the school may receive a positive benefit from the availability of fair procedures. This benefit may result because procedural due process for school discipline would tend to eliminate the unsettling effect likely to accompany

discipline that does not appear to give students a fair opportunity to defend themselves against the authorities and leaves all students with a feeling that they have been dealt with unfairly.

In one essential respect, the school's and the students' interests converge because fair school discipline procedures should help to project an image of a fair society to school children. In contrast to the many negative faces society shows its younger members, fair procedures in disciplinary proceedings represent a virtue with immediate impact on students in trouble and on those who merely watch. To insist upon fair treatment before passing judgment against a student accused of wrongdoing is to demonstrate that society has high principles and the conviction to honor them. Addressing himself to procedural due process in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 170 (1951) (concurring opinion), Mr. Justice Frankfurter said,

> The heart of the matter is that democracy implies respect for the elementary rights of men, however suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by a secret, one-sided determination of facts decisive of rights.

Public school students will tend to learn that "democracy implies respect for the elementary rights of men," or that it does not, depending on whether their "government"—the school—treats them and their classmates fairly or unfairly.

5.1 Any student who is threatened by or subjected to disciplinary sanctions by reason of the student's school-related misconduct is entitled to procedural protection as specified in these standards.

Commentary

This standard merely introduces the general principle that there is a relationship between disciplinary sanctions and procedural safeguards. The availability of procedural protection does not turn on the fact or inevitability of disciplinary sanctions, but on the possibility that such sanctions may be imposed against the student. The nature and timing of required procedures is elaborated throughout this chapter. "Disciplinary sanctions" is a term defined in Part X.

5.2 The extent and nature of procedures available to a student should be commensurate with the seriousness of the disciplinary sanction that might be imposed by reason of the student's misconduct.

Commentary

This standard proposes a sliding-scale approach under which the most complete and extensive procedural safeguards are required for the most serious sanctions threatened and, as the potential consequences of misconduct decline in seriousness, the procedures available as a matter of right decline correspondingly. See *Ingraham v. Wright*, 498 F.2d 248, 267-68 (5th Cir. 1974); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Murray v. West Baton Rouge Parish School Board*, 472 F.2d 438, 443 (5th Cir. 1973); *Pervis v. LaMarque Indep. School Dist.*, 466 F.2d 1054, 1057 (5th Cir. 1972); *Linwood v. Board of Education, School Dist. No. 150, Ill.*, 463 F.2d 763, 768-69 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Vail v. Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 602-04 (D.N.H. 1973); *Gardenhire v. Chalmers*, 326 F. Supp. 1200, 1203 (D. Kan. 1971); Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 *U. Pa. L. Rev.* 545, 551-52, 557-85 (1971); Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1277-79 (1975).

Although this general standard does not provide a finely tuned test, it does provide meaningful guidance by establishing a general principle of proportionality. The element of uncertainty incorporated in the standard is a characteristic of procedural due process in various contexts. According to language of the Supreme Court in *Hanna v. Larche*, 363 U.S. 420, 442 (1960),

> "[d]ue process" is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts. . . . Whether the Constitution requires that a particular right obtains in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account.

The lack of greater precision and predictability is inescapable (in general and in the present context) because of the number of relevant variables and the impossibility of spelling out all of the possible forms and degrees of misconduct and resulting sanctions that various schools and school districts might adopt. But the disadvantage of uncertainty in this general standard is greatly mitigated by the specific provisions of the standards that follow. Furthermore, this uncertainty can be further reduced as a result of the adoption by various schools and school districts of more specific provisions calibrating

conduct, sanctions, and procedures, as they are encouraged and to some extent required to do by other standards in this volume. In any event, despite the inevitable lack of precision, it is essential that the basic principle of proportionality of sanction and procedure be established.

It should be noted that this standard specifies proportionality in terms of both nature and extent. That means, for example, that the seriousness of the sanction will influence not only whether a student has a right to counsel but also the type of participation by counsel that must be permitted. *Cf. Madera v. Board of Education of City of New York*, 386 F.2d 778, 784-89 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968). It should be noted also that proportionality is expressed in these standards in terms of severity of sanction rather than severity of misconduct. It is provided elsewhere that misconduct and sanctions must be commensurate. See Part VI. But it is the potential magnitude of the consequences to the student as a result of the misconduct at issue in the proceeding that should determine procedures available in that proceeding. *Cf. Dunn v. Tyler Indep. School Dist.*, 460 F.2d 137, 144-45 (5th Cir. 1972); *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Vail v. Board of Education of Portsmouth School Dist.*, 354 F. Supp. 592, 603 (D.N.H. 1973); *Gonyaw v. Gray*, 361 F. Supp. 366, 370-71 (D. Vt. 1973); *Hawkins v. Coleman*, 376 F. Supp. 1330, 1332 (N.D. Tex. 1974); *Gardenhire v. Chalmers*, 326 F. Supp. 1200, 1203 (D. Kan. 1971).

5.3 A student who is threatened with a serious disciplinary sanction is entitled to receive the following procedural safeguards:

A. prior to the hearing described in subsection B.,

1. notice in writing that

a. is received long enough before the hearing to enable the student to prepare a defense,

b. factually describes the misconduct charged,

c. identifies the procedural safeguards to which the student is entitled under these standards, and

d. identifies the rule making such misconduct subject to sanction;

2. receipt of a summary of all testimonial evidence to be used against him or her;

3. a right to examine all documents to be used against him or her;

B. a hearing that is private (unless the student expressly requests a public hearing), that is presided over by an impartial hearing officer or tribunal, and at which the student is entitled,

1. to be represented by counsel,
2. to present testimonial or other evidence,
3. to hear the evidence against him or her (or, if presented in the form of affidavits, to see the affidavits),
4. to cross-examine witnesses who testify against him or her (and to challenge adverse affidavits),
5. to make oral and written argument relating to any aspect of the student's position and the case against him or her, and
6. to obtain, at the completion of the proceeding, a record of the hearing proceedings;

C. a decision,
1. concerning the questions whether
a. the student in fact engaged in the conduct charged,
b. a valid rule was violated by that conduct, and
c. the sanction to be imposed is appropriate for that conduct, and
2. that is
a. made by an impartial decision maker or decision making tribunal,
b. based solely on the facts and arguments presented at the hearing, and
c. if against the student, supported by clear and convincing evidence that the student engaged in the misconduct charged and explained in a written opinion; and

D. a right to judicial review within a reasonable time by a court of general jurisdiction to challenge the hearing decision on the ground that the decision is not supported by substantial evidence, is arbitrary and unreasonable, or is contrary to any constitutional or other legal provision.

Commentary

The specific procedural safeguards provided under this standard (and Standards 5.3.1, A., B., and C.) are required only if a student is threatened with a "serious disciplinary sanction" as a result of the student's alleged misconduct. The term, "serious disciplinary sanction," is defined in Standard 9.4. Of course, sanctions of varying degrees of severity are "serious" for some purposes, and the definition brings together sanctions having a range of severity and—as applied through Standard 5.3—requires similar treatment for these different sanctions. Drawing the line between serious and other sanctions is to some extent an arbitrary decision, and it is obvious that

"serious disciplinary sanction" could be defined to include fewer or more sanctions than these standards do. The alternatives to drawing that line somewhere, however, do not seem acceptable. One alternative possibility would be to include a number of levels of seriousness with corresponding procedures specified for each. But that approach would result in a multiplication of detailed provisions in the standards and, in addition, a multiplication of line drawing as well. At the other extreme, the standards might have stopped with the general principle of proportionality stated in 5.2, but that would leave more uncertainty than seems desirable or necessary.

While the majority of courts deciding student discipline cases regard adequate notice as one of the minimal procedural safeguards afforded by the due process clause, only a few have explicitly required written notice. See *Speake v. Grantham*, 317 F. Supp. 1253, 1257–58 (S.D. Miss. 1970); *Marzette v. McPhee*, 294 F. Supp. 562, 567 (W.D. Wis. 1968); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602, 608 (D. Minn. 1972). Most courts, while apparently assuming that notice will be written in the usual case, appear to focus on the specificity and adequacy of the notice rather than its form. See *Williams v. Dade County School Board*, 441 F.2d 299, 300–301 (5th Cir. 1971); *Tate v. Board of Education of Jonesboro, Ark., Spec. Sch. Dist.*, 453 F.2d 975, 979 (8th Cir. 1972); *Sill v. Pennsylvania State University*, 462 F.2d 463, 469 (3d Cir. 1972); *Linwood v. Board Ed., City of Peoria, School Dist. No. 150, Ill.*, 463 F.2d 763, 769–70 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Keller v. Fochs*, 385 F. Supp. 262, 266 (E.D. Wis. 1974); *Marin v. University of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974). In a few cases, courts have been willing to relieve school authorities of the responsibility of providing notice to students before imposing disciplinary sanctions, usually on the grounds that the student had actual notice. See *Farrell v. Joel*, 437 F.2d 160, 163 (2d Cir. 1971); *Baker v. Downey City Board of Education*, 307 F. Supp. 517, 522–23 (C.D. Calif. 1969); *Greene v. Moore*, 373 F. Supp. 1194, 1196–97 (N.D. Tex. 1974). The preparatory time referred to in Standard 5.3 A. 1. a. includes a period of time long enough to obtain counsel and for the counsel to prepare the case. What is sufficient for either purpose depends upon the circumstances. See *Linwood v. Board of Education, City of Peoria, School District No. 150, Ill.*, 463 F.2d 763, 769–70 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) (5 days); *Mills v. Board of Educ.*, 348 F. Supp. 866, 882 (D.D.C. 1972) (4 days); *Siegel v. Regents of University of California*, 308 F. Supp. 832, 834, 839 (N.D. Cal. 1970) (9 days

notice with 5-day postponement); *Jones v. State Board of Education of and for State of Tennessee*, 279 F. Supp. 190, 197 (N.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert.dismissed*, 397 U.S. 31 (1970) (2 days). The time needed depends upon such variables as the nature of the charge, the source and kind of evidence needed to answer it, and whether legal counsel participates on behalf of the student.

The requirement of a factual description in Standard 5.3 A. 1. b., is not intended to introduce any formal pleading technicality but simply to require the student and counsel to be given sufficient information to understand the charge and defend against it. See *Jenkins v. Louisiana State Bd. of Education*, 506 F.2d 992, 1000 (5th Cir. 1975); *Blanton v. State University of New York*, 489 F.2d 377, 385-86 (2d Cir. 1973). Courts, however, frequently require a specific statement of the charges against a student as a part of the minimal due process protection to be afforded in student disciplinary cases. See *Pervis v. LaMarque Indep. School Dist.*, 466 F.2d 1054, 1058 (5th Cir. 1972); *DeJesus v. Penberthy*, 344 F. Supp. 70, 76-77 (D. Conn. 1972). But see *Warren v. National Assn. of Sunday School Principals*, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974); *Baker v. Downey City Board of Education*, 307 F. Supp. 517, 522-23 (C.D. Calif. 1969). Similarly, Standard 5.3 C. 2. c., does not introduce a technical defense of variance; if misconduct described by an appropriate rule is found by clear and convincing evidence and if the student had an adequate notice that he or she was charged with that misconduct, differences between the wording of the charge and the finding would not amount to a reversible defect. Furthermore, the standards do not contemplate the applicability of formal rules of evidence. See *Boykins v. Fairfield Board of Education*, 492 F.2d 697, 701 (5th Cir. 1974); *Whitfield v. Simpson*, 312 F. Supp. 889, 895 (E.D. Ill. 1970); *Herman v. University of South Carolina*, 341 F. Supp. 226, 233 (D.S.C. 1971), *aff'd*, 457 F.2d 902 (1972).

Standard 5.3 B. provides for a private hearing unless the student expressly requests a public hearing. There will be no public hearing unless the student requests one, but the student does not have a right to a public hearing. If the student's request for a public hearing is denied, the denial would be taken into account in any determination of the fairness of the hearing. In making this judgment the consideration would be given to the reasons for denying the public hearing and any indication, including the student's arguments, that a public hearing would have been likely to result in a fairer hearing. Of course it is also relevant that due process aspires to achieve the appearance of fairness, as well as fairness in fact, and an open hearing tends to

dispel some suspicion of hidden unfairness. Although the Supreme Court has held in other contexts that there is a right to a public hearing, *In re Oliver*, 333 U.S. 257, 271–72 (1948); see 1 K. Davis, *Administrative Law* § 8.09 (1959), students' attempts to compel the school authorities to provide public hearings in discipline cases have not been successful. See *Linwood v. Board of Educ., City of Peoria, School Dist. No. 150, Ill.*, 463 F.2d 763, 770 (7th Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 731 (M.D. Ala. 1968) (closed hearings did not deny due process, but hearings should be public when possible); *Zanders v. Louisiana State Bd. of Ed.*, 281 F. Supp. 747, 768 (W.D. La. 1968); *Pierce v. School Comm. of New Bedford*, 322 F. Supp. 957, 961 (D. Mass. 1971); *Consejo Gen. de Estud., Etc. v. Univ. of Puerto Rico*, 325 F. Supp. 453, 456 (D. Puerto Rico 1971).

Consistent with Standard 5.3 A. 2. and 3., courts have generally espoused the position that the student should receive in advance a summary of the evidence, a list of witnesses to be called and the general nature of their testimony, and an examination of the documents to be used to support the charges. See *Sweet v. Childs*, 507 F.2d 675, 681 (5th Cir. 1975); *Wasson v. Trowbridge*, 382 F.2d 807, 812 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 151, 159 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974); *Hobson v. Bailey*, 309 F. Supp. 1393, 1401–02 (W.D. Tenn. 1970).

Standard 5.3 B. 4. requires either the right to cross examine adverse witnesses or the right to challenge adverse affidavits. In some school discipline cases the right to cross examine has been held essential. See *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973); *Marzette v. McPhee*, 294 F. Supp. 562, 567 (W.D. Wis. 1968); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Fielder v. Board of Education of School District of Winnebago, Neb.*, 346 F. Supp. 722, 730 (D. Neb. 1972). But in others due process has not required the right to cross examine. See *Yench v. Stockmar*, 483 F.2d 820, 822–24 (10th Cir. 1973); *Brown v. Knowlton*, 370 F. Supp. 119, 1121–23 (S.D.N.Y. 1974); *Hobson v. Bailey*, 309 F. Supp. 1393, 1402 (W.D. Tenn. 1970). The right to cross examine is frequently afforded to students in school disciplinary hearings and clearly is taken by courts to increase the fairness of the hearing given to the student. See *Linwood v. Board of Educ. City of Peoria, School Dist. No. 150, Ill.*, 463 F.2d 763, 770 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *Rhyne v. Childs*, 359 F. Supp. 1085, 1090 (N.D. Fla. 1973); *DeJesus v. Penberthy*, 344 F. Supp. 70, 76 (D. Conn.); *Pierce v. School Committee of New Bedford*, 322

F. Supp. 957, 960–61 (D. Mass. 1971). Nothing in Standard 5.3 B. precludes the use of affidavits rather than live witnesses in appropriate cases. It is assumed that the presiding officer has broad discretion in regulating the form of evidence presented and that such factors as the importance of the evidence offered, the availability of live witnesses, special reasons justifying confidentiality, and the length of time that would be expended in receiving live testimony would influence the presiding officer's judgment. If there were especially strong reasons to believe identification would endanger the physical well being of a witness, a charge might be sustained in the absence of live testimony by such a witness. See *DeJesus v. Penberthy*, 344 F. Supp. 70, 75–76 (D. Conn. 1972); *Graham v. Knutzen*, 351 F. Supp. 642, 666 (D. Neb. 1972). But see *Tibbs v. Board of Educ.*, 114 N.J. Super. 287, 276 A.2d 165, *aff'd*, 59 N.J. 506, 284 A.2d 179 (1971). Similarly, these standards do not specify compulsory process for the attendance of witnesses and presentation of documentary evidence even though compulsory process would ordinarily be desirable. See *Linwood v. Board of Educ., City of Peoria, School Dist. No. 150, Ill.*, 463 F.2d 763, 770 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972). When cross-examination is required, it can be tailored to protect the school's interests by limiting the scope of cross-examination to prevent the student or his representative from badgering witnesses or, in some cases, by holding the hearing in private. In weighing the burden on the proceeding, the school's interest should be squarely taken into account. Consideration should be given to the expenditure of time and money, the possible negative effect of drying up sources of information, and the potential for poisoning in-school relationships.

But whenever cross-examination would have been useful but was unavailable, the proceeding should be examined with considerable suspicion. For example, if the student lacked the opportunity to cross-examine the witnesses supplying the essential factual basis for the charge of misconduct or if certain testimony might have been vulnerable—because it appeared that the witness lacked direct knowledge of an important event or had some hostility toward the student charged—the suspicion of unfairness should be very strong. In general, it would be a rare case for a decisionmaker to find clear and convincing evidence of misconduct of which a key element was satisfied by affidavit in the absence of an extraordinary excuse for failure to present the live witness.

These standards do not include a specific right to remain silent because they do not provide for compulsory process. See *Buttney v. Smiley*, 281 F. Supp. 280, 287 (D. Colo. 1968) (no duty *to advise* or

right to remain silent). But see *Goldwyn v. Allen*, 54 Misc. 2d 94, 99, 281 N.Y.S.2d 899, 905-06 (Sup. Ct. 1967). See also *Andrews v. Knowlton*, 509 F.2d 898, 908 (2d Cir. 1975) (without regard to right to warning, perjurious statements may be used). The standards concerning interrogation would apply to any statements made by the student, and accordingly any statement obtained in violation of these standards would be inadmissible under Standard 5.4. Of course, the fifth amendment protects a student's right to remain silent in a discipline proceeding concerning any matters that might be incriminating, see *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973), and the exercise of that fifth amendment right should not ordinarily be the basis of adverse inferences concerning the student's alleged misconduct in school. Compare *Gardner v. Broderick*, 392 U.S. 273 (1968); *Sanitation Men v. Commissioner*, 392 U.S. 280 (1968), with *Baxter v. Palmigrano*, 96 S. Ct. 1551 (1976).

Standard 5.3 B. 6. requires that a student have the right to a record of the hearing proceedings. The courts have been split on whether procedural due process ought to require a verbatim record. The right to some record seems imperative to safeguard other procedural rights, including the right to judicial review, and a verbatim record should ordinarily be required where the potential consequences to the student are especially serious. Frequently, reference is made to the fact that a transcript was made, apparently with approval. See *Linwood v. Board of Educ., City of Peoria, School Dist. No. 150, Ill.*, 463 F.2d 763, 769 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *Moore v. Student Affairs Comm. of Troy State Univ.*, 284 F. Supp. 725, 731 (M.D. Ala. 1968); *Jones v. State Bd. of Ed. of and for State of Tennessee*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. dismissed*, 397 U.S. 31 (1970); *Buttney v. Smiley*, 281 F. Supp. 280, 288 (D. Colo. 1968); *Greene v. Moore*, 373 F. Supp. 1194, 1196 (N.D. Tex. 1974). Some courts have held that due process does require that a transcript be made. See *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D. La. 1972); *Speake v. Grantham*, 317 F. Supp. 1253, 1258 (S.D. Miss. 1970) (at school's expense); *Behagen v. Intercollegiate Conference of Faculty Rep.*, 346 F. Supp. 602, 608 (D. Minn. 1972); *Marzette v. McPhee*, 294 F. Supp. 562, 567 (W.D. Wis. 1968) (at student's expense). But other courts have held that due process does not require a record or transcript. See *Due v. Fla. A & M Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963); *Pierce v. School Comm. of New Bedford*, 322 F. Supp. 957, 961 (D. Mass. 1971); *Whitfield v. Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970).

A distinction is made in these standards between the presiding officer (5.3 B.) and the decisionmaker (5.3 C. 2. a.). It is assumed

that the two will often but not always be the same person or persons. Both must be impartial—judged in terms of actual conduct in the case and in terms of absence of any *a priori* bias or personal interest. The difficulty of creating impartiality in school discipline cases results from the fact that the ultimate decisionmaker is almost always the board of education or a school administrator. Prior to the discipline proceeding, board members and especially administrators will often have been involved in the case personally or through discussions, and even when there has been no such involvement, these persons have an overriding tendency to support one another because of their continuing relationships and need for mutual support. Impartiality is to some extent a matter of degree and thus primary importance should be attached to excluding from the decisionmaking process anyone who has had a direct or personal contact with a discipline incident. Beyond that minimal step, much greater impartiality can usually be achieved by having a person who is an outsider to the school system (appointed on a permanent or ad hoc basis) hear the evidence and make a decision. See *Quintanilla v. Carey*, 9 *Clearinghouse Rev.* 14 (N.D. Ill. Mar. 31, 1975, No. 75-C-829); *Mills v. Board of Educ.*, 348 F. Supp. 866, 883 (D.D.C. 1972). If it is assumed that the board of education (or other school official) is legally precluded from delegating the final decision, the neutral outsider's decision can be made in the form of a recommendation.

Although the courts have required impartiality in student disciplinary proceedings, the precise meaning of impartiality varies widely. See *Blanton v. State Univ. of New York*, 489 F.2d 377, 386 (2d Cir. 1973); *Sullivan v. Houston Independent Sch'l Dist.*, 475 F.2d 1071, 1077 (5th Cir. 1973), *cert. denied*, 414 U.S. 1032 (1973); *Sill v. Pennsylvania State Univ.*, 462 F.2d 463, 469 (3d Cir. 1972); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967); *Quintanilla v. Carey*, 9 *Clearinghouse Rev.* 14 (N.D. Ill. Mar. 31, 1975, No. 75-C-829); *Hawkins v. Coleman*, 376 F. Supp. 1330, 1332 (N.D. Tex. 1974); *White v. Knowlton*, 361 F. Supp. 445, 450 (S.D.N.Y. 1973); *Brown v. Knowlton*, 370 F. Supp. 1119, 1121 (S.D.N.Y. 1974); *Whitfield v. Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970); *Pierce v. Schl. Comm. of New Bedford*, 322 F. Supp. 957, 962 (D. Mass. 1971); *Vail v. Bd. of Ed. of Portsmouth Schl. Dist.*, 354 F. Supp. 592, 603-04 (D.N.H. 1973). See generally 2 K. Davis, Administrative Law §§ 12.01-.03, 13.01-.03, 13.10-.11 (1958), Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 *U. Pa. L. Rev.* 545, 615-30 (1971); Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1279-80 (1975).

See also *Hortonville Education Ass'n v. Hortonville Joint Sch'l Dist. No. 1*, 96 S. Ct. 2308 (1976). The courts have sometimes held that due process prohibited combining the judging function with other participation in presenting the case against the student. See *Caldwell v. Cannady*, 340 F. Supp. 835, 839 (N.D. Tex. 1972); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974); *Warner v. Nat'l Ass'n of Secondary School Principals*, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974). But other courts have taken the position that a combination of functions does not violate a student's right to due process. See *Jenkins v. Louisiana State Bd. of Ed.*, 506 F.2d 992, 1003 (5th Cir. 1975); *Winnick v. Manning*, 460 F.2d 545, 548 (2d Cir. 1972); *Jones v. State Bd. of Ed. of and for State of Tennessee*, 279 F. Supp. 190, 197 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 397 U.S. 31 (1970); *Center for Participant Education v. Marshall*, 337 F. Supp. 126, 135 (N.D. Fla. 1972); *Consejo Gen. de Estud., Etc. v. Univ. of Puerto Rico*, 325 F. Supp. 453, 456 (D. Puerto Rico 1971). Although an absolute bar against combining functions is not specified by these standards, the nature and extent of any such combination would be relevant to the question of impartiality. In many instances, the use of a separate hearing officer would cure an otherwise disqualifying combination of functions by one or more of the decisionmakers.

These standards impose no particular limits, other than impartiality, upon institutional decision making. Thus, it would be possible for the presiding officer to present a record or a recommended decision to the decision maker. Under Standard 5.3 C. 2. b., however, it is essential that the decision be based upon facts and arguments presented at the hearing. See *Marzette v. McPhee*, 294 F. Supp. 562, 567 (W.D. Wis. 1968); *Fielder v. Bd. of Ed. of Sch'l Dist. of Winnebago, Neb.*, 346 F. Supp. 722, 731, n. 7 (D. Neb. 1972); but see *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970); *Merkey v. Board of Regents of State of Florida*, 344 F. Supp. 1296, 1300–1304 (N.D. Ala. 1972). Therefore, if the decisionmaking is bifurcated, the student (and, of course, representatives of the school) should have an opportunity to examine and challenge the basis of the record or proposed decision presented to the decisionmaker. See 2 Davis, Administrative Law § 11.02 (1958).

The clear and convincing evidence standard of 5.3 C. 2. c. is intended to present something between "preponderance of the evidence" and "beyond a reasonable doubt." That is, it is intended to require a fairly demanding standard of proof but not one as demanding as the criminal standard of "beyond a reasonable doubt."

See *Smyth v. Lubber*, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (preponderance of evidence or clear and convincing evidence); *Mills v. Board of Educ.*, 348 F. Supp. 866, 883 (D.D.C. 1972) (clear and convincing evidence); *cf. Ingraham v. Wright*, 498 F.2d 248, 268 (5th Cir. 1974) (beyond a reasonable doubt), *reversed en banc on other grounds*, 525 F.2d 909 (1975).

In determining the question of appropriateness of sanctions under 5.3 C. 1. c., the decisionmaker would be relegated to the standards on sanctions, including the general standard of proportionality. (See Part VI.) In applying this standard, the student's previous record and the existence of any mitigating circumstances would be relevant. Standard 5.3 C. 2. c. would require some articulation of the basis for concluding that the sanction is appropriate as a part of the required explanation in a "written opinion."

The right of judicial review seems essential to make the preceding rights meaningful. In actual legislation, the standard of review might be spelled out in greater detail. For these standards it seems sufficient to specify the conventional grounds for judicial review of administrative action. Standard 5.3 D. does not contemplate a de novo hearing in court but only a review on the record of the discipline proceeding. But *cf. Hortonville Education Ass'n v. Hortonville Joint Sch'l Dist. No. 1*, 66 Wis. 2d 491-97, 225 N.W.2d 658, 670-73 (1975), *revd.*, 96 S. Ct. 2308 (1976).

The requirement of substantial evidence does not seem exceptional; if the decision of a tribunal is not based on the facts produced at the hearing, there is little purpose to the hearing and the various procedural safeguards. See *Wong v. Hayakawa*, 464 F.2d 1281, 1283-84 (9th Cir. 1972); *Sill v. Pennsylvania State University*, 462 F.2d 463, 470 (3d Cir. 1972); *Vail v. Board of Educ.*, 354 F. Supp. 592, 603-04 (D.N.H. 1973); *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 166-70 (W.D. Mo. 1968). But *cf. Wood v. Strickland*, 420 U.S. 308, 323-26 (1975). The requirements of a written opinion under 5.3 C. 2. c., and the right of judicial review under 5.3 D. are closely related. These standards do not suggest that a court should not give considerable latitude to the administrative and educational judgment and expertise that inform a decision. The standards do indicate, however, that the school's decision must be explainable in terms that show consistency with law (including these standards), the absence of arbitrariness, and evidentiary support and that a court is competent to determine whether such an explanation of the decision has been forthcoming. See Kirp, Buss, and Kuriloff, "Legal Reform of

Special Education: Empirical Studies and Procedural Proposals," 62 *Calif. L. Rev.* 40, 147-48 (1974). See also Friendly, "Some Kind of Hearing," 123 *U. Pa. L. Rev.* 1267, 1291-92 (1975). These standards do not require an administrative review of initial decisions, but such a review would not be inconsistent with the procedures that are included. Such an administrative review would not, however, in any way qualify the right of judicial review.

5.3.1 As used in these standards, the right to be represented by counsel includes:

A. 1. the right to be advised by the presiding officer of

a. the right to counsel and

b. the channels through which counsel might be obtained;

2. the right to be represented by counsel in preparing for and participating in the hearing specified in Standard 5.3 B.; and

3. in the case of a student who is indigent and is threatened with expulsion or a transfer to a school used or designated as a school for problem children of any kind, the right to have counsel provided at state expense.

B. In advising a student of the right to counsel pursuant to Standard 5.3.1 A., it should be the duty of the presiding officer:

1. to use reasonable efforts to obtain and provide information concerning channels through which counsel might be obtained;

2. to refuse to proceed with a hearing until satisfied that the student

a. has voluntarily waived the right to counsel, or

b. (1) in cases within 5.3.1 A. 3., is represented by counsel who has had adequate opportunity to prepare the student's case,

(2) in cases not within 5.3.1 A. 3., has been given adequate notice of the right to obtain counsel but has failed to do so; and

3. in any proceeding at which the student is not represented by counsel, to use reasonable efforts to protect the student from any disadvantage that would result from not being so represented.

C. Nothing in Standard 5.3, 5.3.1 A. or B. should prevent a student from being represented, at the student's option, by a person who is not a graduate of a law school or admitted to the practice of law, but the option to be so represented should have no effect upon the student's right to counsel except insofar as the right to counsel was waived pursuant to the provisions of Standard 2.2.

Commentary

The right to counsel created by Standard 5.3 B. 1. is elaborated in Standards 5.3.1 A., B., and C. The courts have not been uniform with respect to participation of legal counsel on behalf of students faced with disciplinary sanctions. Counsel has sometimes been required, see *Black Coalition v. Portland Sch'l. Dist.*, 484 F.2d 1040, 1045 (9th Cir. 1973); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Maine 1970) (military academy); *Speake v. Grantham*, 317 F. Supp. 1253, 1257-58 (S.D. Miss. 1970); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974), sometimes noted approvingly without an explicit finding that it was required, see *Linwood v. Board of Educ., City of Peoria, Schl. Dist. No. 150, Ill.*, 463 F.2d 763, 770 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *Marzette v. McPhee*, 294 F. Supp. 562, 567 (W.D. Wis. 1968); *Pierce v. School Comm. of New Bedford*, 322 F. Supp. 957, 960 (D. Mass. 1971); *Fielder v. Bd. of Ed. of Schl. Dist. of Winnebago, Neb.*, 346 F. Supp. 722, 731, n. 7 (D. Neb. 1972); *Southern v. Bd. of Trustees for Dallas Ind. Schl. Dist.*, 318 F. Supp. 355, 358 (N.D. tex. 1970); *Bistrick v. Univ. of So. Carolina*, 324 F. Supp. 942, 952 (D.S.C. 1971); *McDonald v. Bd. of Trustees of Univ. of Illinois*, 375 F. Supp. 95, 104 (N.D. Ill. 1974); *Norton v. Discipline Comm. of East Tenn. State Univ.*, 419 F.2d 195, 200 (6th Cir. 1969); *Lowery v. Adams*, 344 F. Supp. 446, 453 (W.D. Ky. 1972), and it has sometimes been omitted as a procedural protection explicitly required, see *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150, 159 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961); *Esteban v. Central Missouri State College*, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Pervis v. La Marque Indep. Schl. Dist.* 466 F.2d 1054, 1058 (5th Cir. 1972); *Lance v. Thompson*, 432 F.2d 767 (5th Cir. 1970); *Whitfield v. Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970); *Barker v. Hardway*, 283 F. Supp. 228, 237 (S.D.W. Va. 1968), *aff'd per curiam*, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969); *Due v. Fla. A & M Univ.*, 233 F. Supp. 396, 403 (N.D. Fla. 1963); *Sims v. Bd. of Ed. of Indep. Sch'l Dist. No. 22*, 239 F. Supp. 678, 683 (D.N.M. 1971); *Haynes v. Dallas County Junior College Dist.*, 386 F. Supp. 208, 211-12 (N.D. Tex. 1974); *Warren v. Nat'l Assoc. of Secondary School Principals*, 375 F. Supp. 1043, 1047 (N.D. Tex. 1974). A lawyer who is permitted to represent a student at a discipline hearing would tend to improve the fairness and overall quality of the hearing by presenting the relevant facts in an orderly manner, presenting and cross examining witnesses, making legal arguments when appropriate, providing objectivity and professionalism in a frequently emotional

situation, and giving moral support to the student confronted by the school's authority figures. For an elaboration of the arguments concerning right to counsel in student discipline cases, see Buss, "Procedural Due Process for School Discipline: Probing the Constitutional Outline," 119 *U. Pa. L. Rev.*, 545, 609–12 (1971). But see Friendly, "Some Kind of Hearing," 124 *U. Pa. L. Rev.* 1267, 1287–91 (1975).

The right to appointed counsel has been rejected by those courts that have discussed the issue. See *Linwood v. Board of Educ., City of Peoria, Schl. Dist. No. 150, Ill.*, 463 F.2d 763, 770 (7th Cir.), *cert. denied*, 409 U.S. 1027 (1972); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); *Marin v. Univ. of Puerto Rico*, 377 F. Supp. 613, 623 (D. Puerto Rico 1974). See also *Goldberg v. Kelly*, 397 U.S. 254, 270 (1969). These standards attempt to draw a fine line between the right to be represented by counsel retained by the student and the right to be represented by state-provided counsel. Inevitably, they represent an uneasy compromise. The compromise attempts to balance the student's need of counsel against the burden on the school and the state of requiring that counsel be made available in all cases. As always, the main cost of the compromise is incurred by the indigent student. The right to state-provided counsel is required by Standard 5.3.1 A. only for indigent students when expulsions and certain transfers might result from the discipline proceeding. In effect, the standards treat those sanctions as "ultra serious." In other instances, partial protection is provided through the presiding officer, first, in assisting the student to obtain counsel through legal aid offices and other such sources and, second, by attempting to insulate the student from the disadvantage of being without counsel. In a sense, there is a sliding scale between presiding officer impartiality and representation by counsel. Somewhat less impartiality might be acceptable where legal assistance is available; somewhat greater impartiality is required where the student has no counsel. See Kirp, "Schools as Sorters: The Constitutional Implications of Student Classification," 121 *U. Pa. L. Rev.* 705, 789 (1973). Waiver of the right to counsel, including waiver in the modified form of accepting representation by a nonlawyer (but see *Graham v. Knutzen*, 362 F. Supp. 881, 884 [D. Neb. 1973]), is permitted subject to the general requirements of voluntariness specified in these standards. See Standard 2.2 A.–F.

5.4 In determining whether a student has violated a student conduct rule, evidence of student misconduct obtained in violation of these standards or the student's constitutional rights should not be considered.

Commentary

This exclusionary rule will apply mainly to evidence obtained in violation of the standards on interrogations (Part VII) and searches (Part VIII). Ordinarily, the acquisition of evidence obtained in violation of a student's constitutional rights would also be in violation of these standards, but the rule is drafted broadly to include either type of violation. (See also Part II on consents and waivers.)

5.5 A. To provide a basis for sanction under these standards, a rule governing student conduct should be:

1. in a published writing describing with specificity
   a. the conduct prohibited, and
   b. the sanction or sanctions that may be imposed by reason of a violation of the rule; or
2. based on a general understanding, in the light of past practice, with respect to which understanding there is objective evidence that a reasonable student to whom the rule applied under the circumstances involved in the particular case would have been aware of both the rule and the likelihood of a resulting sanction of comparable nature and degree to that now threatened.

B. In determining whether a written rule is sufficiently specific, considerations tending to indicate the validity of the rule include:

1. a relatively high degree of precision of the words actually used in the written statement,
2. the difficulty of using more precise words,
3. the likelihood that the students who were subject to the rule would understand that the conduct alleged to violate the rule was covered by the rule and that the sanction now threatened might be imposed,
4. the lack of opportunity given to school officials by the rule to apply the rule in a discriminatory fashion,
5. the lack of probability that the rule has in fact been applied in a discriminatory fashion to the student now subjected to the rule or to any other student,
6. the relatively low degree of seriousness of the sanction threatened by reason of the misconduct charged or relative lack of importance of permissible conduct discouraged by the rule,
7. the proportionality of the sanction threatened and the misconduct charged,
8. the fact that reasonable efforts were made to bring to the student's attention the nature and significance of the misconduct covered by the rule in view of the age of the students to whom the rule applies.

C. In determining whether a student conduct rule that is not in writing may be imposed:

1. the presumption should be that

a. unwritten rules are invalid, and

b. rules that do not specify a sanction are invalid for purposes of imposing a serious disciplinary sanction; and

2. in determining whether the presumption has been overcome, consideration should be given to

a. the persuasiveness of the reasons for not stating the rule in writing,

b. the improbability that a student has been prejudiced by reason of the fact that the rule is not in writing, and

c. subsections 3.-8. of Standard 5.5 B.

Commentary

These standards provide a vagueness test for student conduct rules. In spite of the failure of some courts to regard the vagueness doctrine as applicable in the school context, see *Papish v. Board of Curators of the University of Missouri*, 331 F. Supp. 1321, 1331 (W.D. Mo. 1971), *aff'd*, 464 F.2d 136 (8th Cir. 1972), *rev'd on other grounds*, 410 U.S. 667 (1973); *Press v. Pasadena Independent School Dist.*, 326 F. Supp. 550, 564 (S.D. Tex. 1971); *Jones v. State Board of Education of and for State of Tennessee*, 279 F. Supp. 190, 202 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969), *cert. denied*, 397 U.S. 31 (1970), the better authority suggests that school officials must act in accordance with properly promulgated rules of sufficient specificity in disciplining students. See *Barghman v. Freienmuth*, 478 F.2d 1345 (4th Cir. 1973); *Shanley v. Northeast Independent School Dist., Bexar County, Texas*, 462 F.2d 960, 975, 977 (5th Cir. 1972); *Sill v. Pennsylvania State University*, 462 F.2d 463, 467 (3d Cir. 1972); *Eisner v. Stamford Board of Education*, 440 F.2d 803, 811 (2d Cir. 1971); *Riseman v. School Committee of the City of Qunicy*, 439 F.2d 148, 149 (1st Cir. 1971); *Soglin v. Kauffman*, 418 F.2d 163, 167 (7th Cir. 1969); *Corporation of Havenford College v. Reeher*, 329 F. Supp. 1196, 1201-09 (E.D. Pa. 1971). The standards do not create an absolute bar to unwritten rules but do attempt to create a heavy burden of justification for such rules. It is not uncommon for courts to uphold unwritten rules on the ground that the existence of the rule was in fact known to the student. See *Dunn v. Tyler Independent School Dist.*, 460 F.2d 137, 142 (5th Cir. 1972); *Richards v. Thurston*, 424 F.2d 1281 (1st Cir. 1970); *Hasson v. Boothby*, 318 F. Supp. 1183, 1188 (D. Mass. 1970); *cf. Esteban v. Central Missouri*

State College, 415 F.2d 1077, 1089 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970). Nevertheless, the party seeking to justify an unwritten rule should be required to bear a heavy burden of justification because of the grave danger that unwritten rules may be applied in an arbitrary or discriminatory manner, *cf. Jacobs v. Board of School Commissioners*, 490 F.2d 601, 605 (7th Cir. 1973), *cert. granted*, 417 U.S. 929 (1974), *vacated as moot*, 420 U.S. 128 (1975); *Rasche v. Board of Trustees of the University of Illinois*, 353 F. Supp. 973, 976-77 (N.D. Ill. 1972), and because of the danger that the innocent student may not have fair warning that certain activity is prohibited. See *Jacobs v. Board of School Commissioners*, 490 F.2d 601, 605 (7th Cir. 1973), *cert. granted*, 417 U.S. 929 (1974), *vacated as moot*, 420 U.S. 128 (1975); *Sill v. Pennsylvania State University*, 462 F.2d 463, 468 (3d Cir. 1972); *Jackson v. Dorrier*, 424 F.2d 213, 217-18 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970); *Lowery v. Adams*, 344 F. Supp. 446, 456 (W.D. Ky. 1972); *Parker v. Fry*, 323 F. Supp. 728, 731 (E.D. Ark. 1971). See generally Note, 109 *U. Pa. L. Rev.* 67 (1960); Note, 80 *Yale L. J.* 1261 (1971).

It should be noted especially that these standards include the sanction as an integral part of the specification requirement. But see *Fielder v. Board of Education of School District of Winnebago, Neb.*, 346 F. Supp. 722, 725, 729 (D. Neb. 1972); *Hasson v. Boothby*, 318 F. Supp. 1183, 1188 (D. Mass. 1970); *Dunn v. Tyler Independent School District*, 460 F.2d 137, 143 (5th Cir. 1972). The assumption is that the purpose of rules is to notify the student not only that certain conduct is prohibited but also how important it is not to engage in that conduct. Without both kinds of notice it is simply unfair to penalize the student. For example, a student may well know that he/she is not to talk in class, but that knowledge would not provide an adequate basis for expelling that student for talking a single time. Unless the student were informed quite explicitly about the possibility of expulsion such a sanction would be unfair. (Of course, that sanction would probably be prohibited because of its being disproportionate to the misconduct under Standard 6.1, but notice might qualify such a conclusion in a less extreme case and lack of notice would exacerbate it.)

5.6 A student who is threatened with a disciplinary sanction that is not a serious disciplinary sanction is entitled to procedural safeguards equivalent or comparable to those specified in Standard 5.3 except insofar as lesser safeguards are justified by:

A. the relative lack of severity of the sanctions threatened; and

B. the substantial burden imposed upon the school's interest by reason of making greater safeguards available.

Commentary

From one point of view this standard is merely a restatement of the general principle contained in Standard 5.2. In addition, this standard has two purposes. First, it makes clear that students threatened by sanctions as serious as, but not specifically mentioned in, the definition of "serious disciplinary sanction" (Standard 9.4) are entitled to full procedural protections. In this sense, this is a partial restatement of Standard 9.4 B. Second, this standard makes clear that the procedural requirements of Standard 5.3 are the starting points and that deviations from those requirements must be justified in the light of the student's relative stake in the outcome of the proceeding and the relative burden upon the school.

5.7 Unless special circumstances bring the case within Standard 5.8, the hearing and hearing procedures required by this chapter should be provided prior to the imposition of a disciplinary sanction.

5.8 A. Notwithstanding any other provision in these standards, a student may be excluded temporarily from a classroom or a school prior to the operation or availability of procedures otherwise required if such an exclusion is clearly justified by an imminent danger of harm to:

1. any person (including the student),

2. the educational process of a substantial and continuing or repetitive nature, or

3. property that is extensive in amount.

B. The determination of the existence of an imminent danger of harm may be made in the first instance by a teacher, counselor, administrator, or other school official in a position both to make such determination and to be required to act to protect persons, the educational process, or property.

C. The exclusion authorized under Standard 5.8 should be for the shortest possible time consistent with the circumstances justifying exclusion.

D. 1. As soon as possible after the temporary exclusion, an emergency hearing should be held to determine whether the exclusion may be continued.

2. The sole question to be determined at the emergency hearing should be whether there is substantial evidence to support the exclusion of the student, pending a full hearing in compliance with Standard 5.3, on the ground that readmission would pose a threat of imminent danger or harm as provided in Standard 5.8 A.

E. In addition to the emergency hearing required by Standard 5.8 D. 1., the excluded student is entitled to a preliminary hearing within a reasonable time after requesting it if:

1. such a hearing can be held substantially sooner than the full hearing required by Standard 5.3;

2. the procedures that could be made available at such a preliminary hearing would be substantially more extensive than those available at the emergency hearing.

F. At the preliminary hearing the student may challenge both the grounds of the exclusion and the determination that the student's presence in school (or the classroom) pending the outcome of the full hearing would present a threat of imminent danger of harm as provided in Standard 5.8.

G. Both the emergency and preliminary hearings should be conducted by an impartial presiding officer and result in a decision by an impartial decision maker and, to the extent possible, should conform to the requirements of Standard 5.3.

H. A determination adverse to the student in either an emergency or preliminary hearing should not prejudice the student in any way nor preclude the assertion of any of the rights required by Standard 5.3.

I. A student may request judicial review of the decision made at either the emergency hearing or preliminary hearing or both, but such judicial review should be available only at the discretion of the reviewing court.

Commentary

In *Goss v. Lopez*, 419 U.S. 565, 582 (1975), the Supreme Court said that "as a general rule notice and hearing should precede removal of the student from school" but that "there are recurring situations in which prior notice and hearing cannot be insisted upon." Consistent with this position, Standard 5.7 adopts the general rule that a prior hearing is required in the absence of special circumstances justifying delay of the hearing. See Buss, "Implications of *Goss v. Lopez* and *Wood v. Strickland* for Professional Discretion and Liability in Schools," 4 *J. Law & Educ.* 567, 569–70 (1975). Before

Goss v. Lopez was decided the federal courts had divided on the question whether the hearing must be held before or after the imposition of the disciplinary sanction, and the courts' opinions do not always make it clear to what extent the particular facts of the case were controlling. Compare *Betts v. Board of Education of City of Chicago*, 466 F.2d 629, 633 (7th Cir. 1972); *Pervis v. LaMarque Indep. School Dist.*, 466 F.2d 1054, 1055-58 (5th Cir. 1972); *Black Students of No. Fort Myers Jr. - Sr. H.S. v. Williams*, 470 F.2d 957 (5th Cir. 1972); *Givens v. Poe*, 346 F. Supp. 202, 208-09 (W.D.N.C. 1972); *Mills v. Board of Education of Dist. of Columbia*, 348 F. Supp. 866, 875-76 (D.D.C. 1972), with *Black Coalition v. Portland School District No. 1*, 484 F.2d 1040, 1044 (9th Cir. 1973); *Banks v. Bd. of Public Instruction of Dade County*, 314 F. Supp. 285, 293 (S.D.Fla. 1970), *vacated*, 401 U.S. 988 (1971), *aff'd*, 450 F.2d 1103 (5th Cir. 1971).

Even though a prior hearing is the ordinary practice, it seems self-evident that an accelerated emergency procedure must be made available so that sanctions can be imposed without a prior hearing where circumstances so require. See *Goss v. Lopez*, *supra*, at 581-82. Standards 5.8 A., B., and C. permit elimination of the prior hearing only when the sanction is exclusion of the student. The difficult problem is to make a special procedure truly available for emergency cases without leaving an opening for subverting the basic procedural safeguards otherwise applicable. The effort in these standards is to juggle these twin objectives by stating the grounds of emergency restrictively, but not impossibly, and by building in various opportunities for challenging the emergency action and to prevent its being extended beyond the justifying time or circumstances. These standards do not specify a time limit but the courts have clearly indicated that any postponed hearing must be held "within a reasonable time thereafter." *Goss v. Lopez*, *supra*, at 567. A reasonable time must be determined in the light of the fact that a student is out of school and in view of the time necessary for preparation and scheduling. Although the standards may appear at first to be excessively complex, they are consistent with precedent and common sense. See *e.g.*, *Stricklin v. Regents of University of Wisconsin*, 297 F. Supp. 416, 419-20 (W.D. Wis. 1969), *appeal dismissed as moot*, 420 F.2d 1257 (7th Cir. 1970).

Perhaps the most debatable provision included in these standards is the "preliminary hearing" contained in Standard 5.8 E. It is arguable that it will be undesirable for student and school alike to have a series of half-hearings. Once a student has been removed and an emergency hearing held, the argument runs, it would be in everyone's

interest to await the full hearing when the matter can be conclusively resolved. Despite the considerable merit to that view, the standards have taken the position that it is undesirable to keep the student out of school for an extended period of time while waiting for the full-dress hearing. Thus, the standards permit the additional interim ("preliminary") hearing if the procedures that could be made available to the student would place the student in a significantly better position to develop a case than permitted at the time of the emergency hearing (5.8 E. 2.) and if the preliminary hearing could be held significantly sooner than the full hearing (5.8 E. 1.). The preliminary hearing might be held significantly sooner than the full hearing because of the time required to find and prepare witnesses for the full hearing or because of the difficulty of scheduling the more complete and thus lengthier hearing. Even if these conditions can be satisfied, however, the standard leaves it to the student's determination whether to proceed with the interim hearing. See also the standards in Part VI with respect to the use of force for self-defense or to remove an obstructive student.

5.9 Every school should provide a procedure through which a student can initiate and obtain an appropriate resolution of grievances.

Commentary

This standard is intentionally broad and general. "Grievances" are not defined in these standards. The term would include, but not be limited to, a claimed denial of rights under these standards. Compare also Standards 1.8 B. and C.

It would be possible to assimilate the grievance procedure with the discipline procedural scheme contained in this chapter. Without foreclosing that possibility it seems desirable to leave open other options such as an ombudsman approach.

The standard refers to a procedure through which "a student" can grieve, but it does not intend to foreclose a system of representation by which a student chooses to process grievances through student organizations or adult child-advocacy groups. Any such system of representation would have to be worked out carefully to protect the individual student's interest and to insure a feasible school operation, but such a collective or advocacy approach would not be inconsistent with Standard 5.9.

Under Standard 5.9, the obligation to establish grievance machinery is placed upon the "school." It would be possible, con-

sistent with this standard, to have an integrated school-district-wide system for processing grievances. But Standard 5.9 assumes that the operation of at least the entry levels of any grievance system should be on the school level to increase the likelihood that a student will be aware of the prescribed procedures and will feel that access is actually available and not remote.

This standard specifies that the grievance procedure should make available an "appropriate resolution" of a grievance. This would require, at least, that the grievance in fact be disposed of with reasonable expedition by a person of authority and that the disposition contain an explanation in terms and in form responsive to the student's request.

PART VI: DISCIPLINARY SANCTIONS

6.1 School disciplinary sanctions against student conduct or status should be imposed only if consistent with the limitations contained in these standards as to a school's authority to regulate student conduct and status, and only to the extent that is reasonably necessary to accomplish legitimate school objectives that cannot otherwise be reasonably effectuated.

Commentary

This general standard first limits the scope of all school disciplinary sanctions, as that term is defined in Standard 9.3 hereof, to the standards controlling the authority of school officials to regulate student conduct and status as set out in Standards 3.1-3.7 *supra.* The power of school authorities to impose sanctions is, therefore, limited by the same criteria that limit the basic power to regulate the student conduct or status.

The second proposition contained in this general standard adopts a concept of "frugality" for sanctions. Sanctions should be employed only to the extent that they are reasonably necessary to accomplish valid objectives of school authorities. Unnecessary or excessive sanctions are clearly undesirable from both legal and pedagogical viewpoints. See *Anderson v. Ind. School Dist. No. 281*, Dist. Ct. Juv. Div. (4th Jud. Dist., Feb. 18, 1969), *appeal dismissed as moot*, 287 Minn. 515, 176 N.W.2d 640 (1970).

Furthermore, the choice of a specific sanction to be imposed should be made in light of the nature of the offense and explicit consideration by the school administrators of the purposes of the

exercise of their authority and the objectives to be effectuated by the imposition of a particular sanction. A classic example of school sanctions that are not consistent with this standard is the suspension of students for being truant from school. In a study of the problems involved with suspended junior and senior high school students in New Haven, Connecticut, it was noted:

> Perhaps the most obvious example of this problem involves the more than 30% of the students who reported that at least part of the reason they were suspended had to do with their being truant from school, cutting classes or being late. When school officials were asked about keeping out of school those students whose offenses consisted of avoiding school, the officials only replied that they could think of no other disciplinary techniques. Many of the truant students are glad to be ejected from school, while many of the students suspended for recurring lateness are late because they have unusual responsibilities in their homes in the morning before they can leave for school, such as cleaning house, taking care of younger children, or buying food—and they are not late because of lack of concern for school. In both cases, suspension does not seem a helpful action. Dixwell Legal Rights Foundation, "Report on School Suspension In New Haven."

Note the reported admission by the school authorities in New Haven that the suspension sanction was employed only because the students had clearly violated school rules by being truant or late and the school administrators could think of no other sanctions. Indeed, the absence of a range of effective school sanctions is a serious problem. Yet, it cannot be overcome by employing sanctions that are counterproductive. Compare Carrington, "Civilizing University Discipline," 69 *Mich. L. Rev.* 39, 3 398 (1971). The lack of a productive sanction for violation of a given school rule should be an important factor in a school administrator's decision as to whether or not to adopt the rule in question, and the inadequacy of productive school sanctions suggest the overall desirability of restricting school rules governing student conduct and status to a reasonably necessary minimum.

The traditional justifications for imposing sanctions on undesirable conduct are stated in terms of general deterrence (deterrence of other possible offenders), special deterrence or intimidation (deterrence of the person punished from offending again), incapacitation, rehabilitation, and retribution; H. Packer, *The Limits of the Criminal Sanction* 35–61 (1968). Under Standard 6.1 retribution would not be a permissible purpose of school sanctions as it is not consistent

with the authority of school administrators to regulate student conduct or status. The other purposes for imposing santions, however, may be consistent with Standard 6.1 in appropriate circumstances.

Standard 6.1 applies to all sanctions as defined in Standard 9.3 hereof, including, but not limited to, expulsion, suspension, transfer to a different school or to a different class, program, or track, denial of any opportunity ordinarily available to students to participate in activities or to engage in conduct, and reduction of grade or loss of academic credit in any course. Additionally, specific limitations on the use of the sanctions of corporal punishment, suspensions, expulsions, and grade reduction or other academic sanctions are contained in the subsequent standards in this Part.

6.2 Corporal punishment should not be inflicted upon a student, but school authorities may use such force as is reasonable and necessary:

A. to quell a disturbance threatening physical injury to persons or property, or

B. to protect persons (including school authorities themselves) or property from physical injury, or

C. to remove a pupil causing or contributing to a disturbance in the classroom or disruption of the educational process who refuses to leave when so ordered by the school authority in charge; or

D. to obtain possession of weapons or other dangerous objects upon the person or within the control of a student.

E. Such acts do not constitute corporal punishment.

Commentary

This standard follows closely (with the addition of C.) the New Jersey statute outlawing corporal punishment. N.J.S.A. 18:6-1 (1964). A distinction is made between true corporal punishment that is "the willful infliction for disciplinary purposes of bodily punishment for past behavior," *Sims v. School Dist.*, 13 Ore. App. 119, 508 P.2d 236 (1973), and the use of force that is necessary to deal with a serious ongoing situation. Subsection C. was added to deal with the problem of a student who, although not presenting the physical danger of the other three subsections, is causing or contributing to a disturbance that makes teaching impossible, and who refuses to leave the classroom when told to do so.

The recently adopted Massachusetts statute banning corporal punishment merely states that "the power of the school committee

or any teacher or other employee or agent of the school committee to maintain discipline upon school property shall not include the power to inflict corporal punishment on any person." Mass. Gen. Laws. Ann. ch. 71 § 37G (Supp. 1976). Senator Jack Backman, sponsor of the bill, stated that "(t)otal abolition of corporal punishment . . . does not prohibit the use of force to quell a student disturbance or the use of force by a teacher or other employee to defend himself. Corporal punishment . . . is physical force used as *punishment.* Therefore, no qualification is needed to provide for the use of force to protect life and property." "Report of the National Conference on Use of Force in the Public School" (1972). Since courts and administrators are free to disagree with this interpretation, however, it seems that any exceptions to the ban should be made explicit in order to avoid misunderstanding or confusion for teachers, administrators, and courts.

The exceptions in Standard 6.2 to its prohibitions on the use of force are included with the realization that the use of force to deal with ongoing situations may carry with it a greater risk of injury to the student than properly administered after-the-fact corporal punishment. Nevertheless situations do arise where only the use of some force can properly deal with a dangerous ongoing situation.

The use of corporal punishment in public schools has recently been challenged in federal court as a violation of the eighth amendment proscription against cruel and unusual punishment. The use of corporal punishment in nearly every other context in which it was formerly allowed — seamen, convicts, wives by their husbands, has been discontinued or ruled unconstitutional. *Jackson v. Bishop* 404 F.2d 571 (8th Cir. 1968), struck down corporal punishment of state prisoners as violating the eighth amendment. Judge (now Mr. Justice) Blackmun stated that corporal punishment "offends contemporary concepts of decency and human dignity and precepts of civilization which we profess to express." *Id.* at 579. This, taken together with the Supreme Court decisions extending rights under the constitution to minors and school students (*Tinker v. Des Moines School Dist.*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1 (1967)), would seem to make substantial argument against the constitutionality of the employment of corporal punishment in public schools.

Nevertheless, the majority of federal courts that have passed on the issue have upheld the constitutionality of corporal punishment in public schools. The *Jackson* case was specifically distinguished as not applicable to schools in *Sims v. Board of Education*, 329 F. Supp. 678 (D.N.M. 1971), *aff'd*, 458 F.2d 1360 (5th Cir.), *cert. denied*, 409 U.S. 1027 (1972). See also *Gonyaw v. Gray*, 361 F. Supp. 366

(D. Vt. 1973); *Ware v. Estes*, 328 F. Supp. 657 (N.D. Tex. 1971), *aff'd*, 458 F.2d 1360 (5th Cir. 1972); *Ingraham v. Wright*, 525 F.2d 909 (5th Cir. 1976). These cases uniformly reached the conclusion that corporal punishment is not a per se constitutional violation.

The Supreme Court in the recent case of *Baker v. Owen*, 96 S. Ct. 210 (1975), summarily affirmed a district court ruling that upheld the constitutionality of a North Carolina statute that permitted school officials and teachers "to use a reasonable force in the exercise of lawful authority to maintain order." The statute was upheld even in the face of parental objections to corporal punishment, the Court holding only that minimal procedural due process be afforded students in the course of inflicting such punishment.

One federal court, in contrast to the above cited cases, has placed substantive limits on the use of corporal punishment as a disciplinary sanction, although without holding corporal punishment to be unconstitutional per se. In *Glaser v. Marietta*, 351 F. Supp. 555 (W.D. Pa. 1972), the district court also upheld the general constitutionality of corporal punishment, but held additionally that the infliction of deliberate, after-the-fact corporal punishment on a pupil over the objection of the child's parents violates parental constitutional rights under the fourteenth amendment. This argument has, however, been explicitly rejected by the *Baker* decision that was affirmed by the Supreme Court, as well as by the other federal decisions that have faced this issue, *supra.* Moreover, it does not appear to be well reasoned either in terms of the specific precedential authority upon which it relied or general constitutional principles. See S.R. Goldstein, *Law and Public Education* 431–435 (1974). Standard 6.2 does not, therefore, rest on this constitutional argument. The standard prohibits corporal punishment as a policy matter rather than as a legal one.

There is little doubt that significant popular support continues to exist in this country for the use of corporal punishment in schools. A 1970 Gallup poll showed that 62 percent of parents favored corporal punishment in the lower grades, ACLU Reports, "Corporal Punishment in the Schools," 34–35 (March 1972), while a National Education Survey taken the same year showed that 65.3 percent of elementary school teachers and 55.5 percent of secondary school teachers favored the "judicious" use of corporal punishment. "Corporal Punishment: Teacher Opinion," *NEA Research Bulletin*, vol. 48, no. 2 (May 1970), at 48–49.

On the other hand, the dominant thinking today among many educators has turned away from the use of corporal punishment in schools. See K. James, *Corporal Punishment in the Schools* 82–85

(1963). A 1972 Task Force of the National Education Association, after extensive hearings held throughout the country, concluded that corporal punishment in schools should be prohibited. Among the reasons given for this conclusion by the Task Force were:

"Physical punishment usually has to be used over and over again, to be even minimally effective.

"Teaching that might is right increases rather than decreases a student's disruptive behavior.

"Corporal punishment is used much more often against pupils who are smaller and weaker than the teacher; it is used more frequently against poor children and members of minority groups than against children of white, middle-class families.

"In many cases, corporal punishment causes lasting psychological damage to children.

"Corporal punishment increases aggressive hostility, rather than increasing self-discipline.

"The availability of corporal punishment discourages teachers from other, and better, avenues of discipline.

"Any set limitations on the use of corporal punishment are usually ignored." "Report of the Task Force on Corporal Punishment," National Education Association (1972).

Currently, sixteen states have specific statutory provisions that permit corporal punishment, thirty states have no statutory provision on the subject one way or the other, and three states (Hawaii, Massachusetts, and New Jersey) have provisions that explicitly prohibit corporal punishment. In Maryland, corporal punishment is permitted, by local option, in some counties and prohibited in others. For a recent compilation of the state statutes, see Children's Defense Fund, *Children Out of School in America*, 231–232 (1974). See also, K. James, *supra*.

In addition, corporal punishment has been prohibited by school boards in a number of major cities, including New York, Chicago, Philadelphia, Washington, D.C., and Pittsburgh. See "ACLU Reports," *supra* at 32.

6.3 A. No student should be permanently excluded from school. No student should be excluded from school for a period in excess of one school year. No student should be suspended or otherwise excluded from school for more than one school month, unless the student's presence in school presents a clear and imminent threat of harm to students or other persons on school premises, property, or the educational process, and that threat cannot be eliminated by other, less restrictive, means.

B. Prior to suspending or otherwise excluding a student from school for more than one school month, the student should be provided with a hearing de novo before the state commissioner of education or equivalent officer. In such a hearing the burden of proving that the requirements for exclusion under Standard 6.3 A. have been met should be on the local school authorities.

Commentary

Standard 6.3 A. absolutely prohibits the exclusion of a student from regular school attendance for a period of time in excess of one school year. Standard 6.3 B. provides specific limitations on the most extreme sanction that can be employed by schools—exclusion from regular school attendance for a period of time between one school month and one school year. This sanction should be employed only as a last resort in those very few cases where there is no other mechanism available for protection of the school. The extreme effect of the sanction of long-term exclusion from school also requires that the underlying facts be determined by an official who is not employed by or responsible to the local school authorities. The standard recommends a hearing before the state commissioner of education, because, while maintaining the necessary independence from the local authorities, the commissioner is still within the educational structure and thus able to use his or her expertise in the area to provide a hearing suited to the needs of this structure. State school officers are provided for in all states by their constitutions or statutes, and in many states already perform similar judicial functions as an alternative to, or in addition to the court system. Appeals from the decision of the commissioner to the state courts under this standard would be allowed as provided for by state law pertaining to other decisions of the commissioner.

It should be noted that the procedure required by Standard 6.3 B. is in addition to, and not in lieu of, the hearing before the local school authorities provided for in Part V of these standards. Before turning to the state commissioner, local school authorities must face the difficult determination required by Standard 6.3 A. The purpose of Standard 6.3 B. is to afford further protection for a student's right to attend school, not to allow local school authorities to "pass the buck" for making the difficult decisions that they are charged to make.

The limitations on permanent long-term exclusion from schools contained in Standard 6.3 A. and B. is consistent with Standard 1.1 providing that students "*have the right to an education pro-*

vided at state expense." It is also consistent with the fact that permanent or long-term exclusion from school runs counter to the basic norm of universal public education embodied in the constitutions or laws of all states of the union.

The most obvious illustration of this norm is the existence of compulsory attendance laws in all states except Mississippi. Even Mississippi had such a law until 1956, when it was repealed, apparently in response to school desegregation fears. Perhaps even more significantly, the two other Southern states—South Carolina and Virginia—that also repealed their compulsory school laws in the 1950s, have now reinstated them. See S.C. Code Ann. § 21-757 (Supp. 1976); Va. Code Ann. § 22-275.1, and there is growing pressure for readoption of compulsory education in Mississippi. See Arons, "Compulsory Education: America in Mississippi," *SR/World*, Nov. 6, 1973, at 54. For compilations of state compulsory laws, see A. Steinhilber and C. Sokolowski, "State Law on Compulsory Attendance" (1966); Children's Defense Fund, "Children Out of Schools" 57 (1974).

In addition to these compulsory attendance laws there are state constitutional and legislative provisions that provide for universal public education. Every state constitution has a provision concerning public education mandating the legislature to establish and maintain a system of free public education. A number of these provisions explicitly state that these free public schools shall be open to all children in the state. Finally, pursuant to these constitutional mandates, state legislatures have established public schools that, in accordance with statutes, are usually open to all resident children between certain ages, with only narrowly drawn exceptions. The ages during which a child may go to school are generally much more inclusive than those during which he must go to school. In most states the compulsory attendance requirement is from seven to sixteen. The permissive age normally begins at age six and extends to age twenty-one. Thus the norm of universal public education is broader than the compulsory education mandate, including within its bounds all students who have a positive legal right to attend school. See A. Steinhilber and C. Sokolowski, *supra*, at 12; Children's Defense Fund, "Children Out of School" 57 (1974).

As stated by the California Supreme Court in *Ward v. Flood*, 48 Cal. 36, 50, 17 A.R. 405, 410 (1874):

> The advantage or benefit thereby vouchsafed to each child attending public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right—a legal right—as

> distinctively so as the vested right in property owned is a legal right, and as such is protected, and entitled to be protected by all the guarantees by which other legal rights are protected and secured to the possessor.

See also in this connection *Brown v. Board of Education*, 347 U.S. 483, 493 (1954); Goldstein, "The Scope and Source of School Board Authority to Legislate Student Conduct and Status: A Nonconstitutional Analysis," 117 *U. Pa. L. Rev.* 373, 393-94 n. 74 (1969); S.R. Goldstein, *Law and Public Education* 13-14 (1974).

This norm of universal public education requires that exclusion of students from school attendance be restricted only to those cases in which it is absolutely necessary to do so. Among other things this should mean that before resorting to exclusion of a student, all reasonably feasible alternatives must be attempted. As stated in *Stansbury v. School Dist.*, 50 D & C 2d 348, 353 (C.P. Pa. 1970):

> Since the law in Pennsylvania requires compulsory education and compulsory attendance it would seem that a proper interpretation of the intent and purpose of this legislation would require the school board to do as it does with the slow learning group, that is, provide special classes with disciplinary rules designed to meet the special situation and with teachers cognizant of the problem and sympathetic to it. . . .

Suspension from regular attendance for a period of time less than one school month is considered in Standard 6.4 herein. The adverse effect on the student involved, as well as the limited effectiveness as a disciplinary tool, of any substantial separation of a student from school has been well set forth in Children's Defense Fund, "School Suspensions: Are They Helping Children," 37-61 (1975).

It has also been well stated by R.E. Phay and J. Cummings, "Student Suspensions and Expulsions," 7-8 (1970):

> Suspension or expulsion of a student is a serious action on the part of the school. (It can, however, be used in a context in which it is not punitive, *e.g.*, to reduce tensions or to provide more time to deal with a problem than is immediately available.) In only a few situations can it be justified. One justified occasion is when a student's continued presence on the school grounds endangers the proper functioning of the school or the safety or wellbeing of himself or other members of the school community. Another is that rare instance when the suspension offers the only effective way of both communicating to the student that his conduct was unacceptable and emphasizing to his parents that they must become immediately involved and should accept a greater

> responsibility in helping the student meet school standards for acceptable conduct. When either of these situations exists, the student should be removed from the school. When neither exists, other ways of dealing with the problem should be sought.
>
> School separation is a poor method of discipline. Students who misbehave usually are students with academic difficulties, and removal from the school almost inevitably adds to their academic problems. Sometimes expulsion is precisely what a delinquent student desires. Also, as the school loses contact with a student and loses its opportunity to work with him to eliminate his antisocial behavior, he may continue his misconduct in a way more dangerous to himself and others.
>
> Thus school suspension should be avoided if possible. For example, a problem child might be put into a special group where closer supervision and greater individual attention is available. Other appropriate community facilities like family service agencies, mental health clinics, or the public health service might be contacted and asked to work with the problem student. We also note that some children disrupt classes because they feel alienated or inadequate. For those children the school should try to offer learning in a way that builds self-confidence rather than destroys self-respect. Classroom instruction should have meaning and relevance to the child's situation. To accomplish this difficult goal, the school may need to make adjustments in the curriculum to provide a more productive experience for the child.

See also Larson and Karpas, "Effective Secondary School Discipline" (1963); J. Flowers and E. Bolmeier, "Law and Pupil Control" 10 (1964); New Haven Dixwell Legal Rights Foundation, "Report on School Suspensions."

Note also the following comment on the inadequacy of expulsion on the university level:

> The most pervasive disability of university punishment is the absence of any satisfactory sanction that a university can bring to bear as a punishment. The traditional form of university punishment—exclusion—is at the same time both too mild and too harsh to support a system of punishment that effectively serves the prescribed goals. It is too mild to satisfy the resentments of those who are offended by truly serious misconduct, such as arson or substantial violence to persons. Such matters must be handled by conventional social punishment, whatever the use made of university sanctions. At the same time, exclusion from the university, even for lesser offenses, is inadequate to interrupt the unwanted behavior. While imprisonment at least puts the wrongdoer out of reach, exclusion does not have thateffect; the excluded student is free to remain in the vicinity, and is likely to do so if he is really bent on further mischief. Indeed, by relieving the wrongdoer of academic

responsibility, the university can be giving him more time to devote his energy to his harmful activities.

Exclusion is equally too harsh in important respects. First, even though exclusion fails to sever the relations that encourage the unwelcome behavior, it does sever those that might operate to engage the wrongdoer in useful activity. All our experience indicates that young people who continue with their academic efforts will probably find some useful occupation eventually. But what is to become of the expelled or suspended student who is cut off from progress toward utility? Is it reasonable to assume that he will find a nice, warm steel mill where he can perform day labor and repent his sins? Or will he join the street people? In dealing with prisoners or parolees, our public institutions make every effort to interest convicts in study as a means of rehabilitation. A judge who sentenced a criminal for a suspended term on condition that the convict abandon his studies and spend his time in the streets would rightly be thought mad and impeached. Yet that is precisely what a university must do when it resorts to exclusion as a means of punishment. Carrington, "Civilizing University Discipline," 69 *Mich. L. Rev.* 393, 398 (1971). See also Van Alstyne, "The Student as University Resident." 45 *Denver L. J.* 582 (1968).

The basis for the restrictions imposed by these standards on permanent or long-term exclusions from school, also requires school authorities, courts, other local, state, and federal government officials, parents and citizen groups to be alert to the problem of students being excluded from school, or "pushed out," by informal pressures that result in "voluntary withdrawals" rather than by the use of formal expulsions. See Children's Defense Fund, "Children Out of School" 118–120 (1974); Southern Regional Council & R.F. Kennedy Memorial, "The Student Pushout, Victim of Continued Resistance to Desegregation" (1973). Such processes should never be allowed to circumvent the requirements of these standards.

Additionally, as well documented by the report of the Southern Regional Council and the R.F. Kennedy Memorial and the two reports of the Children's Defense Fund cited in this commentary, a grossly disproportionate number of students excluded from school, either by informal means, or formal methods of expulsion or suspension, consist of members of minority groups. See, in particular, Children's Defense, "School Suspensions: Are They Helping Children?" 63–78 (1975). All segments of government and society must act so as to preclude any school's expulsion or suspension policy practice from being racially discriminatory. *Cf. Larry P. v. Riles*, 343 F. Supp. 1306 (N.D. Calif. 1972).

6.4 A. No student should be suspended from regular school attendance unless the student's continued presence in school presents a demonstrable threat of harm to students, or other persons on school premises, property, or to the educational process, and that threat cannot be eliminated by other, less restrictive means.

B. Suspensions should not exceed in duration the time that is necessary to accomplish the purposes of the suspension.

Commentary

Exclusions and suspensions in excess of one school month are treated in Standards 6.3 A. and B. Standards 6.4 A. and 6.4 B. thus are addressed to suspensions that are shorter in duration than one school month. Yet these shorter suspensions have many of the same legal and pedagogical consequences of a permanent or long term exclusion. It is on this basis that these standards permit such suspensions only if there exists a demonstrable threat of harm to students or others on school premises, property, or the educational process, and the threat cannot be eliminated by other, less restrictive, means. While this is a lesser standard than is required for a long term exclusion under Standard 6.3 A., it is nevertheless substantial and is based on the premise that any school separation is significant and should not be imposed except where required by the circumstances. See generally the commentary to Standards 6.3 A.–6.3 B. and, in particular the quotation from R.F. Phay and J. Cummings in that commentary. See also Children's Defense Fund, "School Suspensions: Are They Helping Children?" 37–54 for a very good discussion of the harm caused to students by suspensions.

A recent nationwide study of suspensions showed that of the 24 million students surveyed, over one million or 4.2 percent of them were suspended at least once during the 1972–1973 school year. Children's Defense Fund, *supra*, at 55–61. These one million suspended students missed an average of four days per year or a total of over four million days. *Ibid.* The Children's Defense Fund also reported that their survey shows that most students are not suspended for the type of serious action that would justify suspension under Standard 6.4 A. As stated in the report:

> Many school systems keep exceedingly poor records of the reasons children are suspended. There are no national summaries of suspension data with reliable, uniform categories or definitions of offenses. Most school superintendents still do not know in detail why principals in their own districts suspend children. As a result, public imagination has

filled in this information vacuum with myths about why children are suspended. Specifically, many people assume that most children are suspended for (1) committing serious offenses involving violence to some other teacher or student or destruction of school property and (2) committing such serious disruptions that it is impossible for the educational process to continue. Neither are true.

In our own survey we asked children, and their parents the reasons causing their suspension. While 36.6 per cent were for 'fighting,' only 1.6 per cent involved fights with teachers or other school personnel. The overwhelming majority of suspensions, 63.4 percent, were for non-dangerous offenses.

Our findings that most children are suspended for nonviolent offenses not only confirm our collective experience over many years as lawyers in school desegregation cases, parents, teachers and community workers in and out of schools, they are corroborated by growing school official data from the school districts which do maintain records of suspensions. As the tables on the following pages show, dangerous or violent acts are low on the lists of reasons for suspension. In schools in very different places, with very different student populations, the major reasons for suspensions are for nonattendance, insubordination, or other minor infractions of school rules which could have been dealt with in ways other than exclusion. For example, in a recent meeting with Portland, Maine school officials and after examinations of their suspension records a year after we surveyed there, we still found that truancy and tardiness were the major cause of all secondary school suspension—85 percent. Smoking accounted for 30 to 62 percent of the suspensions in three Portland junior high schools. In one junior and in one senior high school in Portland only about 1.4 percent of the children were suspended for disruption and poor behavior.

A similar pattern of reasons for suspension existed in a San Francisco high school and in public schools in Prince Georges County, Maryland.

In Columbia, South Carolina, another CDF survey district, 47 percent of the suspensions during one month were for truancy and tardiness.

In Nashville, Tennessee, 68 percent of the suspensions during one year were attendance related and another 12 percent involved smoking.

During the first quarter of 1974–75 in a high school in DeKalb County, Georgia, more than 67 percent of the children were suspended for attendance problems and smoking. *Id.*, at 37-45.

See also the commentary to Standards 6.3 A. and B. as to suspensions for truancy and tardiness. Standard 6.4 A. would preclude suspensions for such insubstantial reasons. Examples of behavior for which suspension might be warranted would include possession of a dangerous weapon, serious vandalism, possession and/or distribution

of dangerous drugs, or violence against other students or teachers. Imposing suspensions only for this type of serious violation that is very disruptive of the educational process, or threatens the health and safety of others, is in line with the general frugality principle of these standards. See Standard 6.1 and commentary thereto. This should lead to more respect for and fewer violations of those more serious and important rules that remain.

Further, Standard 6.4 A. requires that alternative, less restrictive means be used, if possible, before the sanction of suspension is employed. Although the standard does not itself set forth such alternatives, a number of possibilities currently used by some school districts are set forth and discussed by the Children's Defense Fund, *id.*, at 95–108. These include traditional disciplinary tools such as after-school detention, cooling off periods in the principal's office, and class or school transfer, as well as more innovative devices such as behavior contracts, student ombudsmen, peer group counseling, and special in-school cooling off centers. In addition, more basic causes of student misconduct may be reached through the provision of greater alternative forms of education, including work-study programs. For a discussion of such alternatives, see *id.*, at 102–108. See also the quotation from Phay and Cummings in the commentary to Standard 6.3 *supra.*

Standard 6.4 B. is a corollary of 6.4 A. in requiring that no suspension should exceed the time necessary to effectuate the purposes of the suspension. Again, the premise is that unnecessarily long school suspensions are not useful as a disciplinary mechanism and harmful to the students involved. For the procedural requirements concerning a suspension see Part V.

6.5 When a student is suspended from regular school attendance for any period of time, the school authorities should provide the student with equivalent education during the period of the suspension.

Commentary

A student's right to education, as discussed in the commentary to Standards 6.3–6.4 as a basis for limitations on excluding students from school, also forms the basis of this standard's requirement that school authorities provide alternate forms of education in the rare instances when a student is suspended from regular school attendance. A school system's obligation should not be viewed as discharged by exclusion of a student even in the case where some exclusion is necessary.

This would appear to require a change from current practices in some school districts. The Dixwell Legal Rights Foundation, "Report on School Suspensions in New Haven" reported that of the suspended students it interviewed, 48 percent stayed home and played during their suspensions, 28 percent stayed home and studied, and 6 percent stayed home and worked. The report concluded in regard to the effects of the New Haven suspension arrangements as follows:

> Two points may be considered in regard to the effects of present suspension arrangements. The first has to do with the use of the suspension itself as a disciplinary technique. Granted that it could be helpful to teachers and other students to remove some students from the classroom, it would appear that the schools did not utilize these suspensions as constructively as they might have, for example by (a) contacting outside resources to work with the suspended student, (b) following up suspensions to judge their effectiveness, (c) trying to involve the parents in the disciplinary attempt, or (d) helping them deal with it.

It is particularly incumbent upon school authorities to provide compensatory education to those students who were suspended, and whose suspensions were later held to be invalid or unwarranted. In such cases all efforts must be made to put students in at least as good a position as they would have been absent the suspension. In some cases this may include free summer instruction and monetary compensation to the student for time lost from a summer job.

6.6 Academic sanctions should not be imposed on any student where the student's conduct involves a nonacademic disciplinary offense.

Commentary

The principal sanctions that are included under this standard are grade reductions, withholding of credits or diplomas, and exclusion from graduation ceremonies. There are academic disciplinary offenses for which these sanctions may be considered valid, subject to the usual standards of reasonableness. Usually, these offenses involve some sort of cheating on tests or exams. When the offense is nonacademic in nature, however, none of these sanctions should be imposed.

In *Valentine v. Ind. School District*, 191 Iowa 1100, 183 N.W. 435 (1921), the court ordered the school board to issue a diploma to a student who had been refused one because she refused to wear an "odoriferous" gown at the graduation ceremony. The case was decided on the ground that such conduct is totally unrelated to gradu-

ation and the receipt of a diploma, especially where the pupil had successfully completed the required course of study. Similar logic was used by the court in *Ladson v. Board of Education, Union Free School District*, 67 Misc. 2d 173, 323 N.Y.S.2d 545 (Sup. Ct. 1971), which held that a student who had successfully completed the school's course of study and was not a threat to the orderliness of the graduation could not be excluded from the ceremony (let alone be denied a diploma) because of a previous incident where the student had struck and threatened the principal.

Even more fundamentally, grade reductions should never be used as a means of punishment for any nonacademic offense. The New Jersey Commissioner of Education in a well reasoned opinion has determined that local school authorities may not use a zero grade for tests and classwork on days when the student was either truant or absent without a valid excuse. *Minorics v. Board of Education*, N.J. Comm. Educ. Dec. (March 24, 1972). The decision noted that such sanctions bear at best a tenuous relationship to the host function of keeping good order and discipline allegedly served by the sanction. As the decision noted, these offenses are more appropriately dealt with by other types of sanctions.

PART VII: INTERROGATION OF STUDENTS

The standards of this Part deal with the interrogation of students and the following Part deals with searches of students. Although both this and the following chapters assume that law enforcement in the public schools is the exception rather than the rule, both chapters also assume that law enforcement activities will occasionally occur in school. Neither chapter deals with the more extensive mingling of school and law enforcement activities that results when police officers are stationed in and around a school on a continuing basis. Yet it is clear that in some situations—some schools, some school systems—crime within the school is not an isolated incident but a pervasive condition. See Grealy, "Criminal Activities in Schools: What's Being Done About It?" 58 *National Association of Secondary School Principals* 73 (1974); McGowan, *Crime Control in Public Schools: Space Age Solutions*, 57 National Association of School Superintendents Bulletin 43 (1973); Foster, *To Reduce Violence: The Interventionist Teacher and Aid*, Phi Delta Kappan, at 59 (September 1971); Buss, *Legal Aspects of Crime Investigation in the Public Schools*, at 6-10 (NOLPE Monograph 1971). Consequently, in some circumstances it will be appropriate to respond to

that condition by placing police officers on public school premises. But such circumstances are truly extraordinary and any police presence ought to be strictly limited to such occasions when there is a clear basis for concluding that the police will actually help. Furthermore, it is essential that the possible impact of stationing police officers in a school on students and the educational process be taken into account and, as appropriate, weighed against any advantages of a police presence.

Because of the relative novelty of having police in schools and the absence of anything approaching a principled basis for considering the question, these standards do not treat this problem affecting juvenile justice in the public schools. Plainly the silence of the standards does not in any way suggest that the problem is unimportant or that "standards" are not needed to deal with the problem. On the contrary, standards clearly are needed, and continuing attention should be given to the development of appropriate controls such as requiring a decision by a court, a neutral outsider, as a condition precedent to lengthy police posting in school, somewhat akin to a judicial determination that probable cause exists for the issuance of a carefully tailored warrant to search.

Several basic assumptions support the standards proposed in this Part on interrogations and Part VIII on searches. First, school is a place to which students are permitted and required to come for purposes of being educated. The educational process is most likely to thrive in an atmosphere of freedom and openness. Positive relationships between students and their teachers, administrators, and counselors will foster such a free atmosphere. A positive relationship for these purposes does not necessarily mean a confidential relationship, but it does mean a relationship built on an understanding that the authority of professional school employees over students is based upon the school's educational purpose and the professional employee's educational functions. Second, children are not assembled in school for the purpose of facilitating law enforcement efforts. By the same token, their collection for educational purposes should not be exploited for law enforcement purposes. Third, "socialization" is commonly accepted as part of the educational process of the public schools. But an acceptable socialization process should encourage commitment to basic values rather than expedient achievement of immediate goals. If students are subjected to law enforcement efforts that would be unconstitutional or otherwise inappropriate outside school, the educational process will have been distorted to antisocial purposes.

Fourth, insofar as professional school employees use their posi-

tions over and relationships with students to engage in law enforcement activities, they will tend to undermine the educational process of the school and their authority to carry out their educational functions. Moreover, when they perform law enforcement functions, they intrude into the individual interests of students that are deserving of protection against the police functions of the state. Neither the intrusion nor the need for protection can be distinguished by reason of the fact that it is the school official rather than a regular police officer performing in the same manner. At the same time, however, the ambivalent role of persons who operate both as law enforcement officers and educators is likely to result in confusion and ambiguity in the minds of all concerned—students, educators, and police. Furthermore, those persons trained and experienced in law enforcement work are likely to perform that work more effectively than professional educators, except insofar as the educator has legal license to perform law enforcement tasks that are blocked by law when performed by the police. It is precisely such situations in which the temptation is great for the police to accomplish indirectly, through school authorities, what they cannot do directly.

Fifth, in addition to the fact that they are primarily educational institutions, schools are unique institutions in that, on the one hand, they involve a massing of large numbers of young people in one location under tight control and, on the other hand, the student presence represents an extraordinary limitation of the liberty that would otherwise exist for the student and the student's parent. The massing of children requires that measures be taken to preserve order so that the purpose of their presence—education—may be achieved. Nevertheless, the restraint on the children's liberty as a result of which they are assembled in school requires that close attention be given to protecting the individual rights of the students. An accommodation of these two needs requires that any school rules for maintaining order be narrowly drawn and implemented to avoid unnecessary invasion of personal liberty. In particular, these school rules should be confined to immediate school needs and should not spill over to broader societal goals involved in enforcing the criminal law. While this does not mean that students are immunized from the general law because they are students or in school, it does mean that student status and school attendance should not result in a special vulnerability.

Taken together, these several premises suggest that legal principles applicable to law enforcement officers should be generally applicable to teachers, administrators, and other school officials when these

officials perform law enforcement functions. In this Part concerning the interrogation of students the proposed standards stop just short of treating identically school officials performing law enforcement functions and regular law enforcement officers, in order to give somewhat greater leeway to school officials in performing their school administrative tasks. Somewhat similarly, these standards treat some school disciplinary sanctions as comparable in seriousness, and thus deserving comparable protection, to criminal sanctions. But here, too, a distinction is drawn, and the standards stop short of affording a full measure of criminal law protection to students interrogated with respect to conduct leading only to serious discipline. As will be evident, drawing these two types of distinctions, which are admittedly debatable, entails certain costs by increasing the complexity of the resulting standards.

7.1 If an interrogation of a student by a police officer concerning a crime of which the student is a suspect occurs off school premises and not in connection with any school activity, the validity of the interrogation should in no way be affected by the student status.

Commentary

This standard has a very limited scope and purpose. It states that a juvenile is not in any way entitled to a special immunity or placed under a special disability by reason of the fact that the juvenile is a public school student. Therefore, an interrogation that is not in any way school-related other than by reason of the fact that the person interrogated is a public school student should be treated legally like any other interrogation of a juvenile.

7.2 The interrogation of a student by a police officer for any purpose should not take place in school, or away from school when the student is engaged in a school related activity under the supervision of a school official, except:

A. when it is urgently necessary to conduct the interrogation without delay in order to avoid,

1. danger to any person,

2. flight from the jurisdiction of a person who is reasonably believed to have committed a serious crime, or

3. destruction of evidence; or

B. when there is no other reasonably available place or means of conducting the interrogation.

Commentary

This standard is not designed primarily for the protection of students suspected of crime or in the custody of the police, although it applies to student suspects (or in custody) as well as to students interrogated merely for investigatory purposes. The fundamental assumption of Standard 7.2 is that carrying out law enforcement activities in the school is likely to be disruptive of the educational process and tends to be exploitive of the presence of students who have been brought together for educational purposes. Standard 7.2 recognizes, however, that occasions will arise when interrogations of students in school or engaged in school related activities will be appropriate. The special justifying circumstances seem likely to occur only rarely. The specified circumstances might operate to permit an interrogation of either a student who was a suspect or a student who was merely thought to have information; and they might operate to justify interrogations in connection with either school related or nonschool related crimes. The critical inquiry, in any event, focuses on the presence of urgent circumstances demanding immediate investigation or the absence of a nonschool setting in which a needed interrogation can be conducted. The latter exception in particular would be extremely rare. It might occur, for example, if the student's home were the only alternative physical location but an interrogation in the home would be dangerous to the student. Among the circumstances justifying urgent action is the avoidance of danger to persons. Arguably, danger to property could be included as well, but most serious threats to property—larceny, theft, arson—also involve personal danger.

Although Standard 7.2 does not assume the existence of conditions that would call for the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966) (whether those conditions are best characterized in terms of custodial investigations or a person who is the focus of investigation), it is noteworthy that every student in school (or engaged in school activities) is in the custody of school officials and subject to a restraint of personal freedom. Consequently, Standard 7.2 is reinforced by the fact that, due to the coercive setting, any statement given by any student in school custody may be of questionable reliability. See *Miranda v. Arizona*, 384 U.S. 436, 467 (1966); *United States v. Fowler*, 496 F.2d 1091 (7th Cir. 1973); *Thieriault v. State*, 66 Wis. 2d 33, 223 N.W.2d 850, 854 (1974); *In re K.W.B.*, 500 S.W.2d 275 (Mo. Ct. App. 1973). See generally Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 *Iowa L. Rev.* 739, 777–78 (1974).

Standard 7.2 is, most importantly, only a threshold barrier; if it is

satisfied—*i.e.*, if an interrogation is permitted at all—the validity of the interrogation will be determined by subsequent standards.

The prohibition of this standard cannot be qualified or altered by consent or waiver. See Standard 2.2 E.

As used in this standard, "interrogation" would not include any conversations that might include questions between a student and a police officer who appears in school in a noninvestigatory capacity, such as might occur under a "police-officer-as-friend" program. On the other hand, any questioning in the course of "undercover" police work by regular police officers or police informants would be interrogations covered by these standards. Similarly, any questioning of a student that is investigatory in nature would be an interrogation without regard to the official designation of the role of the police officer asking the questions. Accordingly, the fact that a police officer was in school as a "friend" (or "advisor" or some other non-law enforcement capacity) would in no way immunize from these standards that officer's questions designed or used to learn about criminal activity.

7.3 A. When, pursuant to Standard 7.2, a police officer interrogates a student who is on school premises or engaged in a school activity and who is suspected of a crime, the student should be advised of this suspicion in terms likely to be understood by a student of the age and experience involved; should be advised of the right to counsel (including state-appointed counsel if the student is indigent), the right to have a parent present, and the right to remain silent; and should be advised that any statement made may be used against the student.

B. If, pursuant to Standard 7.2, a police officer interrogates a student who has not theretofore been suspected of conduct covered by Standard 7.3 A. but during such interrogation information is obtained, either from that student or from any other source, that would lead a reasonable person to suspect the student of such conduct, the interrogation should immediately thereafter be governed by Standard 7.3 A.

Commentary

This standard entails a situation in which it should be concluded that the so-called "*Miranda* warnings" must be given to prevent students from giving potentially unreliable evidence against themselves and to prevent the police from utilizing a coercive situation to extract damaging statements from the student. It has already been

ordinarily places the student in a coercive setting in which the student is likely to feel the absence of personal freedom that underlies the Supreme Court's *Miranda* decision. It has also been observed that children are particularly susceptible to coercive pressure. *In re Gault*, 387 U.S. 1, 41, 55 (1967); *Gallegos v. Colorado*, 370 U.S. 49, 54-55 (1962); *Haley v. Ohio*, 332 U.S. 596 (1948). But *cf. In re Carter*, 20 Md. App. 633, 318 A.2d 269 (1974), *aff'd sub. nom. In re Spalding*, 273 Md. 690, 332 A.2d 246 (1975). Moreover, juveniles have generally been held to be entitled to "*Miranda* warnings" before they can be interrogated in the prehearing juvenile process. See *United States v. Fowler*, 476 F.2d 1091, 1092 (7th Cir. 1973); *Lopez v. United States*, 399 F.2d 865, 866-67 (9th Cir. 1968); *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138, 140 (1972); *In re Rust*, 53 Misc. 2d 51, 58-60, 278 N.Y.S.2d 333, 340-41 (Fam. Ct. 1967). But *cf. Clemons v. State*, 317 N.E.2d 859, 866 (Ind. 1974); *In re Carter*, 20 Md. App. 633, 318 A.2d 269 (1974). Furthermore, the absence of the parent has frequently been treated as increasing the likelihood that the student's statement was not freely given. See *West v. United States*, 399 F.2d 467, 469 (5th Cir. 1968), *cert. denied*, 393 U.S. 1102 (1969); *In re S.H.*, 61 N.J. 108, 115-16, 293 A.2d 181, 184-85 (1972); *State v. R.W.*, 115 N.J. Super. 286, 295-96, 279 A.2d 709, 714 (1971), *aff'd*, 61 N.J. 118, 293 A.2d 186 (1972); *Lewis v. State*, 259 Ind. 431, 288 N.E.2d 138 (1972).

Standard 7.3 A. requires age-oriented warnings calculated to do an effective and meaningful job of advising children of their rights. See Ferguson and Douglas, "A Study of Juvenile Waiver," 7 *San Diego L. Rev.* 39, 51 (1970); Note, *U. Ill. L. Forum* 625, 631 (1972). This standard is not intended to diverge from the standards applicable to *Miranda* warnings for juveniles generally. See also standards on consents and waivers, Part II.

Standard 7.3 B. is of fairly limited significance. It makes clear what would probably be necessarily inferred in any event—that an entire interrogation does not continue to be free of the protection provided by 7.3 A. and related standards simply because the student is not a suspect at the beginning of questioning. This standard should also give rise to an inference that, if information developed during an interrogation should bring 7.3 A. into operation but steps are not taken to satisfy that standard, the student was probably suspected of crime from the beginning and, therefore, Standard 7.3 A. was violated throughout. If, on the other hand, suspicion is triggered during an interrogation and Standard 7.3 A. is thereafter satisfied, the evidence obtained up to the point of triggering would have been validly

obtained. Of course a standard such as this one may seem to invite disagreement and uncertainty (and perhaps a temptation to dispute what information was received when). Occasionally, this problem will be eliminated when the receipt of concrete information can be pinpointed. But there is no avoiding the problem except by a rule that would be too rigid to be satisfactory.

7.4 A. If a school official interrogates a student suspected of a crime

1. at the invitation or direction of a police officer,

2. in cooperation with a police officer, or

3. for the purpose of discovering evidence of such conduct and turning that evidence over to the police, the interrogation should be subject to all of the requirements of a police interrogation under Standard 7.3 A.

B. In connection with any interrogation of a student by a school official that leads directly or indirectly to information that results in criminal charges against the student, it should be presumed in the absence of affirmative proof to the contrary that each of the characteristics identified in Standard 7.4 A. 1.-3. apply to the school official's interrogation.

Commentary

Standard 7.4 A. involves two distinct situations. First, when school officials actively join the police in law enforcement activities, they should be treated in every respect as if they were police officers. This conclusion seems clear as a matter of principle although the most direct authority is provided by search rather than interrogation cases. See cases cited in Part VIII, *infra.* The clearest example of such law enforcement activity is provided when an educator acts directly as an agent of the police. But the standard treats the principle as operating in the slightly less clear situations in which the educator is simply invited to act by the police or the two are acting jointly without clear specification that the educator has undertaken to assist the police. Second, this standard also applies when a school official—acting alone on his or her own initiative—is attempting to carry out a law enforcement function. It is the assumption of this part of the standard that the effect on the student and the need for protection is not different in substance simply because the school official is a volunteer.

Consistent with this assumption it is arguable that the standard

should cover educator interrogations if criminal evidence is obtained and turned over to the police without regard to the purpose of the educator in questioning the student in the first place. This argument is strengthened by the fact that a student may feel as coerced by an education setting as a police environment but may, at the same time, be less likely to appreciate the jeopardy of making statements to a school official than would be the case if the statement were asked to be made to a police officer. But the standards reject this argument because there may be legitimate and distinct school-related purposes for questioning a student. As Standard 7.5 indicates, the student is given somewhat less protection in these noncriminal situations.

It may also be argued with some force that the focus on the educator's *purpose* in Standard 7.4 A. (and in 7.5) is an invitation to controversy. Although there is no complete answer to this criticism, it is an inevitable consequence of concluding *both* that crime-focused interrogations ought not be subjected to a lower standard simply because made by an educator *and* that lower standards should apply to education-focused interrogations. (See also the commentary to Standard 7.5.) The problem created by introducing a proof element is partially solved by the presumption created by 7.4 B.

Standard 7.4 B. adds to 7.4 A. by a burden of proof allocation. This standard is important and likely to be controversial. Without it, the protection afforded by 7.4 A. is likely to be largely illusory because the facts that bring 7.4 A. into play would ordinarily be known only by the school officials and the student, consequently, would seldom be able to prove their existence. On the other hand, it will be argued that 7.4 B. forces the government to prove a negative, and there is no doubt substance to this criticism—which would be particularly weighty in connection with attempting to disprove 7.4 A. 3. Nevertheless, there are at least three very good reasons why 7.4 B. should be adopted. First, the government's difficult burden of proof is completely avoidable if the protections referred to in 7.3 A. are included in school official interrogations. Second, even if the circumstances that trigger the application of 7.4 A. are not present, the reasons for providing the protections required in connection with criminal law interrogations will often be applicable to educator interrogations although arguably these reasons are somewhat diluted if the investigation does not focus on criminal conduct and liability. See *Lopez v. United States*, 399 F.2d 865, 866 (9th Cir. 1968). Third, as already suggested, any system that gives school officials a significantly freer hand than the police in questioning students will inevitably create serious temptations for the police to avoid legal

restraints through covert arrangements with school officials.

It should be noted that, when standards 7.4 A. 3. and 7.4 B. are read together, educator interrogations resulting in incriminating evidence are presumed to have been made for the purpose of both discovering such evidence and turning over that evidence to the police. In many instances school officials will not have thought through the sequence of events that will follow their investigations and discovery of evidence, even though they have had previous police contacts and even though they are partly motivated by their sense of public duty in helping the police. In fact, it is likely that there will be no clear line between the school official's desire to help the police and the desire to attend to strictly educational concerns. Especially because of the significant overlap between criminal conduct and school misconduct, the presumption should cause any ambiguity in the educator's purposes to be resolved by treating the educator's interrogation as a police interrogation.

7.5 A. If a school official interrogates a student who is suspected of student misconduct that might result in a serious disciplinary sanction, the student should be advised of this suspicion in terms likely to be understood by a student of the age and experience involved and should be advised of the right to have a parent or other adult present and the right to remain silent.

B. If, under Standard 7.5 A., the sanction that might result from the suspected misconduct includes expulsion, long-term suspension, or transfer to a school used or designated as a school for problem juveniles of any kind, the interrogation should be subject to all of the requirements of a police interrogation under Standard 7.3 A.

Commentary

These two standards utilize the definition of serious disciplinary sanctions (see Standard 9.4 *infra*), and subject interrogations that focus on misconduct potentially leading to such sanctions to restrictions comparable to but less than those applicable to interrogations of criminal suspects. If "ultra" serious sanctions are threatened, the interrogation is treated as an interrogation of a criminal suspect. Despite the fact that only some disciplinary misconduct is equated to criminal misconduct for purposes of these standards, it is assumed that many of the same concerns apply to interrogations focusing on criminal and disciplinary misconduct. The consequence to the stu-

dent of a serious disciplinary sanction is likely to be as detrimental or at least to entail a deprivation of liberty of comparable gravity. The threat of overreaching by the interrogator and the corresponding need for protection in a coercive setting would be similar to that resulting from crime-focused interrogations. Because there is a substantial overlap between serious disciplinary misconduct and crime, any attempt to separate the two is likely to be administratively unworkable and to invite circumvention. Standard 7.5 A.—like Standard 7.3 A.—has the weakness of leaving open the possibility that the protection provided may be circumvented by interrogations that are conducted on the pretense that the questioner has purposes other than those reached by this standard.

7.6 Any evidence obtained directly or indirectly as a result of an interrogation conducted in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in the imposition of either criminal or disciplinary sanctions against the student.

Commentary

The exclusionary rule adopted in Standard 7.6 is encompassed by the standards in Part V insofar as school discipline proceedings are concerned, but only the present standard applies to criminal proceedings. Standard 7.6 adopts the fruit-of-the-poisonous-tree approach, barring evidence obtained by invalid interrogations both "directly" or "indirectly."

The exclusion applies to *all* disciplinary proceedings, not just to those that threaten "serious disciplinary sanctions." This broad scope of the exclusionary rule may be of relatively little significance both because minor discipline cases are not likely to result from illegal interrogations and because the minor discipline cases have reduced consequences for all concerned. Still, the principle seems applicable to all such cases.

Although Standard 7.6 permits a student to consent to the admission of excludible evidence (see Part II for standards covering consents and waivers), *explicit* consent is required to make clear that the mere failure to object will not make the evidence admissible.

7.7 If an interrogation of a student by a school official or police officer is conducted without providing the student the safeguards specified in Standard 7.5 A., evidence obtained directly or indirectly as a result of that interrogation should be inadmissible (without the

student's express consent) in any proceeding that might result in the imposition of either criminal or serious disciplinary sanctions against the student so interrogated.

Commentary

It will appear at first that this standard is inconsistent with several standards that precede it. And it is true that the adoption of 7.7 would considerably reduce the importance of several other standards. But Standard 7.7 adds to rather than undercuts other standards. Under other standards, student protections related to interrogations turn on whether the student is suspected of criminal or serious school misconduct. When such a suspicion exists, the student is entitled to receive certain specified safeguards, varying with the level and kind of misconduct involved. If the required safeguards are not provided, no evidence that results from the interrogation can be used to jeopardize the student. In addition, although it is not specified in the standards, those violating the student's rights may be subjected to job discipline, such as discharge, or to civil liability. *Cf. Wood v. Strickland*, 420 U.S. 308 (1975); *Potts v. Wright*, 357 F. Supp. 205 (E.D. Pa. 1973). Standard 7.7 is a different type of exclusionary rule. It does not stem from a violation of rights in gathering evidence, but rather holds the evidence-gatherer to uses of the evidence consistent with the ostensible purposes prompting the interrogation.

Standard 7.7 is plainly a departure from existing law. Ordinarily, if an interrogation violates no applicable standards, the evidence obtained from it can be used in any way. Thus, under existing law, if a student not suspected of conduct covered by Standard 7.3 or 7.5 were interrogated but evidence of such conduct obtained, the evidence could be used against the student in a criminal (and, a fortiori, a disciplinary) proceeding. Standard 7.7 takes a different tack. It says, in effect, that if the safeguards of an interrogation that focuses on serious misconduct are not heeded because such a focus is not present, the use of any evidence obtained should be restricted to the more modest objectives of the inquiry. Or, to put the same point slightly differently, the government should be forced to use any information obtained in a manner commensurate with the safeguards it was willing to provide.

At a time when the exclusionary rule is under a considerable cloud, Standard 7.7 is likely to seem extreme. It may be justified on three distinct grounds. The first, and the overwhelmingly most important ground, is prophylactic. It is designed to reduce drastically

any temptation to employ the pretense of innocent purposes in order to obtain damaging evidence from persons suspected of serious misconduct. Although it is arguable that the presumption of Standard 7.4 B. achieves this purpose in large measure with respect to interrogations by educators, the presumption does so only imperfectly and only as thoroughly as the courts insist upon substantial proof. Second, 7.7 will not preclude the admission of any evidence in any situation if safeguards are provided, and there is often a clear benefit in providing the safeguards even when serious misconduct is not suspected. Third, the reasons that safeguards are not required for all interrogations is that there are many circumstances in which a serious threat to student liberty is not presented, school officials have some legitimate interest in knowing information that a student can provide, and informal conversation and inquiries are desirable. It does not seem an excessive cost of protecting such an informal process to insist that its uses be closely linked to its needs.

Even though Standard 7.7 applies to police as well as educator interrogations, it limits admissibility of evidence by the lesser school discipline standard rather than the police standard. This approach is taken primarily for simplicity and partly because the lesser standard seems adequate to prevent subversion of the other standards of this Part.

PART VIII: SEARCHES OF STUDENTS AND STUDENT AREAS

The Supreme Court's decision in *Goss v. Lopez*, 419 U.S. 565 (1975); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); and *In re Gault*, 387 U.S. 1 (1968), would seem to suggest that students in public school are "people" protected by the fourth amendment from "unreasonable searches and seizures." See generally Buss, "Searches of Students By School Officials in Public Schools," 20 *Inequality in Educ.* 5 (1975); Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 *Iowa L. Rev.* 739 (1974). Phay and Rogister, "Searches of Students and the Fourth Amendment" 5 *J. Law & Educ.* 57 (1975). The courts have not generously applied the fourth amendment's protection against searches conducted by or with the aid of school administrators. Compare Buss, *supra*, 20 *Inequality in Educ.* 14, n. 1, with *id.* n. 6; *People v. D*, 34 N.Y.2d 483, 315 N.E.2d 466, 358 N.Y.S.2d 403 (1974). *Cf. Smyth v. Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975). But the courts have stated or assumed that that amendment does apply to students in public schools. See *e.g.*, *In re W.*, 29 Cal. App. 3d 777, 780, 105 Cal. Rptr. 775, 777 (1973); *In re G.C.*, 121 N.J. Super.

108, 112-13, 296 A.2d 102, 104-05 (1972); *People v. Overton*, 24 N.Y.2d 522, 525-26, 249 N.E.2d 366, 368, 301 N.Y.S.2d 479, 481-82 (1969). But *cf. In re Donaldson*, 269 Cal. App. 2d 509, 511-12, 75 Cal. Rptr. 220, 221-22 (1969) (treating school administration search as by private person); *State v. Baccino*, 282 A.2d 859, 871 (Del. Super. 1971) (qualified fourth amendment rights). In remanding *People v. Overton*, *supra*, for reconsideration the Supreme Court gave no indication that students or children were not entitled to fourth amendment rights. See *Overton v. New York*, 393 U.S. 85 (1968). *Accord: State v. Mora*, 307 So. 2d 317 (La.), *vacated and remanded*, 423 U.S. 809 (1975). At the same time, except insofar as police searches are validated through the special authority of school officials, there is no suggestion in any of the cases that the police have special immunity to make warrantless searches in public schools without some facilitating action taken by school officials. But *cf. In re Boykin*, 39 Ill. 2d 617, 237 N.E. 2d 460 (1968) (reasonableness of police action affected by educator's judgment of danger).

The standards in this chapter are clearly derived from constitutional principles. But in many respects they go beyond what the courts have interpreted the fourth amendment to require in the school context. The assumptions outlined at the beginning of Part VII underlie the standards in this part as well, and the standards in this part follow a pattern very similar to that of Part VII. In general, the standards on searches of students and student areas assume that neither school nor student status is occasion for a unique vulnerability or immunity of the student's right to privacy; that educators who perform police work should be held to standards applicable to the police; that the threat of serious disciplinary sanctions should result in protections against unreasonable searches comparable to those applicable in the case of searches for evidence of crime; and that educators need not be held to precisely the same standards as police officers in all instances. It seems worth repeating here that the potential violation of the student's privacy is, at most, only marginally diminished by reason of the fact that a search is conducted by an educator for evidence of school misconduct instead of by a police officer for evidence of criminal misconduct. Thus, all searches by school officials might reasonably be held to exactly the same standards as those governing police searches. As was true of the previous Part, distinctions in the treatment of the conduct of police officers and educators are adopted by these standards at the cost of a substantial increase in complexity.

8.1 The limits imposed by the fourth amendment upon searches and seizures conducted by police officers are not qualified or alleviated in

any way by reason of the fact that a student is the object of the search or that the search is conducted in a school building or on school grounds.

Commentary

This standard is comparable to Standard 7.1 concerning interrogations in that both 7.1 and 8.1 indicate that student status does not create a special vulnerability or immunity. The standards on searches are not parallel to the interrogation standards in one important particular, however. With respect to interrogations, the standards assume that there is rarely a strong reason for the police to interrogate a student in school rather than somewhere else, but that there would be some temptation to do so because the student is already being held. With respect to searches, by contrast, the standards assume that there will often be a strong reason to search a student (and, even more clearly, a student area) in school when the information the police have relates to something the student possesses at the time the student is in school. This difference leads to two distinctions between the interrogation and search standards. First, unlike interrogations under 7.1, Standard 8.1 includes searches in school in its general rule disclaiming special treatment of students with respect to police conduct. Second, there is no provision on searches in Part VIII comparable to the general bar to in-school interrogations contained in Standard 7.2.

8.2 A search by a police officer of a student, or a protected student area, is unreasonable unless it is made:

A. 1. under the authority and pursuant to the terms of a valid search warrant,

2. on the basis of exigent circumstances such as those that have been authoritatively recognized as justifying warrantless searches,

3. incident to a lawful arrest,

4. incident to a lawful "stop," or

5. with the consent of the student whose person or protected student area is searched; and

B. in a manner entailing no greater invasion of privacy than the conditions justifying the search make necessary.

Commentary

Standard 8.2 makes explicit what is necessarily implied by 8.1. In

view of the fact that fourth amendment doctrine is riddled with exceptions and qualifications, Standard 8.2 also plays a useful role in limiting the effect of any such evolutionary dilution. In fact, by incorporation through subsequent standards (8.6 A. and 8.7 B.), Standard 8.2 applies to certain searches by educators even though it is not clear under the decided cases that the fourth amendment would be so interpreted. Furthermore, 8.2 introduces the "protected student area" concept, to be defined in Standard 8.3, and this concept eliminates possible arguments about applicability of the fourth amendment to certain areas.

8.3 As used in these standards, a protected student area includes (but is not limited to):

A. 1. a school desk assigned to a student if

a. the student sits at that desk on a daily, weekly, or other regular basis,

b. by custom, practice, or express authorization the student does in fact store or is expressly permitted to store, in the desk, papers, equipment, supplies, or other items that belong to the student, and

c. the student does in fact lock or is permitted to lock the desk whether or not

(1) any school official or a small number of other students have the key or combination to the lock,

(2) school officials have informed the student or issued regulations calculated to inform the student either that only certain specified items may be kept in the desk or that the desk may be inspected or searched under specified conditions,

(3) the student has consented to or entered into an agreement acknowledging the restrictions described in Standard 8.3 A. 1. c. (1) and (2), above, or

(4) the student has paid the school for the use of the desk;

B. 1. a school locker assigned to a student if

a. the student has either exclusive use of the locker or jointly uses the locker with one or two other students and

b. the student does in fact lock or is permitted to lock the locker whether or not

(1) school officials or a small number of other students have the key or combination to the lock,

(2) school officials have informed the student or issued regulations calculated to inform the student either that only certain specified items may be kept in the locker or that the

locker may be inspected or searched under specified conditions,

(3) the student has consented to or entered into an agreement acknowledging the restrictions described in Standard 8.3 B. 1. b. (1) and (2), or

(4) the student has paid the school for the use of the locker;

C. 1. a motor vehicle located on or near school premises if

a. it is owned by a student, or

b. has been driven to school by a student with the owner's permission.

8.4 As used in these standards, a search "of a student" includes a search of the student's

A. body,

B. clothes being worn or carried by the student, or

C. pocketbook, briefcase, duffel bag, bookbag, backpack, or any other container used by the student for holding or carrying personal belongings of any kind and in the possession or immediate proximity of the student.

Commentary

Although physical areas such as lockers and desks have received fourth amendment protection, see *Katz v. United States*, 389 U.S. 347 (1967) (telephone booth); *Stoner v. California*, 376 U.S. 483 (1964) (hotel room); *Rios v. United States*, 364 U.S. 253 (1960) (taxicab); *United States v. Blok*, 188 F.2d 1019 (D.C. Cir. 1951) (desk), and the fourth amendment is said to protect "people, not places," *Katz v. United States*, *supra*, at 351, this standard expressly avoids those cases that have failed to give fourth amendment protection to school locker searches. See *Donaldson*, 269 Cal. App. 2d 509, 513, 75 Cal. Rptr. 220, 223 (1969); *State v. Stein*, 203 Kan. 638, 640, 456 P.2d 1, 3 (1969), *cert. denied*, 397 U.S. 947 (1970); *People v. Overton*, 24 N.Y.2d 522, 526, 249 N.E.2d 366, 368, 301 N.Y.S.2d 479, 483 (1969). It is arguable that desks should not be included here along with lockers on the ground that a desk is an impermanent station that a student occupies transiently and shares with many others. The standard attempts to deal with that consideration by limiting coverage of desks to those situations with respect to which a desk is actually used or authorized as a storage place. In short, this definition of student protected area attempts to identify those areas

that are used by students and in which a privacy expectation ought to be recognized and protected. The standard prevents certain factors such as possession of a key or existence of a regulation authorizing a search, arguably of overriding importance in some of the cases, from taking the area out from under the protection otherwise available. The standard does not, however, make such factors irrelevant to the question of the reasonableness of the search. Similarly, although these definitional standards do not attach disqualifying significance to joint ownership or possession, they do not purport to change existing law on third person consents. Although these standards generally accept the third-person consent doctrine as firmly entrenched, the definitions contained in Standard 8.3 would not be disturbed were that doctrine reexamined. See Tigar, "Waiver of Constitutional Rights: Disquiet in the Citadel," 84 *Harv. L. Rev.* 1, 11-12, 14 (1970). See also Standard 8.5.

8.5 The validity of a search of a student, or protected student area, conducted by a police officer in school buildings or on school grounds may not be based in whole or in part upon the fact that the search is conducted with the consent of:

A. a school official, or

B. the student's parent except insofar as the parent's approval is necessary to validate a student consent.

Commentary

In denying any general power of school officials (or parents) to validate police searches through a consent, this standard is contrary to some authority. See *People v. Overton*, *supra; State v. Stein*, *supra*. But see *Piazzola v. Watkins*, 316 F. Supp. 624 (M.D. Ala. 1970), *aff'd*, 442 F.2d 284 (5th Cir. 1971). See generally Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 *Iowa L. Rev.* 739, 779-87 (1974). At least in this limited respect the third-party consent doctrine is qualified by these standards.

8.6 A. If a school official searches a student or a student protected area:

1. at the invitation or direction of a police officer,

2. in cooperation with a police officer, or

3. for the purpose of discovering and turning over to the police evidence that might be used against the student in a criminal proceeding,

the school official should be governed by the requirements made applicable to a police search under Standard 8.2.

B. In connection with any search of a student or student protected area that leads directly or indirectly to information that results in criminal charges against the student, it will be presumed in the absence of affirmative proof to the contrary that each of the characteristics identified in Standard 8.6 A. 1.-3. applies to the school official's search.

Commentary

Standards 8.6 A. and 8.6 B. exactly parallel the interrogation standards contained in 7.4 A. and 7.4 B., and much of the interrogation commentary applies. The basic device of Standards 8.6 A. and 8.6 B. is to identify circumstances under which educator searches ought to be treated as police searches and then to create a rebuttable presumption that these circumstances are present if evidence of criminal conduct is discovered as a result of a search. The basic justifications for this approach are, again, quite similar to those already identified for the interrogation standards: the effect upon the student is not materially different whether the search for criminal evidence is made by police or educator; the likelihood of police-educator cooperation to circumvent legal barriers is very great if educators are subjected to less restrictive standards and then permitted to turn over the fruits of their search to the police. Support of the standards proposed here is clear in the case of the educator acting directly as agent of the police. See *Gambino v. United States*, 275 U.S. 310, 313-314 (1927) (search by state officers solely on behalf of federal prosecution); *Byars v. United States*, 273 U.S. 28, 32-33 (1927) (joint venture); *Corngold v. United States*, 367 F.2d 1 (9th Cir. 1966); *cf. Keene v. Rodgers*, 316 F. Supp. 217, 220 (D. Me. 1970); *Stapleton v. Superior Court*, 70 Cal. 2d 97, 101-02, 447 P.2d 967, 969-70, 73 Cal. Rptr. 575, 577-78 (1968); Annot., 36 A.L.R.3d 553, 590-99 (1971). But the principle remains, in the view of these standards, any time the educator acts functionally in a police capacity. Moreover, there is little doubt that close police-school coordination does in fact develop. See *In re C.*, 26 Cal. App. 3d 320, 325, 102 Cal. Rptr. 682, 685 (1972) (policeman acted as school officials' "agent"); *State v. Stein*, 203 Kan. 638, 639-40, 456 P.2d 1, 2-3 (1969), *cert. denied*, 397 U.S. 947 (1970) (police made locker search with student's or administrator's "consent"); *People v. Jackson*, 65 Misc. 2d 909, 910, 319 N.Y.S.2d 731, 732 (App. Div. 1971), *aff'd*, 30 N.Y.2d 734, 284 N.E.2d 153, 333 N.Y.S.2d 167 (1972) (police officer stationed in

school joined administrator in chasing student but not in searching student); *State v. Walker*, 528 P.2d 113 (Ore. App. Ct. 1974) (search by assistant principal after consultation with and at suggestion of police); *cf. Potts v. Wright*, 357 F. Supp. 215, 217–18 (E.D. Pa. 1973) (search by police with possible administrative participation); *In re Boykin*, 39 Ill. 2d 617, 618, 237 N.E.2d 460, 461 (1968) (search by police following call by administrator). Furthermore, it is arguable that in one important respect treating educator searches differently from police searches is even more difficult to justify than a distinction between educator and police interrogations. "Interrogations" cannot be clearly distinguished from other inquiries, and it would be undesirable to burden unduly educator-student discussions that might include questions. Searches, on the other hand, whether directed to evidence of crime or other matters, are not very easily confused with any educator-student relationship associated with the educational process. Finally, for purposes of searches as well as interrogations it is well to remember that school officials clearly bring the force of the government to bear upon students. See Buss, "The Fourth Amendment and Searches of Students in Public Schools," 59 *Iowa L. Rev.* 739, 753–60, 765–76 (1974); *cf. Camara v. Municipal Court*, 387 U.S. 523 (1967). The argument that school officials should be restrained by general fourth amendment standards whether or not they behave like police officers is simple but powerful.

8.7 A. If a search of a student or protected student area is conducted by a school official for the purpose of obtaining evidence of student misconduct that might result in a serious disciplinary sanction, the search is unreasonable unless it is made:

1. under the authority and pursuant to the terms of a valid search warrant, or

2. with the consent of the student whose person or protected student area is searched, or

3. after a reasonable determination by the school official that

a. it was not possible to detain the student and/or guard the protected student area until police officers could arrive and take responsibility for the search and

b. failure to make the search would be likely to result in danger to any person (including the student), destruction of evidence, or flight of the student, and

4. in a manner entailing no greater invasion of privacy than the conditions justifying the search make necessary.

B. If, under Standard 8.7 A., the sanction that might result from the suspected misconduct includes expulsion, long-term suspension,

or transfer to a school used or designated as a school for problem students of any kind, the search should be subject to all of the requirements of a police search under Standard 8.2.

Commentary

Standards 8.7 A. and 8.7 B. parallel interrogation Standards 7.5 A. and B. and the commentary to those standards is generally applicable here. Searches for evidence of serious student misconduct are subject to comparable but lesser restrictions than those applicable to searches for evidence of crime. If, however, the student misconduct would result in "ultra" serious sanctions, a distinction between standards applicable to criminal and disciplinary sanctions is rejected.

8.8 Any evidence obtained directly or indirectly as a result of a search conducted in violation of these standards should be inadmissible (without the student's express consent) in any proceeding that might result in either criminal or disciplinary sanctions against the student.

Commentary

Like the parallel exclusionary rule for interrogations in Standard 7.6, Standard 8.8 partly overlaps the disciplinary exculsionary rule stated in Part V; includes a fruit-of-the-poisonous-tree approach; applies to all disciplinary proceedings, not just those leading to serious disciplinary sanctions; and may be waived only if the consent is explicit.

8.9 If a search of a student by a school official is conducted without providing the student the safeguards specified in Standard 8.7. A., evidence obtained directly or indirectly as a result of that search should be inadmissible (without the student's express consent) in any proceeding that might result in the imposition of either a criminal or a serious disciplinary sanction against the student searched.

Commentary

Parallel to interrogation Standard 7.7, this standard applies a unique form of exclusionary rule. The use of evidence obtained from

searches made for purposes not related to criminal behavior or serious student misconduct—and thus not covered by the standards of this chapter—is limited to the purposes of the search. This is contrary to the generally prevailing legal rule that evidence produced by a search legal when made can be used for any purpose. But see *Coolidge v. New Hampshire*, 403 U.S. 443, 469–73 (1971). Yet such a rule seems justified in order to prevent subversion of the otherwise applicable restrictions. It should be noted, moreover, that this is the only protection under these standards for students searched for purposes not ostensibly aimed at finding evidence of crime or serious student misconduct. Finally, there are, in certain respects, stronger grounds for Standard 8.9 than for the parallel interrogation standard. Any search involves an intrusive invasion of the student's right of privacy, but some interrogations result in genuinely voluntary responses and involve no significant interference of student rights. By the same token, searches, unlike at least certain interrogations, cannot be justified in terms of furthering objectives integrally involved with the education process.

PART IX: DEFINITIONS

9.1 As used in these standards, the term "school(s)" "school officials," "school authorities," and "school personnel" refer to public educational institutions, or groups of such institutions, other than institutions of post-secondary education. Unless the context of a definition contained in a particular standard indicates otherwise, the term "school(s)" and the terms "school officials," "school authorities," and "school personnel" include any person or group of people authorized to, or apparently authorized to, act on behalf of a school, as defined above.

Commentary

This standard sets forth the basic fact that the standards in this volume are directed at public schools, at the elementary and secondary level. For a discussion of their possible relevance to private schools, see the Introduction to this volume.

The possible difference in norms between elementary and secondary education, on one hand, and higher, or post-secondary education on the other, explains the fact that these standards are addressed only to elementary and secondary education. Compare the commentary to Standard 4.2, *supra*.

Finally, Standard 9.1 makes clear that the various defined terms all apply, unless the context or an explicit definition in a particular standard indicates otherwise, to a person, or group of persons, who is acting for a public school or group of schools. Such persons would include, for example, state educational officials, local school boards of education, or school committees, administrative officials, counselors, and teachers.

9.2 As used in these standards the term "parent(s)" includes a guardian or other person having legal custody of a juvenile, as well as a natural parent of a juvenile.

9.3 A. As used in these standards, a "disciplinary sanction" means any action required of a student or any action taken by the school upon or with respect to a student that:

1. would be regarded by a reasonable person in the student's circumstances as substantially painful, unpleasant, stigmatizing, restrictive, or detrimental, or a denial of a substantial benefit; and

2. would not occur but for the misconduct with which the student is charged.

B. Action is not prevented from being a disciplinary sanction because:

1. it is taken (or characterized as taken) in the best interest of the student, or

2. the student is given choices between two or more courses of action, any of which, if the sole option, would be a disciplinary sanction.

Commentary

As used in Standard 9.3 A. 1. the words "substantially" and "substantial" connote something more than frivolous or de minimus. The "reasonable person" element means that pain, unpleasantness, and the like will be determined objectively rather than subjectively, but the language, "in the student's circumstances," would require that objectivity be determined in accordance with an appropriately discrete group of students. A student's age or size might be relevant circumstances but a student's hypersensitivity to pain would not be.

Standard 9.3 A. 2. is necessary to distinguish a "sanction" from various other aspects of in-school life that a student might (reasonably) find painful or unpleasant. Under this provision, unpleasantness experienced more or less by all students (or all students of a particu-

lar type) by reason of generally similar treatment—or even unpleasantness experienced particularly by a specific student by reason of the student's education program—is clearly not a disciplinary sanction. Of course the standard on its face will not answer all questions. Copying over a long paper might be a sanction in some circumstances but not others.

Standard 9.3 B. attempts to answer two arguments that are commonly advanced to demonstrate that the student is not really being punished. According to 9.3 B. 1., the fact that the school's action is taken for the student's "own good" is treated as irrelevant. The motivation behind disciplinary action is often complex and mixed. The standards make the impact, not the intention, controlling.

According to 9.3 B. 2. giving a student choices does not preclude treatment as a sanction if one of the choices would clearly be a sanction. It is arguable that the school action should be treated as a sanction only if each choice would, by itself, be a sanction. According to this argument, if one of the choices is not a sanction, the student has a sanctionless alternative. That argument is rejected here for two reasons. First, it may sometimes be difficult to determine whether particular action taken by the school is a sanction or not, and it is unlikely that a student would be given a choice between undesirable and desirable (or neutral) alternatives. Second, the voluntariness of the choice may often be debatable, particularly in view of the child's age and the subtle means that might be used to reduce an actual free choice.

9.4 A "serious disciplinary sanction" includes

A. the following specified disciplinary sanctions:

1. expulsion;*

2. suspension for a period that either

a. in the aggregate is in excess of five days during any one academic year, or

b. is of indefinite length by reason of either

(1) the failure of the school to specify the duration of the suspension or

(2) the student's being directed to do or cease doing something when the student desires not to obey that direction;

3. a transfer to a different school;

4. corporal punishment;

5. denial of any opportunity ordinarily available to students to participate in activities or to engage in conduct if

*But see Standard 6.3 A. and commentary thereto.

a. the denial extends beyond three weeks and

b. the denial would be regarded by a reasonable person in the student's circumstances as a substantial detriment; or

6. reduction of grade or loss of academic credit in any course, including action that inevitably results in such reduction or loss; or

B. any disciplinary sanction reasonably likely to have consequences for the student comparable to the consequences of any of the sanctions specified in Standard 9.4 A.

Commentary

For the most part this list and description of "serious" sanctions speaks for itself. The most difficult question likely to be raised by this particular list is not whether the items included are "serious" in some sense but whether each of them is sufficiently serious to justify the various student rights that are tied to this definition by various standards in this volume. (See Parts V, VII, VIII.) The length of time at which a suspension or loss of privilege becomes serious is debatable and necessarily somewhat arbitrary. A loss of privilege becomes serious only if it both extends for a period of time (three weeks) and constitutes a "substantial detriment" to a person in the student's position. The five days per academic year standard is suggested for suspensions by the pattern of activities, assignments, and tests in junior and senior high school, indicating that substantial disadvantage due to missed work and activities would begin to be felt during that length of time. It should be noted that, whatever the period, the length of time should be aggregated. Thus, under these standards, a suspension for three days after a prior suspension of two days would be a serious sanction. A suspension is also serious under these standards when the length of time is based upon the student's refusal to obey a direction of the school even though, in such cases, the student has it within his or her power to achieve readmission immediately. *Cf. Press v. Pasadena Independent School District*, 326 F. Supp. 550, 561–63 (S.D. Tex. 1971). But *cf. Graham v. Houston Independent School District*, 335 F. Supp. 1164, 1168 (S.D. Tex. 1970). Thus, for example, when a student is suspended until the student obtains a haircut meeting certain specifications, the suspension is regarded as serious. See *Hutch v. Goerke*, 502 F.2d 1189, 1194 (10th Cir. 1974). But see *Freeman v. Flake*, 320 F. Supp. 531, 536 (D. Utah 1970).

It is arguable that a disciplinary transfer is not necessarily "serious." But the likelihood that such a transfer will be dislocating and

stigmatizing, the difficulty of drawing lines between different types of transfers (but see Standard 5.3.1 A. 3.), and the relative deliberateness of a transfer decision all seem to justify requiring more thorough safeguards for all transfers. See *Betts v. Board of Education of City of Chicago*, 466 F.2d. 629, 633 (7th Cir. 1972); *cf. Mills v. Board of Education of District of Columbia*, 348 F. Supp. 866, 875-76 (D.C. 1972).

The inclusion of corporal punishment here is superfluous if, as proposed by other standards contained in this volume, corporal punishment is precluded from being used as a sanction. (See Part VI.)

Similarly, the inclusion of academic sanctions here is superfluous if, based on the standards contained elsewhere in this volume, such sanctions are prohibited. (See Part VI.) If academic sanctions are permitted under any circumstances they are clearly serious in that they undermine the school's primary educational function and they have a potentially devastating effect upon a student. It is important to treat as an academic sanction, any action that would—whether or not intended—have the effect of penalizing a student academically. This is true even though such separate action might not itself be regarded as a serious sanction. For example, if a test is given on the one day on which the student is suspended and the student is not permitted to make up the test, the student's grade (or credit) in the course is likely to be affected and, therefore, the sanction is serious under these standards.

The making of a record entry is not itself treated here as a serious disciplinary sanction. But is it important to realize that such an entry (or many such entries cumulatively) can play a crucial role in producing serious sanctions. For example, a central purpose of the procedural safeguards provided under Standard 5.3 is to enable students to challenge the factual basis of the charge against them. If any part of the case against a student is based on the pre-established record, it is obvious that, to that extent, the procedures available to the student are fruitless. The student might be permitted to challenge the record at the time it contributes to a serious disciplinary sanction, but at that time the facts on which the record entry was based will often be stale and virtually impossible to recreate without excessive cost. Somewhat similarly, before the student is put to his or her proof of rebuttal, the school might be required to establish the likelihood that the entry is accurate and was made with care. Although this second alternative is slightly better, it still suffers the primary defects of the previous one. Under the so-called Buckley Amendment, a student has a kind of continuing right to examine and challenge the record, but it is unclear how great an incentive there will be

to use this right, or how complete the procedures in the challenged hearing will be. See Family Educational Rights and Privacy Act of 1974, 20 U.S.C. § 1232g (Supp. IV, 1975); Note, 61 *Iowa L. Rev.* 106 (1975).

Subsection B. emphasizes the fact that the list of serious sanctions in subsection A. is not exhaustive and invites decision makers (school officials, courts) to extrapolate from the list, on the basis of the likely impact of other sanctions upon the student.

When school discipline appears to be racially related, Standard 9.4 B. should be construed to apply because discipline affected by racial considerations is always likely to have severe consequences. Such a situation might occur either when disciplinary sanctions against black students rise immediately following desegregation or when disciplinary sanctions are imposed disproportionately against black children. Of course the two types of occurrences may well be linked. See *Hawkins v. Coleman*, 376 F. Supp. 1330 (N.D. Tex. 1974); Demarest and Jordan, "*Hawkins v. Coleman:* Discriminatory Suspensions and the Effect of Institutional Racism on School Discipline," 20 *Inequality in Educ.* 25 (1975); Yudoff, "Suspension and Expulsion of Black Students from the Public Schools: Academic Capital Punishment and the Constitution," 29 *Law and Cont. Prob.* 374 (1975). In either situation, the circumstances of student discipline argue strongly in favor of extraordinary protective measures for the children who seem to be penalized by reason of their racial identity. If Standard 9.4 does not now unambiguously cover this situation, that standard or Part V should be revised to insure the availability of the most comprehensive procedural safeguards. Furthermore, it is arguable that this situation calls for a quite different sort of protection such as express recognition that the federal court with jurisdiction over the desegregation order has adequate power to deal with the situation. *Cf. Bradley v. Milliken*, 402 F. Supp. 1096, 1142 (E.D. Mich. 1975); *Smith v. St. Tammany Parish School Board*, 316 F. Supp. 1174 (E.D. La. 1970), *aff'd*, 448 F.2d 414 (5th Cir. 1971).

Dissenting View

Statement of Commissioner Justine Wise Polier

This volume on *Schools and Education* presents standards on the right of all children to an education in the public schools on which there was full agreement by the commission. It places the primary duty on local school districts and asserts that the right to education requires that education be comparable and equal for all students in the state and throughout school districts. It proposes standards to safeguard the due process rights of children in regard to any action by school authorities that may lead to or result in disciplinary action, including suspensions, expulsions, or special assignments. It proposes standards for limiting school action to control conduct related to education, and prohibits the use of school authority that violates constitutional rights accorded to adults. It takes a clear position against any racially segregated educational system as incompatible with a just system.

Unfortunately, the volume also reflects compromise positions to conform with other volumes requiring the rejection of any "coercive intervention of juveniles merely for rehabilitation." In carrying over such restrictions regarding juveniles charged with delinquency to the field of education, the volume treats public schools as comparable to "other custodial institutions" that have control of juveniles under law.

The constitutionality of state compulsory education laws is not questioned, but the standards propose that they should be limited to children under sixteen years of age. The proposed standards would seriously restrict court action concerning children who truant extensively or parents who fail to secure school attendance of their children. A petition to the court would only be permitted as "a last resort" after all prescribed efforts by the school have failed. Court action would be limited to developing participation by a student and parents in a supervised plan for alternatives. Sanctions for nonparticipation are not allowed. The standards also fail to provide for any

court action when parents are charged with preventing their children from attending school.

The commentary reports on the close correlation between trouble in school and with the law. It also reports the strong correlation between years of schooling and subsequent income. These significant facts, however, are not reflected in the decision to center the focus of these standards on establishing a framework of justice for juveniles in the public schools. The stated aim of the standards is to free children from regulations and punishment under arbitrary rules. While this purpose is sound, it does not justify the avoidance of developing standards that adequately relate the state's duty to fulfill the right of all children to adequate and appropriate education to a positive obligation of parents and children to exercise the right to education.

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