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STUDENT DISCIPLINE 2012: PROCEDURAL DUE PROCESS

Overview

Of the possible student disciplinary alternatives spelled out in local school system policies the most serious ones are: *long-term (out-of-school) suspension* and *expulsion* (from the school system). Both alternatives not only interrupt access to classroom instruction and activities but also have a potentially damaging impact on a student's school record and his/her future education and employment.

The Supreme Court Speaks

Beginning in the mid-1960's and moving into the 1970's, the courts established a foundation for recognizing and building substantive and procedural rights for young people. Following the United States Supreme Court's landmark juvenile law decision in Gault(1967), lower courts (federal and state) firmly established that youthful offenders are persons under the United States Constitution and therefore must be afforded due process under the Fourteenth Amendment. (Vacca and Bosher, 2012) However, it was not until 1975 that the United States Supreme Court articulated a constitutional standard specifically applied in public education law when in Goss v. Lopez (1975), a short-term suspension case, the high court spelled out three elements of basic procedural due process and these are: (1) *notice* of the alleged disciplinary offense(s), (2) *reasons* (not cause) for taking subsequent disciplinary action, and (3) a chance for the student being disciplined *to tell his/her side of the story*—especially where he/she denies committing the offense.

Impact of the Goss Standard.

Over the past three-plus decades, the *Goss* (1975) due process standard has been consistently followed and made more formal, thus causing contemporary local school boards to print, publish, and widely distribute (to parents, students, staff, and community) the school system's policies and procedures governing student behavior in what are often called a *Student Code of Conduct* or *Student Discipline Code.* While it is neither practical nor legally required that every possible infraction be spelled out in detail, as a general rule these documents include; (1) *prior notice* to parents and students; (2) a *list of offenses* for which a student will be subjected to disciplinary action; (3) *disciplinary alternatives* for each violation (*e.g.*, first offense, second offense); (4) *procedures*

followed in carrying out disciplinary alternatives; and (4) designate a *staff member* (by position not name—usually an administrator) responsible for implementing the procedures and meting out disciplinary alternatives. (Vacca, 2012)

State Law

Today's public school officials also know that in addition to what constitutes minimal due process underGoss (1975), the mandates of state law (statutory law and court decisions) must be factored into student disciplinary actions. Public school officials and staff must become knowledgeable of and follow their state's due process mandates –sometimes more extensive and formal than are those listed in *Goss*. (Vacca and Bosher, 2012)

Issue Producers. While contemporary public school officials (with the assistance of their attorney) continue to refine and produce enforceable student disciplinary policies, four issue producers nonetheless remain constant and often find their way into a court of law—especially where the disciplinary alternatives are serious (*e.g.*, long-term [more than 10 days] suspension from school and expulsion). First, the need to draft policies and rules that survive the *vagueness test* produce litigation. Collins v. Prince William CountySchool Board (4th Cir. 2005) Second, and related to the first issue issue, efforts to give timely and adequate *notice* (oral or written) of infractions and subsequent disciplinary procedures to parents and students are often challenged. Lanham ex rel. Smith v. GreenCounty (M.D. 2005) Third, because each student disciplinary situation is fact bound, whether the evidence produced supports and justifies the appropriateness of the disciplinary action taken is tested. Rossi v. West Haven Board of Education (D. Conn. 2005) Fourth, school disciplinary actions taken as a result of student off school grounds misbehavior remains a source of litigation. Kulbany v. School Board (M.D. Fla. 1993)

McGrath, et al. v. Hamilton, et al. (S.D. Ohio 2012)

Recently, I came across a federal district court decision where both the *Goss* (1975) mandate and state law were applied in a student suspension/expulsion situation. What makes this case both interesting and instructive is that it also involves: (1) a vagueness challenge to the wording contained in a local school system's student disciplinary code, (2) off school grounds misbehavior, and (3) subsequent questioning of a student and the search of his car by both school officials and local police.

Facts: The Ohio case involves Joshua McGrath, a student at a public high school, who on or about September 23, 2009, drove himself and two other students to school. Because the car did not yet have a valid school parking sticker he parked his car off school grounds in a residential neighborhood. After exiting the car one of the student passengers took out a small quantity of marijuana and asked McGrath if he wanted to smoke some of it. He declined the offer but the student passenger did smoke some of the marijuana. The students then walked to school.

At some point in the morning one of the other student's teachers suspected him of being "under the influence of a prohibited substance." Later in the morning McGrath was called to the principal's office where a vice principal questioned him about the events of the morning—before the students entered school property. McGrath repeatedly denied using marijuana that day. Police officers were brought to the school and questioned McGrath without his parents being present. He continued to deny using marijuana that morning although he stated that some second hand smoke "may have hit my lips." With McGrath's parents' consent both school officials and the police searched the vehicle and no evidence of drugs was uncovered.

The next day (September 24, 2009) school officials sent Joshua and his parents a "Notice of Suspension and Intended Expulsion." The notice stated that Joshua had been given an out of school suspension from September 24, 2009 to October 7, 2009. The stated reason was "Drugs/Alcohol." Also on that day (September 24, 2009) school officials sent them a "Notice of Intended Expulsion" and informed them that a hearing would be held on September 29. 2009. Joshua and his parents attended the hearing without legal counsel. The hearing was presided over by an Assistant Superintendent of Schools.

On October 1, 2009, parents were mailed a letter informing them that Joshua had been "expelled and could not reenroll until February 5, 2010." Joshua and his parents then retained counsel, appealed the expulsion, and requested a hearing before the school board. Subsequently a school board hearing was held (as a part of the school board's regularly scheduled monthly meeting) on December 14, 2009, during which Joshua and his parents were informed that the board would meet in "executive session" to discuss the appeal—without them or their counsel being present. During the private session the board took testimony of the high school principal and an assistant principal and considered "hearsay testimony." Objections were made to the *ex parte* process including the fact that their lawyer could not cross-examine the witnesses. Subsequently the school board resumed its public hearing and announced that the expulsion decision was affirmed by a vote of 5-to-0.

On December 21, 2009, a letter was sent to Joshua's parents officially informing them of the board's decision. The letter included a statement that the decision was based on Joshua's behavior on September 23, 2009, which was a violation of the "Hamilton County High School Student Discipline Code." It was at this time that parents learned that damaging testimony given by an unidentified parent had contributed to the board's disciplinary decision.

District Court Action: Joshua and his parents filed suit in federal district court against the school district, school superintendent, and the board of education. In their pleadings they alleged defamation, negligent infliction of emotional distress, violation of Ohio statutory law, and violation of due process. As relief they sought a declaratory judgment, an injunction to compel school officials to purge Joshua's school records of any references to the expulsion, and the correction of any grades lowered as a result of the expulsion. Defendants filed a motion for judgment on the pleadings.

Subsequently, the parents conceded that they no longer had standing on behalf of Joshua because he had reached the age of eighteen. Plaintiffs also conceded that they could not maintain an action for defamation, infliction of emotional distress, and negligent infliction of emotional distress on grounds of political subdivision immunity under Ohio case law. Thus, Joshua was the only plaintiff left to assert claims of violations of the Ohio Code, due process, and to seek declaratory and injunctive relief.

After treating the technical issues of standing, service of process, motion for judgment on the pleadings, defendants' claim that the matter was moot (Joshua had graduated from high school), plaintiff's requests for declaratory relief, and attorneys fees the district court concluded that Joshua "only had standing to pursue his claim for injunctive relief, violations of Ohio law, and federal constitutional rights."

District Court Opinion and Rationale: The district court first clarified plaintiff's claims that the school district violated Joshua's procedural and substantive due process rights in violation of 42 U.S.C. 1983 and the Fourteenth Amendment, and his arguments that his due process rights were violated by the school district during the school board's hearing and decision on his expulsion. Directly citing Goss v. Lopez (1975) and referencing Newsome v. Batavia (6th Cir. 1988), the district court opined that while the question of what is required for longer suspensions was left open, the court did tell us that "long term suspensions may require

formal hearings." Thus, "[a]t a very minimum, the student must be given an informal hearing at which the student has an opportunity to explain his version of events and that the student 'be told what he is accused of doing and what the basis of the accusation is'."

The court next addressed plaintiff's assertions that he was denied due process because the two written suspension and expulsion notices (which cited the reason for discipline as "Drugs/Alcohol") were "insufficient to apprise him that he was being expelled for being under the influence on school property, rather than because he was found to be in possession of illegal drugs or that he was selling them." And, it was only at the hearing that the school changed its charges against him to include being under the influence. To support his claims plaintiff relied on the *Ohio Revised Code* that required boards of education to adopt suspension and expulsion policies to specify the types of misconduct for which a pupil may be suspended, expelled, or removed. As such, plaintiff asserted that the language in the school system's student code of conduct on which his discipline was based was "vague and overbroad" and therefore in violation of state law.

The court disagreed. The "Drugs/Alcohol" charge was sufficient to include being under the influence on school grounds. Thus, said the court, the notice to plaintiff requirement was sufficient. The court also added in a footnote that there is no private right of action under this section of the Ohio Code.

Regarding plaintiff's assertion that he was denied due process because hearsay statements were made about him (a parent of a male student reported to the assistant principal that Joshua was smoking marijuana before school on the morning of September 23, 2009), he was not allowed to be present when all testimony was given, and he was not informed of all the evidence against him, the court did not find a due process violation. Citing Newsome v. Batavia (6th Cir. 1988) the court held that "[h]eresay statements may be considered at a less formal administrative hearing such as a student expulsion hearing."

Court Decision: The school district and superintendent of schools were dismissed with prejudice. Defendants' motion for judgment on the pleadings was granted in part and denied in part. Also said the court, plaintiff student lacked standing to seek a declaratory judgment; was not entitled to preliminary or permanent injunctive relief; and showed good cause for his failure to obtain effective service of process. Because a genuine issue of material fact existed, the motion for judgment on the pleadings for violation of plaintiff's due process rights was denied.

Policy Implications

Even though McGrath (2012) is but one case from one federal jurisdiction the court's rationale demonstrates the traditional judicial nonintervention philosophy evident in a majority of student cases—*i.e.*, judges are reluctant to get involved in or in any way interfere with the day-to-day student disciplinary prerogatives of and administrative decisions made by local public school authorities. Also, the court shows a willingness to accept a general wording of school system policies to include a variety of individual infractions (in this case, for example, "Drugs/Alcohol"). While the district court in McGrath (2012) does not trivialize the seriousness of student suspension and expulsion, it makes it clear that student procedural due process is less formal when placed in the context of an administrative hearing.

What follow are some suggestions for local school system policy gleaned from the federal district court's rationale.

Local school boards must make it clear that:

- While the board recognizes and respects the rights of students, the board possesses the legal authority to discipline students whose behavior disrupts the learning environment, or is unlawful, or presents a threat to the welfare and safety of other students and staff, or causes damage to school property.
- No student is immune from school system disciplinary action.
- Students are informed of behavioral expectations and the consequences of misbehavior.
- Types of disciplinary violations, alternative punishments for disciplinary infractions, procedures appropriate to carrying out each disciplinary alternative, and an appeals process are included in the school system's *Student Code of Conduct*.
- While students have due process rights, the nature and extent of theses rights vary with the facts and circumstances of each disciplinary situation.
- School principals and their administrative staff are granted discretion to carry out student discipline policies and do what is necessary to maintain a safe, secure, disruption-free learning environment.

Final Thought

Today's public school officials must, as early as practicable, inform and involve parents in school disciplinary situations involving their children—especially in situations that may culminate in out of school suspension or expulsion. However, the reader is cautioned that the phrase *parental notification* has become a subject of judicial interpretation—especially in juvenile and domestic relations law. Who is or is not parent, coupled with issues of residency and domicile, often is not clear. Plus, the primary language spoken in a student's home may not be English. Thus, what comprises "timely and adequate notice to parents" whose child has become involved in a disciplinary infraction may not be easily implemented.

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Note: The views expressed in this commentary are those of the author.