A HOMEMADE SWITCHBLADE KNIFE AND A BENT FORK: JUDICIAL PLACE SETTING AND STUDENT DISCIPLINE

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I. INTRODUCTION

There is no more important relationship for the judiciary to get right than the relationship between the courts and public elementary and secondary education, particularly as it impacts the discipline of students. The Nebraska Supreme Court recently had before it two cases involving the expulsion of middle school students, one for possession of a homemade switchblade knife at school and one for injuring another student with a hand-heated fork.

Each of these cases is worthy of study in its own right. However, this article will focus on the broader issue of how federal and state courts in the United States currently exercise judicial review of student disciplinary decisions by public school educators and then make some suggestions for enhancing the deference courts are currently granting to public elementary and secondary educators.

The concern of this article is not procedural, but substantive. There are obviously certain procedures which must be followed before a court generally may review actions taken by public school officials. Those procedures vary from state-to-state and court-to-court. The central focus of this article is on the substantive standards in light of which courts review public school decision-making once those public school decisions are properly procedurally before the court. These substantive principles of decision-making are both statutory and decisional. For example, the Nebraska Student Discipline Act at section 79-291, lists a state district court's authority to alter school board decision-making in student discipline cases. That authority is limited to

those cases where the substantial rights of the student may have been prejudiced because the board’s decision is:

1. **In violation of constitutional provisions;**
2. **In excess of the statutory authority or jurisdiction of the board;**
3. **Made upon an unlawful procedure;**
4. **Affected by other error of law;**
5. **Unsupported by competent, material, and substantial evidence in view of the entire record as made on review; or**
6. **Arbitrary or capricious.**

Congress has not provided similar statutory constraints on the federal courts. However, the United States Supreme Court has articulated, in a whole series of cases, a standard for federal court review of local school board decision-making that provides for significant judicial deference to school board decision-making.

This article will briefly review the two middle school expulsion cases recently before the Nebraska Supreme Court. The purpose of this review is to articulate, in practical terms, the problem this article will focus on: the degree of appropriate deference which courts should exercise in reviewing school board decision-making in student discipline cases. The article will then examine the degree of deference afforded by the lower federal courts and the state courts to local school board decisions in student discipline cases since the United States Supreme Court decided *Vernonia School District 47J v. Acton* on June 26, 1995, its most recent student discipline related decision. This examination will articulate the type of deference the lower federal courts and the state courts of record have both in word and in fact given to school board decision-making in a wide variety of student discipline related matters, including First Amendment matters, Fourth Amendment matters, expulsions, short-term suspensions, suspensions from co-curricular activities, disciplinary reassignments, and staff use of physical force to control student behavior. Finally, the article will conclude with some reflections on judicial review of school board student discipline decision-making and articulate a case for enhanced judicial deference.

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6. See infra notes 58-177 and accompanying text.
II. THE INITIAL SETTING: MIDDLE SCHOOL UTENSILS

A. THE HOMEMADE SWITCHBLADE KNIFE: KOLESNICK V. OMAHA PUBLIC SCHOOL DISTRICT

Kristoffer Kolesnick was an eighth grade student at King Science Center, one of the schools of the Omaha Public Schools, during the 1994-95 school year. On September 23, 1994, Kristoffer boarded the school van in which he rode to school and took with him on the van a homemade switchblade knife. The knife had a 2-1/2 inch blade. On the van Kristoffer showed the knife to a fourth grade student, poked a hole in the seat back in front of him and also poked a hole in his own jacket sleeve. Kristoffer then placed the knife in his notebook in which he carried it throughout the school day at King Science Center. On the evening of September 23, the fourth grade student told his parents about the incident while riding in the van. Four days later the fourth grader’s mother informed the van’s regular driver (who had not driven the van on September 23) of the incident and told him she had been keeping her son home out of concern for his safety. The next morning the regular van driver related his conversation with the fourth grader’s mother to his supervisor. The supervisor then contacted King Science Center to inform them that Kristoffer had been in possession of a knife while riding in the van. Upon receipt of that information the assistant principal and a security officer searched Kristoffer’s locker but found no knife. Subsequently, the knife was found in Kristoffer’s home.

Since 1983, the Omaha Public Schools had in place a student code of conduct which specified the penalty of expulsion as the only appropriate penalty for possession of a knife on a van or at school. In the 1994 legislative session, the Nebraska Legislature gave to Nebraska school districts the authority to expel for two semesters, instead of one, students who possessed dangerous weapons at school. In response to this additional legislative authority, the Board of Education of the Omaha Public Schools made a decision to treat all knives as dangerous weapons and specified that a two-semester expulsion was the only appropriate penalty for possession of a knife at school. The Student Code of Conduct was followed in Kristoffer’s case. He was

12. Kolesnick, 251 Neb. at 577, 558 N.W.2d at 811.
expelled from all schools in the Omaha Public Schools for the remainder of the 1994-95 school year.13

Kristoffer and his parents filed suit in Douglas County District Court claiming, in part, that the punishment was so excessive that it violated the substantive due process requirements of the Fourteenth Amendment to the United States Constitution.14 The district court agreed with Kristoffer and his parents and reduced the punishment to a one-semester expulsion.15

The critical aspect of the district court's decision in Kolesnick was the court's view of the prism through which a court may view the issue of the appropriateness of a particular penalty for a particular offense. Because Kristoffer did not argue that the homemade switchblade knife was not a dangerous weapon, he could not argue that there was no statutory authority for a two-semester expulsion for possession of such a device. Rather, his argument was that simple possession of a knife ought not merit a two-semester expulsion as a matter of federal substantive due process.16 The district court agreed with Kristoffer. It found that the test for determining whether there was a violation of federal substantive due process was to weigh the severity of the punitive effect of the sanction against the severity of the misconduct.17 The court held that the penalty was appropriate if it "fit the crime." The court also asked whether the penalty had a reasonable relationship to the conduct. The court held that it did not.18

This district court decision was and is terribly troubling. First, it inserted the possibility of constitutional error into decision-making on a proper punishment for any student offense. Second, it did so in a manner that provided the district court authority to weigh the proportionality of the penalty to the offense and change the punishment if the court itself felt the punishment was not reasonable.

This type of standard for judicial review of punishment decisions has significant potential for very timid decision-making by school officials. Under established federal precedent, any school official who violates a student's clearly established constitutional rights is personally liable financially to the student.19 Although insurance is available to

13.  Id. at 579; 558 N.W.2d at 811-12.
14.  Id.
15.  Id.
16.  Id. at 581-84; 558 N.W.2d at 813-14.
18.  Kolesnick, slip op. at 6-7 (No. 933-628).
19.  See Wood v. Strickland, 420 U.S. 308 (1975) (holding that school officials are not entitled to an qualified good-faith immunity from liability for damages under section 1983 if they knew or should have known that the action they took within their sphere of official responsibility would violate the constitutional rights of the student affected, or if
cover such liability, typically such policies have significant deductibles. Hence, unless the school district itself is willing to pay public money for individual violations of students' constitutional rights, administrators face the clear possibility of significant personal liability for their disciplining students in a manner which is pursuant to state statutory authority. Given the troubling character of the district court's decision, the case was appealed to the Nebraska appellate courts.

After taking the case from the Nebraska Court of Appeals at the request of the Omaha Public Schools, the Nebraska Supreme Court reversed the district court and reinstated Kristoffer's two-semester expulsion. The Nebraska Supreme Court did so because it articulated a much more deferential standard of judicial review of punishment decisions by local school boards. The Nebraska Supreme Court held that in the context of student discipline cases the student does not have a fundamental right to an education. Under established federal precedent, this meant that the courts must review school district decisions under the rational basis test. Under this test, as long as the school official's decision is directed to a legitimate purpose and is rationally related to achieving that purpose it meets substantive due process requirements. The Nebraska Supreme Court determined they took the action with the malicious intention to cause a deprivation of such rights or other injury to the student; Harlow v. Fitzgerald, 457 U.S. 800 (1982) (stating that senior advisors and aides to the President of the United States do not have absolute immunity to a suit for damages based upon their performance of official acts); Davis v. Scheror, 468 U.S. 183 (1984) (holding that a plaintiff who seeks damages for violation of constitutional or statutory rights may overcome the defendant official's qualified immunity only by showing that those rights were clearly established at the time of the conduct at issue); Mitchell v. Forsyth, 427 U.S. 511 (1986) (holding that the Attorney General of the United States has qualified, but not absolute, immunity from suit for damages arising from a warrantless wiretap of defendant's telephone); Malley v. Briggs, 475 U.S. 335 (1986) (stating that as a matter of public policy, qualified immunity provides ample protection to all but the plainly incompetent or those who knowingly violate the law); Anderson v. Creighton, 483 U.S. 635 (1987) (holding that Federal Bureau of Investigation agents are immune from liability for damages arising out of an unconstitutional search of a home, so long as a reasonable agent could reasonably believe that the search was constitutional); Siegert v. Gilley, 500 U.S. 226 (1991) (stating that in order to satisfy the necessary threshold inquiry in the determination of a qualified immunity claim, one must allege the violation of a clearly established constitutional right).

20. See, e.g., Errors and omissions insurance policy of the Omaha Public Schools for the period February 4, 1998 to February 4, 1999 (on file with the author).

21. Kolesnick, 251 Neb. at 577, 584, 585, 558 N.W.2d at 811, 814, 815. The Omaha Public Schools explicitly requested that the Nebraska Supreme Court take the Kolesnick case from the Nebraska Court of Appeals so that the Kolesnick case would be decided definitively before Spencer. Both cases involved identical substantive due process claims. Kolesnick's facts were stronger from the Omaha Public Schools' perspective.

22. Kolesnick, 251 Neb. at 581-82, 558 N.W.2d at 813.

23. Id. at 582, 558 N.W.2d at 813.

24. Id.
that safety of students is a legitimate purpose for the schools.\textsuperscript{25} The critical holding of the Nebraska Supreme Court was that a particular punishment is not rationally related to achieving safety only if there is a shocking disparity between the punishment and the offense.\textsuperscript{26} Using this standard, the Nebraska Supreme Court decided that a two-semester expulsion for possession of a knife, particularly because such a sanction was explicitly authorized by statute, does not shock the court's conscience.\textsuperscript{27} The Nebraska Supreme Court also determined that a student code of conduct which prescribes in advance a required punishment for a particular offense does not by its very structure violate substantive due process.\textsuperscript{28}

Under the Nebraska Supreme Court's standard for review of punishment decisions, a district court may not second guess the punishment decision of a school official as long as the punishment is permitted by statute and as long as the punishment is closely related enough to the offense so that it does not shock the conscience of the court. A court may not substitute its judgment for that of locally elected public officials simply because the court thinks a punishment decision is unreasonable. Such determinations are left to the discretion of local school boards.

B. The Bent Fork: \textit{Spencer v. Omaha Public School District}\textsuperscript{29}

During the 1994-95 school year, Blake Spencer was an eighth grade student at McMillan Junior High School, one of the schools governed by the Omaha Public Schools ("OPS"). Some time during the day on September 23, 1994, Blake obtained from the school cafeteria a fork. On his way home on the school van, Blake bent the fork several times, thus heating it up. A fellow McMillan student was sitting in the seat in front of Blake, minding his own business when Blake, knowing that the fork was heated, applied the fork to the other student's neck. The other student described how he felt immediately after the fork touched his neck. He testified that he felt like his neck was bleeding. He kept his hand on the back of his neck for about five minutes. When Blake later asked him if he still felt that, he told Blake that he did. Blake then called him a "wuz" for still feeling a fork burn. The other student accused Blake of having a lighter, but Blake denied that and said that all you had to do to get the fork hot was to bend it fast. The next school day, the other student's parents came to

\begin{thebibliography}{9}
\bibitem{25} \textit{Id.}
\bibitem{26} \textit{Id.}
\bibitem{27} \textit{Id.} at 583, 558 N.W.2d at 813-14.
\bibitem{28} 251 Neb. at 577, 582-83, 558 N.W.2d at 811, 813.
\bibitem{29} 252 Neb. 750, 566 N.W.2d 757 (1997).
\end{thebibliography}
school and complained about Blake's conduct. The school nurse examined the other student and found on the posterior right side of his neck a burn approximately 1/4-inch in diameter that was red and partially blistered.\textsuperscript{30}

Once the matter was reported to school officials at McMillan, they followed the OPS Student Code of Conduct which mandated expulsion for two semesters for intentionally or knowingly causing personal injury to another student.\textsuperscript{31} The two-semester expulsion was upheld both by the school District Hearing Officer and by the Board of Education. Blake appealed the School Board's decision to the District Court for Douglas County claiming not only a violation of substantive due process in the punishment decision, but also claiming that the Student Code of Conduct provision for intentional injury of another student exceeded the statutory authority granted to the Omaha Public Schools under the Student Discipline Act.\textsuperscript{32} The Douglas County District Court found that the OPS actions did not violate or exceed the state statutory requirements, but that the School Board's decision to expel Blake for the remainder of the school year was so excessive as to violate his constitutional right to substantive due process.\textsuperscript{33} The district court reduced Blake's expulsion to one semester.

Out of the same concerns present in the \textit{Kolesnick} case, the Omaha Public Schools appealed the district court decision to the Nebraska appellate courts. On its own motion, the Nebraska Supreme Court took the \textit{Spencer} case from the Court of Appeals.\textsuperscript{34} The Nebraska Supreme Court decided \textit{Spencer} approximately six months after it decided \textit{Kolesnick}.\textsuperscript{35} Instead of reversing \textit{Spencer} for the same reasons it reversed \textit{Kolesnick}, the Nebraska Supreme Court addressed only the statutory authority issue raised in \textit{Spencer} and reversed the district court's finding that the OPS Student Code of Conduct complied with state statutory requirements. Because the Code provision under which Blake was expelled for two semesters was found to be in violation of state statute, the Nebraska Supreme Court completely reversed any disciplining of Blake Spencer.\textsuperscript{36}

\begin{footnotesize}
\begin{enumerate}
\item[31.] \textit{Spencer}, 252 Neb. at 752, 566 N.W.2d at 759.
\item[32.] \textit{Id.}
\item[33.] \textit{Id.} at 752-53, 566 N.W.2d at 759-60.
\item[34.] The Omaha Public Schools did not request that the Nebraska Supreme Court take the \textit{Spencer} case from the Court of Appeals because it felt the \textit{Kolesnick} case was a better vehicle for reaching the decision sought by the Omaha Public Schools regarding substantive due process and because it felt that the \textit{Spencer} case could then be decided in light of whatever the Nebraska Supreme Court decided in the \textit{Kolesnick} case.
\item[35.] \textit{Kolesnick} was decided on January 24, 1997. \textit{Spencer} was decided on July 3, 1997.
\item[36.] \textit{Spencer}, 252 Neb. at 756-57, 566 N.W.2d at 761.
\end{enumerate}
\end{footnotesize}
The Nebraska Supreme Court found that the OPS Student Code of Conduct violated NEB. REV. STAT. § 79-267 which authorizes expulsion for "[c]ausing or attempting to cause personal injury" but makes an exception, among other reasons, for personal injury caused "by accident." In addition to authorizing a two-semester expulsion for intentionally or knowingly causing personal injury to another student, the OPS Student Code of Conduct provided as follows:

It is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm.

The Nebraska Supreme Court found that this provision violated the "by accident" defense authorized in NEB. REV. STAT. § 79-262. In reaching its decision, the Nebraska Supreme Court analyzed several of its prior decisions dealing with interpretation of insurance policies. The court noted that the usual meaning of "by accident" is something that is caused accidentally, unintentionally or unexpectedly.

The Nebraska Supreme Court cited City of Kimball v. St. Paul Fire and Marine Insurance Company which concerned insurance coverage for pollution of an irrigation well due to seepage from the City's sewage line. The statute in pertinent part reads as follows:

The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, when such activity occurs on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or by his or her designee, or at a school-sponsored activity or athletic event:

(3) Causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student. Personal injury caused by accident, self-defense, or other action undertaken on the reasonable belief that it was necessary to protect some other person shall not constitute a violation of this subdivision.

Id.

37. NEB. REV. STAT. § 79-267 (Reissue 1996). The statute in pertinent part reads as follows:

The following student conduct shall constitute grounds for long-term suspension, expulsion, or mandatory reassignment, subject to the procedural provisions of the Student Discipline Act, when such activity occurs on school grounds, in a vehicle owned, leased, or contracted by a school being used for a school purpose or in a vehicle being driven for a school purpose by a school employee or by his or her designee, or at a school-sponsored activity or athletic event:

(3) Causing or attempting to cause personal injury to a school employee, to a school volunteer, or to any student. Personal injury caused by accident, self-defense, or other action undertaken on the reasonable belief that it was necessary to protect some other person shall not constitute a violation of this subdivision.

Id.

38. This section of the Omaha Public Schools Student Code of Conduct, a copy of which is on file with the author, reads in pertinent part as follows:

Assault - Student (involving injury)

1. Intentionally or knowingly causing personal injury.
   First Offense: Expulsion. Remainder of the semester and the following semester or the remainder of the semester, summer school and the first semester of the following year. Police will be contacted.
   2. Recklessly causing personal injury.
   First Offense: Expulsion. Remainder of the semester. Police will be contacted.

It is not a defense to a charge of assault where someone is hurt that the student did not intend to hurt anyone as long as the student intended to engage in the conduct which caused the harm.

Omaha Public Schools Student Code of Conduct (on file with the author).

39. Spencer, 252 Neb. at 755, 566 N.W.2d at 760.
40. 190 Neb. 152, 206 N.W.2d 632 (1973).
lagoon. The court cited *Kimball* for the proposition that the term “accident” is more comprehensive than the term “negligence.” “Accident” means an unexpected happening without intention. Something that happens “by accident” has elements of unforeseen or unexpected damage or consequences as distinguished from the normal or probable consequences from a negligent act.\(^4\) The Nebraska Supreme Court noted that *NEB. REV. STAT.* § 79-267(3) provided a defense to an expulsion for an injury caused by accident rather than an injury caused by an accident.\(^4\)

The Nebraska Supreme Court also cited the case of *Bennett v. Travelers Protective Association of America*\(^4\) which concerned a detached retina caused by physical strain and the interpretation of an insurance policy which covered harms caused by “accidental means.” In *Bennett*, the Nebraska Supreme Court held that an injury which is tragically out of proportion to its trivial cause if it is something unforeseen, unexpected, extraordinary and unlooked for would in the common speech of men be caused by accidental means.\(^4\) The court in *Bennett* also noted that the purpose of accident insurance is to indemnify when unexpected and unforeseen injury follows a voluntary, but not reckless, act in which injury is not the probable or anticipated result of such act.\(^4\)

The Nebraska Supreme Court applied the authority of these two cases to the facts before it. The court found that the OPS Student Code of Conduct did not permit the defense that the act caused a result that was unforeseen, unexpected or accidental. The Nebraska Supreme Court interpreted the OPS Student Code of Conduct to permit expulsion of a student for patting another student on the back if an unexpected injury, such as choking on a stick of gum, resulted from that pat on the back.\(^4\) So interpreted, the Nebraska Supreme Court held the OPS Student Code of Conduct would clearly violate the exception in *NEB. REV. STAT.* § 79-267(3).\(^4\) The court also noted that Blake Spencer claimed he did not intend or foresee the potential harm. In assessing this claim by Spencer, the Nebraska Supreme Court noted that it may very well be that Spencer “intended some harmful result.”\(^4\) But the court found that the OPS Student Code of Conduct


\(^{42}\) 252 Neb. at 755; 566 N.W.2d at 760.

\(^{43}\) 123 Neb. 31, 241 N.W. 781 (1932).

\(^{44}\) *Bennett v. Travelers Protective Ass’n of Am.*, 123 Neb. 31, 33-35, 241 N.W. 781, 782 (1932).

\(^{45}\) *Bennett*, 123 Neb. at 34-36; 241 N.W. at 782-83.

\(^{46}\) *Spencer*, 252 Neb. at 756; 566 N.W.2d at 761.

\(^{47}\) *Id.* at 756, 566 N.W.2d at 761-63.

\(^{48}\) *Id.* at 756, 566 N.W.2d at 761.
did not even permit inquiry into the truthfulness of Blake Spencer's claims.

The dissent by Judge John Gerrard takes strong issue with the supreme court majority's analysis. According to Judge Gerrard, a former school board attorney, the majority erred in relying on cases dealing with the construction of liability insurance policies. The more analogous decisions were criminal law cases regarding the intent required for an assault. In the criminal law context, the intent required relates to intent to engage in the prohibited act rather than intent to cause the consequences or injuries which result from the assault. An accident occurs when there is a lack of intent to engage in the action at all. Judge Gerrard found the OPS Student Code of Conduct provision consistent with the criminal law standard and therefore consistent with Neb. Rev. Stat. § 79-267. Because Judge Gerrard found the statutory authority argument unpersuasive and hence not dispositive of the issues before the Court, he went on to analyze the substantive due process issue as well and found for the reasons stated by the Nebraska Supreme Court in the Kolesnick case that the two-semester expulsion for Blake Spencer should have been upheld in this case as well.

Ostensibly, the Nebraska Supreme Court's decision in the Spencer case appears to be a garden variety exercise of judicial review to check for conformity of school district actions with the authorizing statute. Hence, this case appears to have very little significance for the issue of the type of deference which courts should give to student discipline decisions of school boards. However, the Spencer case illustrates how subtle this issue really is. The Kolesnick decision is clearly a significant statement by the Nebraska Supreme Court that the trial courts in Nebraska should not readily substitute their judgment on appropriate penalties for student misconduct for the judgment of the local school board. Nothing on the surface of the Spencer decision suggests any pull back from that position. However, a fair case can be made that the Nebraska Supreme Court stretched the law to achieve the result it did in Spencer. The analogical use of decisions interpreting insurance policies was not argued or even suggested by counsel for Spencer. There was no discussion of these cases in oral argument. The insurance law analogy was adopted in the face of a clear line of more analogous Nebraska Supreme Court cases interpreting assault

49. Id. at 757-60, 566 N.W.2d at 761-63.
50. Id. at 758, 566 N.W.2d at 762.
51. Id. at 758, 566 N.W.2d at 762.
52. Id. at 759-60, 566 N.W.2d at 762-63.
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cases in the criminal law context. The record in front of the court clearly established that Blake Spencer foresaw the consequence which occurred.\(^{54}\) The facts before the court also established that the injury which occurred was not "tragically out of proportion to its trivial cause."\(^{55}\) All of these factors suggest the possibility that the court was extremely uneasy with the severity of the penalty compared to the court's perception of the triviality of the offense.

If this analysis is correct and if in fact the court was driven to its decision by its perception that the punishment did not fit the crime, the question then arises: What is the Nebraska Supreme Court telling the trial courts about the degree of scrutiny they should exercise over school board student disciplinary decisions? At least this much is clear. The Nebraska Supreme Court in \textit{Spencer} did not overturn its decision in \textit{Kolesnick}. In dissent, Judge Gerrard indicated that the \textit{Kolesnick} decision remains the law in Nebraska. Second, the Nebraska Supreme Court did not find the actions taken by the School Board to be arbitrary and capricious. Such a finding would have invited the trial courts to substitute their judgment for that of local school boards in such cases, albeit without any constitutional Damocles sword of personal liability hanging over an administrator's or a school board member's head. Third, the Nebraska Supreme Court did not find the School Board's decision unsupported by competent material and substantial evidence in view of the entire record as made on review. This also would have given trial courts significant additional discretionary authority to second guess school board student disciplinary decisions. Rather, what the Nebraska Supreme Court did was to find as narrow a statutory ground to reverse the decision of the local school board as it could.

The \textit{Spencer} decision clearly has practical consequences for school administrators because in each case where a student is injured, school officials must deal explicitly with the argument, always made in such cases by the accused student, that he or she did not intend the injury which occurred. However, this should present real practical problems only in the unusual case because strong evidence of a student's intent would usually be available from the natural consequences of the student's actions or from statements the student made before or after the

\(^{54}\) Transcript of the Hearing before the Hearing Examiner in the Due Process Case Record of Blake R. Spencer pp. 7-8 (Nov. 10, 1994). Blake admitted that he had previously heated up utensils. He later referred to the student in front of him as a "wuz" and clearly referred to what he had done as a "fork burn".

\(^{55}\) The injury of a burn from a heated fork was in proportion to what a reasonable person would foresee, quite unlike the injury in question in the cases cited in \textit{Bennett}. 
incident. Likewise, in most cases, students would have said something either before or after the assault to indicate that they did in fact intend to hurt somebody. Finally, if school officials are convinced that the decision will cause serious harm to disciplinary decision-making, school boards remain free to make their case for a change in the statute to the Nebraska Legislature. The Legislature, if it so desired, could change the effect of the Nebraska Supreme Court's decision in \textit{Spencer} in one legislative session.

Nonetheless, the \textit{Spencer} decision is troubling. There is always a significant danger any time a court reverses a student disciplinary decision that student respect for school rules will be diminished. In fact, in the \textit{Spencer} case, Blake Spencer was quoted in the Omaha World-Herald as hoping that his classmates would think of him as "the person who beat OPS." Likewise, there is also the danger that school officials will become timid decisionmakers out of fear of a court finding that they violated a student's statutory rights or that school officials will become overly dependent on lawyers and essentially substitute the judgment of a lawyer for that of a school administrator on the appropriateness or inappropriateness of a particular punishment. This is particularly true when a school administrator would be expected to anticipate in advance the application of the law on interpreting insurance policies to student discipline matters!

Hence, both \textit{Spencer} and \textit{Kolesnick} clearly raise the issue of what kind of deference should courts give to school district decision-making in student discipline matters. Although \textit{Spencer} and \textit{Kolesnick} are among a small handful of decisions even tangentially relevant decided by the Nebraska Supreme Court, there is an extensive body of law from other jurisdictions on this issue. Appropriate judicial deference must also be assessed in light of this broader context.

\section*{III. THE BROADER CONTEXT: OTHER COURTS, OTHER TABLES}

\subsection*{A. THE STANDARD OF DEFERENCE SET BY THE UNITED STATES SUPREME COURT}

In a series of decisions starting with \textit{Tinker v. Des Moines Independent School District}, the United States Supreme Court has


58. 393 U.S. 503 (1969).}
both invited judicial scrutiny of school district disciplinary decisions and also articulated a rule of substantial deference to decision-making by locally elected school officials. The most recent decision by the United States Supreme Court in this area is Vernonia School District 47J v. Acton.\textsuperscript{59} The purpose of this section is to briefly sketch out the standards for judicial deference to school officials articulated by the United States Supreme Court in this series of decisions over twenty-six years. This summary will then be used in the next section to assess the degree to which the lower federal courts and the state courts are following Supreme Court precedent on the deference owed decision-making by local school officials.

The United States Supreme Court in \textit{Tinker} was confronted with a complaint under 42 U.S.C. § 1983 seeking injunctive relief for two secondary school students suspended from school for wearing black arm bands in protest of the war in Vietnam.\textsuperscript{60} The Supreme Court held, on the facts before it, that the suspensions violated the student’s rights of free speech under the First Amendment because there was no reason for school officials to anticipate that the wearing of arm bands would substantially interfere with the work of the school or impinge on the rights of other students.\textsuperscript{61} Only Justices Black and Harlan dissented.\textsuperscript{62}

Justice Black begins his dissent in \textit{Tinker} with the following comment:

The Court’s holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by elected “officials of state supported public schools . . .” in the United States is in ultimate effect transferred to the Supreme Court.\textsuperscript{63}

Justice Black makes this comment despite the Supreme Court’s recognition in the majority opinion written by Mr. Justice Fortas that:

\[\text{[o]n the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.}\textsuperscript{64}\]

and

\[\ldots\] conduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behav-

\begin{itemize}
  \item \textsuperscript{59} 515 U.S. 646 (1995).
  \item \textsuperscript{60} Tinker v. Des Moines Indep. Sch. Dist., 393 U.S. 503, 504 (1969).
  \item \textsuperscript{61} \textit{Tinker}, 393 U.S. at 512-14.
  \item \textsuperscript{62} \textit{Id.} at 515-26.
  \item \textsuperscript{63} \textit{Id.} at 515.
  \item \textsuperscript{64} \textit{Id.} at 507.
\end{itemize}
ior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.65

This pattern of deep concern by dissenting Supreme Court justices and statements deferential to local decision-making was repeated again in the most significant United States Supreme Court case on student discipline, Goss v. Lopez.66 In Goss, the United States Supreme Court held that students suspended from school for up to ten school days have both liberty and property interests protected by the Due Process Clause of the Fourteenth Amendment.67 For such suspensions, the Court required school officials to give students oral or written notice of the charges against them, and if the students denied the charges, an explanation of the evidence the officials had and an opportunity for the students to tell their side of the story.68 Mr. Justice Powell, joined in dissent by the Chief Justice and Justices Blackmun and Rehnquist, characterized the majority opinion as unnecessarily opening “avenues for judicial intervention in the operation of our public schools that may affect adversely the quality of education.”69 Justice Powell also criticized the majority opinion as an “unprecedented intrusion into the process of elementary and secondary education.”70 He also stated that “[f]ew rulings would interfere more extensively in the daily functioning of schools than subjecting routine discipline to the formalities and judicial oversight of due process.”71 Finally, Justice Powell cited Justice Black’s dissent in Tinker and asserted that Justice Black’s prophecy that ultimate control over the public schools would be transferred to the Supreme Court was now being fulfilled.72 Justice Powell noted that in the six years since Tinker, there had been “literally hundreds of cases by school children alleging violation of their constitutional rights.”73 Justice Powell concluded his dissent with the following statement:

[op]one can only speculate as to the extent to which public education will be disrupted by giving every school child the power to contest in court any decision made by his teacher which arguably infringes the state-conferred right to education.74

65. Id. at 513.
68. Goss, 419 U.S. at 581.
69. Id. at 585 (Powell, J., dissenting).
70. Id. (Powell, J., dissenting).
71. Id. at 591 (Powell, J., dissenting).
72. Id. at 600 n.22 (Powell, J., dissenting).
73. Id. (Powell, J., dissenting).
74. Id. (Powell, J., dissenting).
All of this concern by Justice Powell was focused on the requirements which the majority opinion\textsuperscript{75} articulated for the handling of suspensions from school of ten days or less. Those procedures, which are now taken for granted by school officials all across this country, required simply an informal conference between the disciplinarian and the accused student in which the disciplinarian was required to tell the student what the charges were against him or her and, if the student denied the charges, the disciplinarian was required to give the student an explanation of the evidence the school authorities had and an opportunity to present his or her version of what happened.\textsuperscript{76}

The majority opinion in \textit{Goss} also paid homage to the Supreme Court's earlier decision in \textit{Epperson v. Arkansas}\textsuperscript{77} in which the Supreme Court noted that:

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . By and large, public education in our Nation is committed to the control of state and local authorities.\textsuperscript{78}

The majority opinion also recognized that our public schools are vast and complex and that "[s]ome modicum of discipline and order is essential if the educational function is to be performed."\textsuperscript{79}

In its next decision dealing with student discipline, \textit{Wood v. Strickland},\textsuperscript{80} the Supreme Court was confronted with the issue of personal liability for school officials under Title 42 U.S.C. § 1983 for violating students' constitutional rights. In \textit{Wood}, two Mena, Arkansas high school students were expelled from school for spiking the punch at a meeting at school of an extracurricular school organization attended by parents and students.\textsuperscript{81} The Supreme Court used the dispute caused by these two expulsions to articulate a qualified immunity from personal liability for school and other public officials and to vest substantial discretion in such officials to interpret their own policies. The Court's resolution of the personal liability issue was not without controversy. The dissenting opinion, once again authored by Justice Powell, closed by wondering whether qualified persons would continue to volunteer for service in public education given the degree of risk the majority's standard for personal liability had imposed upon them.\textsuperscript{82}

\textsuperscript{75} The justices joining in the majority opinion were Justices White, Douglas, Brennan, Stewart and Marshall.
\textsuperscript{76} 419 U.S. at 581.
\textsuperscript{77} 393 U.S. 97 (1968).
\textsuperscript{78} \textit{Goss}, 419 U.S. at 578 (quoting \textit{Epperson v. Arkansas}, 393 U.S. 97, 104 (1968)).
\textsuperscript{79} \textit{Id.} at 580.
\textsuperscript{80} 420 U.S. 308 (1975).
\textsuperscript{82} \textit{Wood}, 420 U.S. at 331.
The majority standard imposed personal liability if the school official knew or reasonably should have known that the action he or she took within the official's sphere of responsibility would violate the constitutional rights of the students affected or if the school official took action with the malicious intention to cause deprivation of constitutional rights or other injury to the student. Justice Powell's dissent argued for imposing personal liability only in those cases in which school officials acted with impermissible intentions.

In the course of developing its standard, the majority clearly recognized the potential impact of too rigorous a standard for personal liability:

The imposition of monetary costs for mistakes which were not unreasonable in the light of all the circumstances would undoubtedly deter even the most conscientious school decision-maker from exercising his judgment independently, forcefully, and in a manner best serving the long-term interests of the school and the students. The most capable candidates for school board positions might be deterred from seeking office if heavy burdens upon their private resources for monetary liability were a likely prospect during their tenure.

The difference between the majority and the dissent was that the majority felt it reasonable to require school officials to be aware of the settled indisputable law regarding the rights of students. The dissent, given changes over time in Supreme Court assessment of such rights, was skeptical about the existence of any such settled indisputable law.

All nine justices joined together in that portion of the Supreme Court's opinion which discussed the level of deference owed by federal courts to local officials' interpretations of their own policies. The Supreme Court unanimously recognized that "[i]t is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion."

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83. Justice White's opinion was joined in by Justices Douglas, Brennan, Stewart and Marshall.
84. Wood, 420 U.S. at 322.
85. Id. at 322 (Powell, J., dissenting). Justice Powell elaborates the standard as follows: Whether in light of the discretion and responsibilities of his office, and under all of the circumstances as they appeared at the time, the officer acted reasonably and in good faith. Id. (Powell, J., dissenting).
86. Wood, 420 U.S. at 319-20.
87. See supra notes 78-79 and accompanying text.
88. Wood, 420 U.S. at 329.
89. Id. at 309.
90. Id. at 326.
nine justices also held that section “1983 does not extend the right to relitigate in federal court evidentiary questions arising in school disciplinary proceedings or the proper construction of school regulations.”

These clear findings by the Supreme Court were based on the unanimous recognition that public education in the United States must necessarily rely upon the “discretion and judgment of school administrators and school board members.” Finally, the justices also unanimously held that “[section] 1983 was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violations of specific constitutional guarantees.”

Two years later, the majority on the United States Supreme Court shifted in the case of Ingraham v. Wright. This time a five to four majority of United States Supreme Court held that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not apply to corporal punishment imposed as a discipline in public schools and that, although a liberty interest was involved, due process did not require notice and a hearing prior to the imposition of corporal punishment in the public schools. The majority based its opinion on what it categorized as the openness of the public schools and the supervision of those schools by the community and on the legal constraints imposed at common law. The majority also noted that imposing additional administrative safeguards as a constitutional requirement would significantly intrude into the area of educational responsibility that lies primarily with the public school authorities.

Underlying the majority's position was its view of the degree of deference which the federal courts should grant to the local authorities. The court explicitly cited a portion of Justice Black’s opinion in Powell v. Texas as follows:

It is always time to say that this Nation is too large, too complex and composed of too great a diversity of peoples for any one of us to have the wisdom to establish the rules by which local Americans must govern their local affairs. The constitutional rule we are urged to adopt is not merely revolutionary-

91. Id.
92. Id.
93. Id.
95. The majority opinion was written by Mr. Justice Powell joined by Justices Blackmun, Rehnquist, Stewart and Chief Justice Burger. Mr. Justice White authored a dissenting opinion in which Justices Brennan, Marshall and Stevens joined. Justice Stevens also filed a separate dissenting opinion.
it departs from the ancient faith based on the premise that experience in making local laws by local people themselves is by far the safest guide for a Nation like ours to follow.\textsuperscript{99}

The majority opinion recognized that several of the states had explicitly authorized the use of corporal punishment and that the \textit{Goss} type hearing requirements urged by the four dissenting justices "would significantly burden the use of corporal punishment as a disciplinary measure."\textsuperscript{100} The majority opinion specifically recognized that even informal hearings require personnel, time, and diversion of attention from regular school pursuits.\textsuperscript{101} The court expressed fear that if it imposed such requirements, school officials would choose to abandon corporal punishment rather than incurring the burdens of complying with these procedural requirements.\textsuperscript{102}

In its concluding analysis, the Supreme Court specifically recognized that elimination of corporal punishment would be welcomed by many in our society.\textsuperscript{103} But the Supreme Court concluded that:

\begin{quote}
when such a policy choice may result from this Court's determination of an asserted right to due process, rather than from the normal processes of community debate and legislative action, the societal costs cannot be dismissed as insubstantial.\textsuperscript{104}
\end{quote}

The Supreme Court recognized that it was here reviewing a legislative judgment that must be viewed "in light of the disciplinary problems commonplace in the schools."\textsuperscript{105} The Court concluded that assessment of the need for, and the appropriate means of maintaining, school discipline is committed generally to the discretion of school authorities subject to state law.\textsuperscript{106}

The dissenting opinion authored by Justice White, who wrote the majority opinion in \textit{Goss}, would have held the Eighth Amendment's prohibitions on cruel and unusual punishment applicable to corporal punishment because Justice White and the three Justices who joined in his opinion\textsuperscript{107} could see no reason that severe corporal punishment is any more acceptable when inflicted on children in the public schools than it is when inflicted on prisoners in this country's prisons.\textsuperscript{108} The

\begin{itemize}
\item \textsuperscript{99} \textit{Ingraham}, 430 U.S. at 670-71 n.39 (quoting \textit{Powell v. Texas}, 392 U.S. 514, 547-48 (1968) (Black, J., concurring in judgment)).
\item \textsuperscript{100} \textit{Id.} at 662, 680.
\item \textsuperscript{101} \textit{Id.} at 680.
\item \textsuperscript{102} \textit{Id.} at 680-81.
\item \textsuperscript{103} \textit{Id.} at 681.
\item \textsuperscript{104} \textit{Id.}
\item \textsuperscript{105} \textit{Id.} at 681-82.
\item \textsuperscript{106} \textit{Id.}
\item \textsuperscript{107} Justices Brennan, Marshall and Stevens.
\item \textsuperscript{108} \textit{Ingraham}, 430 U.S. at 690-92 (White, J., dissenting).
\end{itemize}
dissent also could not square the Court's holding in Goss that rudimentary due process applies prior to a suspension from school with the Court's holding in Ingraham that such rudimentary due process does not apply to corporal punishment when each of these punishments implicates a protected constitutional interest. The dissent concluded that the fear of a significant intrusion into the disciplinary process expressed in Ingraham is just as exaggerated as that expressed in Goss.\(^\text{109}\) In the eyes of Justice White and the justices who joined him, any procedure less than the Goss procedures is less than a fair-minded school principal would impose upon himself or herself in order to avoid injustice in inflicting corporal punishment.\(^\text{110}\)

Eight years after Ingraham, the United States Supreme Court decided the case of New Jersey v. T.L.O.\(^\text{111}\) In T.L.O., the Supreme Court held, in an opinion authored by Justice White,\(^\text{112}\) that the Fourth Amendment's prohibition on unreasonable searches and seizures applied to searches conducted by public school officials, but that the standard for authorizing searches in the public school context was less rigorous than that in the criminal law setting.\(^\text{113}\) In the school setting, the legality of a student search depended on its reasonableness, both at its inception and with respect to its scope. The Supreme Court held that under ordinary circumstances the search of a student by a school official would be justified at its inception "when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school."\(^\text{114}\) The search will be permissible in its scope, the Court held, when the measures adopted by school officials are reasonably related to the objectives of the search and not excessively intrusive in light of the student's age and sex and the nature of the offense.\(^\text{115}\) In light of this standard, the United States Supreme Court upheld the search of a fourteen year old female high school student for cigarettes which ultimately turned up evidence of possession of marijuana.\(^\text{116}\)

Underlying the two critical determinations by the United States Supreme Court in T.L.O. to apply the Fourth Amendment in the public school setting, but in a less stringent manner than in the normal criminal law setting, is the continuing debate reflected in the Supreme

\(^{109}\) Id. at 700 (White, J., dissenting).

\(^{110}\) Id. (White, J., dissenting).

\(^{111}\) 469 U.S. 325 (1985).

\(^{112}\) Justice White's opinion was joined by the Chief Justice Burger, and Justices Powell, Rehnquist and O'Connor.


\(^{114}\) T.L.O., 469 U.S. at 341-42.

\(^{115}\) Id. at 342.

\(^{116}\) Id. at 343-48.
Court's earlier decisions about the degree to which deference should be granted to school officials in making student disciplinary decisions. Each of the five separate opinions written in *T.L.O.* recognized the need for enforcement of discipline in the public school setting.\(^{117}\) Indeed, these opinions reflect a greater urgency with respect to the need for appropriate discipline in the schools than the Supreme Court's previous opinions. Although all of the justices clearly recognized the need for discipline and order in the public schools, all of the justices also recognized that school authorities are governed by the Fourth Amendment. In reaching this conclusion, all of the justices explicitly rejected the characterization of school authority as simply flowing from a delegation of parental authority. The Supreme Court's opinion, joined by all of the justices, explicitly stated that:

> Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.\(^{118}\)

This characterization of the authority of school officials as representatives of the state for purposes of the Fourth Amendment was simply a consistent application of the reasoning underlying the Supreme Court's previous decisions in *Tinker* and *Goss*. It is precisely this position, which the Supreme Court appears to be backing away from in *Vernonia School District 47J v. Acton*.\(^ {119}\)

Historically, the essence of Fourth Amendment protection for citizens required that public officials not engage in a search without a warrant\(^ {120}\) and that a warrant not be issued except on probable cause.\(^ {121}\) All of the justices in *T.L.O.* concurred that a warrant requirement was not appropriate in the school setting. The disagreement focused on whether school officials would be permitted to search students without having probable cause. Six of the nine justices

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agreed that probable cause was too stringent a requirement.\textsuperscript{122} Justice White's opinion for the Court explicitly noted that although public schools were clearly having difficulty maintaining discipline, the situation was not so extreme that students in schools could claim no legitimate expectations of privacy.\textsuperscript{123} Likewise Justice White's opinion recognized that students had a legitimate need to bring personal property into school buildings or onto school grounds.\textsuperscript{124} Justice White, however, recognized, in clearer terms than in any of the earlier Supreme Court opinions discussed above, the need for classroom discipline. Specifically, Justice White recognized that school disorder has in recent years often taken particularly ugly forms involving drug use and violent crime.\textsuperscript{125}

The concurring opinion by Justice Powell also clearly recognized the need for establishing discipline and maintaining order.\textsuperscript{126} Justice Powell observed that without such order, teachers cannot even begin to educate their students.\textsuperscript{127} Justice Powell also recognized that schools have an obligation to protect pupils and teachers from violence by students.\textsuperscript{128} Justice Powell also correctly asserted that the decisions of the Supreme Court had never held that the full panoply of constitutional rights applies with the same force and effect inside school as it does in the general enforcement of this country's criminal laws.\textsuperscript{129}

Justice Blackmun even more eloquently than Justice Powell recognized the particular problems confronted in this nation's classrooms by lack of order. Justice Blackmun asserted that maintaining order in a classroom can be a difficult task, particularly because generally it must be carried out by a single teacher over a large number of students.\textsuperscript{130} Justice Blackmun correctly observed that students are sometimes inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a fellow student if that misbehavior is not swiftly dealt with.\textsuperscript{131} Justice Blackmun also recognized the in-

\begin{itemize}
  \item \textsuperscript{122} \textit{T.L.O.}, 469 U.S. at 341, 353. Justice Blackmun's concurrence in the judgment of the Court clearly and explicitly recognizes that probable cause is not an appropriate standard in the day to day administration of the public schools. \textit{Id.} at 353 (Blackmun, J., concurring). The other five non-dissenting justices explicitly joined in Justice White's opinion holding that probable cause was not a requirement in the school setting. \textit{Id.} at 341 (White, J., concurring).
  \item \textsuperscript{123} \textit{T.L.O.}, 469 U.S. at 338.
  \item \textsuperscript{124} \textit{Id.} at 339.
  \item \textsuperscript{125} \textit{Id.}
  \item \textsuperscript{126} \textit{T.L.O.}, 469 U.S. at 350 (Powell, J., concurring).
  \item \textsuperscript{127} \textit{Id.} (Powell, J., concurring).
  \item \textsuperscript{128} \textit{Id.} (Powell, J., concurring).
  \item \textsuperscript{129} \textit{Id.} (Powell, J., concurring).
  \item \textsuperscript{130} \textit{T.L.O.}, 469 U.S. at 352 (Blackmun, J., concurring).
  \item \textsuperscript{131} \textit{Id.} (Blackmun, J., concurring).
\end{itemize}
creasing problem of drug use and possession of weapons and that these growing problems required immediate responses, not just to provide an appropriate learning environment, but also to protect teachers and students' physical safety. Justice Blackmun asserted that the government has a "heightened obligation" to safeguard students in school. Finally, Justice Blackmun very correctly observed that a teacher has neither the training nor the day-to-day experience in the complexities of probable cause necessary to make quick judgments about when probable cause exists and when it does not.

Both the dissenting opinion by Justice Brennan and the dissenting opinion by Justice Stevens also recognized the clear need for discipline in schools. Justice Brennan recognized what he called the "serious problems of drugs and violence that plague our schools." These problems clearly caused Justice Brennan to state that a warrant requirement was not required in schools. Justice Brennan dissented on the abrogation of the requirement of probable cause because he believed that cases interpreting the Fourth Amendment required application of that standard in the school context and also because he felt that the probable cause standard was sufficiently nontechnical, practical and easily applied that school officials could be expected to understand it and follow it. In contrast, he felt that the reasonableness standard adopted by the majority was too amorphous for appropriate application by school officials without the risk of significant litigation testing its contours. Finally, Justice Brennan articulated his suspicion that the majority's real purpose, despite its language to the contrary, was to permit school officials to ignore the Fourth Amendment in their student discipline decision-making.

The dissent by Justice Stevens raises the most pertinent issue for purposes of this article. Although Justice Stevens also specifically recognized the discipline problems confronted by schools, he articulated a standard which would require judicial assessment of the relative importance of various school rules. In dispensing with the warrant requirement, Justice Stevens stated as follows:

Violent, unlawful, or seriously disruptive conduct is fundamentally inconsistent with the principal function of teaching institutions which is to educate young people and prepare

132. Id. at 352-53 (Blackmun, J., concurring).
133. Id. at 353 (Blackmun, J., concurring).
134. Id. (Blackmun, J., concurring).
135. Id. at 357 (Blackmun, J., concurring).
136. Id. (Blackmun, J., concurring).
137. Id. at 364-65 (Blackmun, J., concurring).
138. Id. at 365 (Blackmun, J., concurring).
139. Id. at 370 (Blackmun, J., concurring).
140. T.L.O., 469 U.S. at 376 (Stevens, J., concurring in part, dissenting in part).
them for citizenship. When such conduct occurs amidst a sizeable group of impressionable young people, it creates an explosive atmosphere that requires a prompt and effective response.\textsuperscript{141}

Justice Stevens refused to abrogate the requirement of probable cause in school searches generally as determined by the majority because of his concern that school officials will conduct searches of students to enforce what Justice Stevens believed are trivial school rules. In urging a standard for school searches that would take into account the relative importance of the school rule involved, Justice Stevens explicitly confronted the argument made by the Solicitor General for a lesser standard. The Solicitor General, relying heavily on empirical evidence of the presence of violent and unlawful behavior in America's schools, argued as follows:

The sad truth is that many classrooms across the country are not temples of learning teaching the lessons of good will, civility, and wisdom that are central to the fabric of American life. To the contrary, many schools are in such a state of disorder that not only is the educational atmosphere polluted, but the very safety of students and teachers is imperiled.\textsuperscript{142}

Justice Stevens took the position that the appropriate rule should permit school officials to search a student only in those circumstances when they had reason to believe that the search would uncover evidence of a violation of the law or evidence of the student engaging in conduct that is seriously disruptive of the school order or the educational process.\textsuperscript{143} The ease of governmental intrusion into a student's zone of expected privacy should match the seriousness of the problem the government is proposing to deal with. Justice Stevens, like Justice Brennan, also expressed the thought that the rule adopted by the majority was so open ended that it would make the Fourth Amendment virtually meaningless in the school context.\textsuperscript{144}

Justice White explicitly and articulately responded to the position taken by Justice Stevens. In an extremely insightful assessment of the appropriate role for courts in reviewing student discipline decisions, Justice White made the following comments:

We are unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of various school rules. The maintenance of discipline in the schools requires not only that students be

\textsuperscript{141} Id. (Stevens, J., concurring in part, dissenting in part).
\textsuperscript{142} Id. at 378 n.19 (Stevens, J., concurring in part, dissenting in part) (citations omitted).
\textsuperscript{143} Id. at 378 (Stevens, J., concurring in part, dissenting in part).
\textsuperscript{144} Id. at 385 (Stevens, J., concurring in part, dissenting in part).
restrained from assaulting one another, abusing drugs and alcohol, and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities. We have "repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools . . . . The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should, as a general matter, defer to that judgment and refrain from attempting to distinguish between rules that are important to the preservation of order in the schools and rules that are not. 145

Hence, the Supreme Court's decision in T.L.O. represents not only an important articulation by the Court of the appropriate standard for searches in schools, but also marks a clear recognition by the Supreme Court that the courts have no business weighing the relative importance or lack of importance of a particular school disciplinary rule. This is a function committed to local school officials.

The Supreme Court's deference to local school district decision-making continued in the next case involving discipline of students before the Court: Bethel v. Fraser. 146 In Fraser, the United States Supreme Court upheld the decision of the Bethel School District to suspend for three days a student who gave a nominating speech for a fellow student which was laden with a sexual metaphor and to remove his name from a list of potential graduation speakers. The Bethel School District had a rule which prohibited any conduct which materially and substantially interferes with the educational process, including the use of obscene language. The local school authorities found Fraser's speech to be obscene within the ordinary meaning of that term. The case came to the United States Supreme Court from an affirmance by the Ninth Circuit of the District Court's opinion in which the Ninth Circuit held that Fraser's speech was "indistinguishable from the protest armband in Tinker." 147 The Supreme Court immediately dispatched this Court of Appeals' position by noting that there was a "marked distinction" between the political message in Tinker and the sexual content of Fraser's speech. 148 The Court distinguished Tinker because Tinker did "not concern speech or action that

145. Id. at 342-43 n.9 (citations omitted).
146. 478 U.S. 675 (1986).
intrudes upon the work of the schools or the rights of other students."

The Supreme Court began its consideration of the underlying principles by noting that one of the core functions of public education is to inculcate "habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self government in the [United States]." The Court recognized that any inculcation of these fundamental values must also take into account consideration of the sensibilities of others and that schools must teach students the boundaries of socially appropriate behavior. Instead of analyzing the facts of the case using the Tinker standard, the Court simply concluded that the decision on what kind of speech inside the schools is appropriate or inappropriate properly rests with the school board. Likewise, it is the schools, and not the courts, who are charged with the responsibility of determining the degree of toleration in a school for lewd, indecent or offensive speech.

It is highly significant that the Supreme Court cited T.L.O. rather than Tinker in its consideration of what the First Amendment requires in the school setting. Rather than emphasizing the holding in Tinker that students do not shed their constitutional rights at the school house door, the Supreme Court stressed its holding in T.L.O. that the constitutional rights of students in public schools are not automatically coextensive with those rights of adults in other settings. Likewise, it is highly significant that the Court, in considering the procedural due process issue raised in Fraser, cited T.L.O. rather than Goss as its first point of reference. The Court cited T.L.O. for the proposition that the Supreme Court has recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student teacher relationship." With this analysis from T.L.O. as its starting point, the Supreme Court concluded that school disciplinary rules need not be as detailed as a criminal code in order to comply with the requirements of procedural due process. This finding was critical because the meaning of the term obscene was interpreted very broadly by school officials. This broad interpretation was clearly sanctioned by the Supreme Court.

149. Id. (citations omitted).
150. Id. at 681.
151. Id.
152. Id. at 683.
153. Id.
154. Id. at 686 (quoting T.L.O., 469 U.S. at 340).
155. Id.
One other development in Fraser is of particular note. In discussing other First Amendment cases involving the schools, the Supreme Court referred to the role of school authorities as that of acting in loco parentis to protect children.\textsuperscript{156} Gone from the Court's opinion is the stress on school authorities being government employees.

Fraser did not completely overrule Tinker. The Court explicitly noted that the sanctions imposed by the Bethel School District were not in any way related to any political viewpoint.\textsuperscript{157} Tinker remains the governing authority on that issue.

In dissent, Justice Marshall faulted the Supreme Court majority for not analyzing the facts of the case in light of the Tinker standard.\textsuperscript{158} However, even Justice Marshall recognized that school officials "must be given a wide latitude to determine what forms of conduct are inconsistent with the school's educational mission."\textsuperscript{159}

Justice Stevens' dissent recognized that school officials have authority to prohibit the use of vulgar terms in classroom discussions and in extra curricular activities that are sponsored by the school and held on school grounds.\textsuperscript{160} Justice Stevens was concerned about due process not being followed because, in Justice Stevens' view, Fraser was not given sufficient notice that his speech would subject him to punishment.\textsuperscript{161}

Although Hazelwood School District v. Kuhlmeier\textsuperscript{162} is not strictly speaking a school discipline case because it involved a suit for declaratory judgment by students whose articles had been censored in a school sponsored student newspaper, it nonetheless forms an important link in understanding the Supreme Court's views on the discretion properly granted to school officials to discipline students. In Hazelwood, the Supreme Court clearly limited the Tinker substantial disruption standard to those circumstances in which educators are dealing with a student's personal expression that happens to occur on school premises.\textsuperscript{163} The Court rejected application of the Tinker standard to any expressive activities that "members of the public might reasonably perceive to bear the imprimatur of the school."\textsuperscript{164} With respect to such activities, the Supreme Court held that school officials

\begin{itemize}
  \item \textsuperscript{156} Id. at 684.
  \item \textsuperscript{157} Id. at 685.
  \item \textsuperscript{158} Bethel, 478 U.S. at 690 (Marshall, J., dissenting).
  \item \textsuperscript{159} Id. (Marshall, J., dissenting).
  \item \textsuperscript{160} Bethel, 478 U.S. at 691 (Stevens, J. dissenting).
  \item \textsuperscript{161} Id. (Stevens, J. dissenting).
  \item \textsuperscript{162} Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266, 270-71 (1988).
  \item \textsuperscript{163} Hazelwood, 484 U.S. at 271.
\end{itemize}
may regulate student speech in any manner they see fit so long as the actions are reasonably related to legitimate pedagogical concerns.\footnote{165}

The dissent in Hazelwood, authored by Justice Brennan and joined in by Justices Marshall and Blackmun, urged continued broad application of the Tinker standard.\footnote{166} In the course of its argument, the dissent stated its view that Fraser applied the Tinker standard in reaching its decision.\footnote{167} However, the majority opinion rejected this characterization of its decision in Fraser. The majority opinion explicitly stated that:

The decision in Fraser rested on the “vulgar,” “lewd,” and “plainly offensive” character of a speech delivered at an official school assembly rather than on any propensity of the speech to “materially disrupt class work or involve[ ] substantial disorder or invasion of the rights of others.”\footnote{168}

The majority opinion also clearly noted that the Court’s opinion in Fraser cited Justice Black’s dissent in Tinker for the proposition that nothing in the Federal Constitution “compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.”\footnote{169} The majority opinion concluded that Justice Black’s dissent was equally applicable in the Hazelwood situation.\footnote{170}

The Supreme Court in Hazelwood also explicitly dealt with the issue of deference to school officials’ decision-making. The Supreme Court stated that in light of the standard it had devised, any decision by school officials to censor student expression in a school-sponsored activity would be interfered with by the courts only if such a decision “has no valid educational purpose.”\footnote{171} In so stating, the majority opinion referred to the fact that a number of lower federal courts “have similarly recognized that educators’ decisions with regard to the content of school-sponsored . . . activities are entitled to substantial deference.”\footnote{172}

Hence, Hazelwood is one further indication of the Supreme Court’s clear determination that the federal courts are to grant substantial deference to decision-making of school officials regarding which activities by students are subject to sanction.

\footnotesize{\begin{itemize}
  \item \footnote{165}{\textit{Id.} at 273.}
  \item \footnote{166}{Hazelwood, 484 U.S. at 280-91 (Brennan, J., dissenting).}
  \item \footnote{167}{\textit{Id.} at 281 (Brennan, J., dissenting).}
  \item \footnote{168}{Hazelwood, 484 U.S. at 271-72 n.4.}
  \item \footnote{169}{\textit{Id.} (citations omitted).}
  \item \footnote{170}{\textit{Id.} at 271 n.4.}
  \item \footnote{171}{\textit{Id.} at 273.}
  \item \footnote{172}{\textit{Id.} at 273 n.7.}
\end{itemize}}
Vernonia School District 47J v. Acton\textsuperscript{173} is the most recent United States Supreme Court opinion dealing with the discretion of school officials to control student behavior. It is also the only United States Supreme Court decision in this general area made by the current membership of the United States Supreme Court. In the Vernonia School District 47J case, the Court upheld the validity of a school district's student athlete drug policy which authorized suspicionless random urinalysis drug testing of students who participate in a school district's athletic programs. The critical issue decided by the Supreme Court was that individualized suspicion was not necessary before drug testing of student athletes was permissible.\textsuperscript{174} The authorization of a search without individualized suspicion drew the dissent of Justices O'Connor, Stevens and Souter.\textsuperscript{175} The dissent found the need for individualized suspicion at the core of the Fourth Amendment even as it applied in the school context.\textsuperscript{176}

The Vernonia School District 47J case is very important from the perspective of this article because of what it has to say about the basic authority of public school officials. Although the Supreme Court clearly recognizes that public school officials do not stand merely \textit{in loco parentis} and that they do exercise their duties as state actors, the Court emphasized, citing \textit{T.L.O.}, that the authority of school officials was "custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."\textsuperscript{177} The Supreme Court stressed that, in \textit{Fraser} it recognized that for many purposes school officials did act \textit{in loco parentis} and had the power and duty to "inculcate the habits and manners of civility."\textsuperscript{178} The Court also paid homage to its earlier decision in \textit{Tinker}, but with one critical change of language. In \textit{Tinker}, the Supreme Court noted that "students" did not "shed their constitutional rights to freedom of speech or expression at the school house gate."\textsuperscript{179} In Vernonia School District 47J, the Court stated that "children" did not "shed their constitutional rights... at the school house gate."\textsuperscript{180} The Court in Vernonia School District 47J continued the use of this terminology by noting that "the nature of those rights is what is appropriate for children in school"\textsuperscript{181} and by

\textsuperscript{173} 515 U.S. 646 (1995).
\textsuperscript{175} Vernonia, 515 U.S. at 666-86.
\textsuperscript{176} Vernonia, 515 U.S. at 684-85 (O'Connor, J., dissenting).
\textsuperscript{177} Vernonia, 515 U.S. at 655.
\textsuperscript{178} \textit{Id.} (citations omitted).
\textsuperscript{179} \textit{Tinker}, 393 U.S. at 506.
\textsuperscript{180} Vernonia, 505 U.S. at 655-56.
\textsuperscript{181} \textit{Id.} at 656 (emphasis added).
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stating that the "reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children."\(^{182}\)

In concluding his opinion for the Court, Justice Scalia took the Supreme Court's opinion one very significant step beyond its immediate context by generalizing the appropriate type of inquiry for courts examining actions of school officials. The Supreme Court's opinion noted that, "[w]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake."\(^{183}\)

The majority opinion clearly applies this standard to all search issues in the public schools. The issue remains whether this view of school officials as guardians and tutors will have application beyond the search context after the Vernonia School District 47J case and to what extent the lower federal courts and the state courts will defer to school officials on decisions to discipline students. It is precisely that issue that this article will now explore.

B. THE STANDARD OF DEFERENCE IN FACT EXERCISED BY THE LOWER FEDERAL COURTS AND STATE COURTS SINCE THE UNITED STATE'S SUPREME COURT'S DECISION IN VERNONIA SCHOOL DISTRICT 47J v. ACTON

In reviewing the state of the law on judicial deference to school district decision-making regarding student discipline, a total of fifty-four\(^{184}\) lower court decisions since Vernonia School District 47J were examined. These cases covered a wide variety of student discipline

\(^{182}\). Id. (emphasis added).

\(^{183}\). Id. at 665.

\(^{184}\). The lower federal court and state court cases reviewed in writing this article, all decided since Vernonia School District 47J, are as follows:

Ex rel. Angelia D.B., 564 N.W.2d 682 (Wis. 1997).


In re E.R.D., 551 N.W.2d 238 (Minn. App. 1996).

issues including the legitimacy of school district concern for student safety,\textsuperscript{185} due process issues regarding expulsions and suspensions,\textsuperscript{186} the provision of alternative education for expelled students,\textsuperscript{187} various First Amendment issues,\textsuperscript{188} various Fourth Amendment issues,\textsuperscript{189} and issues concerning the role of parents.\textsuperscript{190} It is apparent from a review of these cases that the lower federal courts and the state courts have generally taken to heart the admonition of the United States Supreme Court to grant deference to decision-making of local school


Lovell v. Poway Unified Sch. Dist., 90 F.3d 367 (9th Cir. 1996).


Miller \textit{v.} Bd. of Educ. of Caroline County, 690 A.2d 557 (Md. App. 1997).


Richie \textit{v.} Board of Educ. of Lead Hill Sch. Dist., 933 S.W.2d 375 (Ark. 1996).

Smith \textit{v.} Severn, 129 F.3d 419 (7th Cir. 1997).

Spaek \textit{v.} Charles, 928 S.W.2d 88 (Tex. App.—Houston 1996).


Stephenson \textit{v.} Davenport Comm. Sch. Dist., 110 F.3d 1303 (8th Cir. 1997).

\textit{In re} T.H., III, 681 So. 2d 110 (Miss. 1996).

Thompson \textit{v.} Carthage Sch. Dist., 87 F.3d 979 (8th Cir. 1996).


Wallace \textit{ex rel.} Wallace \textit{v.} Batavia Sch. Dist. 101, 68 F.3d 1010 (7th Cir. 1995).


officials. In three-fourths of these cases, the courts decided the cases either in favor of the school district or in favor of the position which would grant greater discretion to school officials in student discipline matters in those cases in which school officials were not directly involved. Nonetheless, there remains cause for concern by school officials because of the vague wording of some of the standards adopted by the lower courts in these student discipline decisions. The purpose of this final section of this article is to examine these lower federal court and state court decisions and to draw some more precise conclusions regarding the degree of deference granted currently by the courts to school officials. Finally, the concluding portion of this section will make some suggestions for future judicial decision-making.

1. School Safety Issues

An examination of these lower court cases leaves no doubt that the courts very much recognize the legitimacy of school officials' concerns about the safety of students and preserving an appropriate educational atmosphere in the schools. The Kansas Supreme Court in Matter of C.M.J., articulately described the concern of school officials:

We have explained the vital remedial role expulsion may serve in maintaining institutional order within a public school: Boards of education are given an important role in the training and education of our children. The high school education

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191. In fifteen of the cases, the court found against the school district or against an interest favorable to school district interests. Those cases are:
Spacek v. Charles, 928 S.W.2d 88 (Tex. App.—Houston 1996).
In re T.H., 681 So. 2d 110 (Miss. 1996).
Both Pruitt and In re T.H. found on some issues for the school district and on others against it. Therefore, although there are 15 cases listed, the total should only be 14 against the school district given the dual holdings in Pruitt and In re T.H.


mission requires that hundreds of immature, volatile and aggressive adolescents be brought together in confined quarters. Most of these youth are seeking their own identity as well as an education. If a suitable atmosphere for instruction, study and concentration is to be provided, the students and the teachers must be subjected to a wide variety of disciplinary rules. For many adolescents learning is a discipline rather than a pleasure and it must be carried on in dignified and orderly surroundings if it is to be practiced satisfactorily. Obedience to duly constituted authority and respect for those in authority should be instilled in young people.  

The Kansas Supreme Court further stated that:

The school administration also has a compelling interest in assuring safety in school facilities. Public school attendance in Kansas is mandatory. One prerequisite to empowering the State to enforce such compulsion is that attendance must not expose the students to 'daily dangers to life and limb so obvious and so great that in the exercise of reasonable prudence their parents should not permit them to incur the hazard.'

A similar concern was expressed by the Supreme Court of Illinois in People v. Dilworth:

In short, a high school 'is a special kind of place in which serious and dangerous wrong doing is intolerable.' The state, having compelled students to attend school and thus 'associate with the criminal few' or perhaps merely the immature and unwise few' 'closely and daily,' thereby 'owes those students a safe and secure environment.'

As noted above, the Nebraska Supreme Court also clearly recognized this concern for school safety as a compelling governmental interest in the Kolesnick case.

In the face of these legitimate concerns with school safety, the courts have also recognized that school officials and not the courts are the appropriate arbiters of the proper methods of assuring safety in our nation's schools. The Court of Appeals of Indiana expressed this view very well:

Barnell [the disciplined student] argues that since he was not threatening anyone with what might be considered by some to be a relatively innocuous knife, his expulsion was not reasonably necessary to maintain order and was therefore arbitrary. We disagree. School officials, with their expertise in

194. C.M.J., 915 P.2d at 68 (citations omitted).
197. See supra notes 8-28 and accompanying text.
such matters, are in the best position to determine in their
discretion what actions are reasonably necessary to carry out
school purposes, and their decisions in this regard will not be
disturbed upon judicial review unless clearly arbitrary and
groundless.198

Perhaps the United States District Court for the Southern Dis-
trict of Texas has said it best in Piwonka v. Tidehaven Independent
School District:199

The Fifth Circuit has stated, and this Court wholeheartedly
agrees, that 'school disciplinary matters are best resolved in
the local community and within the school system.' The
Court is not in the business of micro-managing middle
schools.200

This general recognition has prevailed in decisions focusing on
the severity of a particular punishment. The other courts which have
examined the issue considered in the Kolesnick case are in basic
agreement with the Nebraska Supreme Court’s resolution of a court’s
role in reviewing the severity of a particular punishment. The
Supreme Judicial Court of Massachusetts in the case of Doe v. Super-
intendent of Schools of Worcester201 used reasoning identical to that of
the Nebraska Supreme Court when confronted with a substantive due
process challenge to a two semester expulsion for possession of a small
knife concealed inside a lipstick case. Other courts considering the
severity of a particular punishment, although they have not explicitly
utilized the reasoning of the Nebraska and Massachusetts courts,
have recognized that the law should grant school officials extensive
discretion in determining the severity of a particular punishment.
The Court of Appeals of Minnesota in In the Matter of the Welfare of
E.R.D.,202 rejected a double jeopardy claim brought by a student who
had been suspended from school for five days for bringing a knife to
school. In the course of reaching its conclusion, the Minnesota Court
of Appeals noted that the suspension, which was the maximum pun-
ishment allowed by Minnesota Statutes, “is certainly not ‘overwhelm-
ingly disproportionate’ to E.R.D.’s conduct.”203 Although not the same
precise language as the standard enunciated in Doe v. Superintendent
of Schools of Worcester or Kolesnick, the “overwhelmingly dispropor-

198. Board of Sch. Trustees of the Muncie Community Schs. v. Barnell, 678 N.E.2d
citations omitted).
201. 653 N.E.2d 1088 (Mass. 1995).
"rationate" standard clearly vests substantial discretion in school officials to determine an appropriate punishment.

Intermediate appellate courts in both Georgia\textsuperscript{204} and Pennsylvania\textsuperscript{205} also have recently clearly recognized that boards of education have significant discretion to set punishments. Moreover, the only two cases dealing with severity of punishment which did not uphold the school district's punishment decision are not inconsistent with the line of cases exemplified by \textit{Kolesnick}. In one of those cases, the Commonwealth Court of Pennsylvania in \textit{Hamilton v. Unionville-Chadds Ford School District}\textsuperscript{206} refused to uphold a permanent expulsion of an eighth grade student for theft from another student and possession of marijuana at school, not because expulsion was too harsh a penalty for these combined offenses or because the school board lacked discretion to expel a student when the board believed the circumstances warrant that penalty, but because the expulsion was inconsistent with the individual code of conduct for the middle school where the offenses occurred.\textsuperscript{207} Likewise, the United States District Court for the Eastern District of Tennessee in \textit{Orange v. County of Grundy},\textsuperscript{208} although it refused to grant defendants' (school officials) motions for summary judgment in a section 1983 action involving the in-school suspension program of the Grundy County High School, nonetheless recognized that courts could overturn punishments of school districts based on a claim that the penalty was too severe only in those circumstances where the punishment shocked the conscience of the court.\textsuperscript{209} The Court clearly stated that placing a student in an in-school suspension room for a school day without access to food or toilet facilities did shock the Court's conscience.\textsuperscript{210}

Hence, in the lower court cases decided since \textit{Vernonia School District 47J}, the courts uniformly have recognized that substantial discretion must be placed in school officials to make decisions regarding the appropriate severity of a punishment for student misconduct.

Several courts have also dealt with the issue of the use of force by faculty members in controlling students. Here too, the courts have recognized the need for granting school officials significant discretion. The United States District Court for the Middle District of Penn-

\textsuperscript{208} 950 F. Supp. 1365 (E.D. Tenn. 1996).
\textsuperscript{210} Orange, 950 F. Supp. at 1373.
sylvania in Jones v. Witinski,211 rejected a section 1983 claim against a seventh grade math teacher for grabbing a seventh grade student by the arm and pulling the student toward the teacher, which caused the student to bang into a desk and then somehow bump into a bulletin board and end up on the floor. As a result of the teacher's actions, the student was injured. After reviewing decisions by several courts on the issue of suits against school staff for injuring students,212 the Court concluded that in order to establish a constitutional violation, a plaintiff must allege more than the commission of an ordinary common law tort.213 The Court cited favorably the standard adopted by the United States Court of Appeals for the Sixth Circuit in Webb v. McCullough214 which held that:

Inquiry in school corporal punishment cases must be whether the force applied caused injury so severe, was so disproportionate to the need presented and was so inspired by malice or sadism rather than a merely careless or unwise excess of zeal that it amounted to a brutal and inhumane abuse of official power literally shocking to the conscience.215

The Court concluded that the teacher in the case before it did not act out of malice or intent to inflict harm. The Court also concluded that pulling a student by the arm is not "a brutal and inhumane abuse of official power literally shocking to the conscience."216

The United States Court of Appeals for the Seventh Circuit in Wallace by Wallace v. Batavia School District 101217 was confronted with a section 1983 action brought by a sixteen year old female high school student who claimed that her male business teacher grabbed her by her left wrist to speed her exit from a classroom in which she was involved in a confrontation with another student. The student also alleged that the teacher grasped her right elbow as well. When the student told the teacher to let go of her, he did. The Seventh Circuit found no violation of the student's Fourth Amendment right against unreasonable seizures or her Fourteenth Amendment right to substantive due process in the teacher's actions. The Seventh Circuit concluded that both constitutional claims were covered by the same standard and that a violation of constitutional dimension occurs when a teacher or administrator seizes a student and "the restriction of liberty is unreasonable under the circumstances then existing and ap-

214. 828 F.2d 1151 (6th Cir. 1987).
215. Witinski, 931 F. Supp. at 369 (quoting Webb v. McCullough, 828 F.2d 1151, 1158 (6th Cir. 1987)).
216. Id. at 371 (citations omitted).
217. 68 F.3d 1010 (7th Cir. 1995).
parent." The court's own gloss on its standard was that a teacher or administrator is required to take reasonable actions to achieve the goals of maintaining order and discipline. \textsuperscript{219} The Court concluded that, "[d]epending on the circumstances, reasonable action may certainly include the seizure of a student in the face of provocative or disruptive behavior." \textsuperscript{220}

The Court reached its opinion based in part on its view that, as specified by the United States Supreme Court in \textit{Hazelwood}, the education of students is "primarily the responsibility of parents, teachers, and state and local officials, and not federal judges." \textsuperscript{221}

Perhaps the most interesting aspect of the Seventh Circuit decision in \textit{Wallace} is its insight into the role of discipline in ultimately promoting liberation of the student. The Court stated as follows:

Wallace was not free to roam the halls or to remain in Cliffe's classroom as long as she pleased, even if she behaved herself. She was deprived of liberty to some degree from the moment she entered school, and no one could suggest a constitutional infringement based on that basic deprivation. And if, as the Supreme Court recognized in \textit{T.L.O.}, discipline is crucial to education and education, as Epictetus wrote in the Discourses, is necessary for freedom, depriving students of some liberty is linked to the ultimate liberation of the student. Moreover, flexibility in discipline is necessary to preserve the informality of the student-teacher relationship. \textsuperscript{222}

The one case under examination in this article which did not uphold the use of force by a school official to promote discipline involved two high school coaches who were accused of threatening to hang a student if he did not improve his grades, of reaching for an extension cord and telling the student to look at the ceiling and attempting to grab the student, and placing the student in a headlock and putting a gun to his head and threatening to kill him if his grades did not improve. \textsuperscript{223} There should be no doubt that such conduct, if proved, would be shocking to the conscience. The Court of Appeals of Texas refused to grant qualified immunity to the accused coaches because there was a dispute of material fact regarding whether the faculty members had engaged in the actions alleged. In the course of its opinion, the Court of Appeals of Texas cited the standard of the Restate-
ment (Second) of Torts on the permissible use of reasonable force by teachers on students. The Restatement purports to cite the common law on this issue. The Restatement (Second) of Torts sections 150 and 151 (1965) provide as follows:

In determining whether force or confinement is reasonable for the control, training, or education of a child, the following facts are to be considered:

(a) Whether the actor is a parent;
(b) The age, sex, and physical and mental condition of the child;
(c) The nature of his offense and his motive;
(d) The influence of his example upon other children of the same family or group;
(e) Whether the force or confinement is reasonably necessary and appropriate to compel obedience to a proper command;
(f) Whether it is disproportionate to the offense, unnecessarily degrading, or is likely to cause serious or permanent harm.

Force applied for any purpose other than the proper training or education of the child or for the preservation of discipline as judged by the above standards is not privileged.

After reviewing the common law as enunciated in the Restatement (Second) of Torts, the Court of Appeals of Texas concluded that the standard for teachers in Texas was that teachers were to be given the necessary support to enable them to discharge their responsibilities and that therefore they may use reasonable force “not only to punish wrongful behavior, but also to enforce compliance with instructional commands.” The Court of Appeals of Texas informed teachers, however, that a teacher “may not use physical violence against a child merely because the child is unable or fails to perform, either academically or athletically, at a desired level of ability, even though the teacher considers such violence to be ‘instruction and encouragement.’”

Clearly the lower federal courts and the state courts are willing to grant school officials significant discretion to reasonably use force. However, the courts will clearly not countenance the use of force which shocks the conscience.

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224. Spacek, 928 S.W.2d at 95.
225. Id.
226. Id.
227. Id. (citations omitted).
2. *Due Process Issues*

Several recent cases confronted the issue of whether a school district's failure to follow its own policies would negate discipline imposed on a student. The two courts which considered the issue of whether such a failure to follow a district's own policies violated federal due process rights split on the issue.\(^{228}\) The court which held that a failure to follow the district's own policy does not violate due process did not have to reach the issue of whether such a failure would also violate state law and negate the discipline.\(^{229}\) However, two other courts were confronted with that precise issue\(^ {230} \) and both held that under the laws of their respective jurisdictions, a failure to follow the school district's own policy would violate state law. This is clearly one area of school official conduct for which the courts are not prone to grant any discretion to school authorities. School officials simply must follow the policies of the district if their disciplinary decisions are to be upheld by the courts.

As noted above,\(^{231}\) the Nebraska Supreme Court in the *Kolesnick* case clearly affirmed the right of a school district to adopt a set of disciplinary rules which mandate a specific punishment for a specific offense, regardless of the other circumstances of the student who engaged in the prohibited misconduct. The *Kolesnick* court upheld such a mandatory student code of conduct in the face of a challenge that claimed such a mandatory code violated substantive due process. The Court of Appeals of Indiana upheld a challenge to a mandatory student code of conduct based on a state law claim that such a mandatory code was arbitrary.\(^{232}\) The Court of Appeals of Indiana reasoned that there was nothing arbitrary about the adoption of mandatory punishments for certain offenses.\(^ {233} \) Although not confronted directly with the validity of a mandatory code of conduct, the Supreme Court of Mississippi held that under Mississippi law, a student code which prescribed a mandatory punishment for a certain offense did not take away from school officials their discretion to administer such a rule with "flexibility and leniency."\(^ {234} \) Hence, the

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231. See supra notes 8-28 and accompanying text.
courts which have confronted the issue of the validity of a mandatory student code of conduct since the Vernonia School District 47J case have granted school districts discretion to adopt or continue codes of conduct which specify certain penalties for certain offenses.

Several courts have determined that due process in student expulsion hearings is less rigorous than in court proceedings. One recent court decision permitted expulsions based on hearsay only. Another authorized school employees to serve in the role of student discipline hearing officers. Two recent court decisions which have considered whether the exclusionary rule applies in student discipline proceedings have reached opposite conclusions, but the court with greater authority held that it did not. At least one court has recognized that parents do not need to receive the Goss type due process notice. The Goss requirements apply only to notification to students. One court has held that the notice to a student need not cite to a particular school rule that was violated. That same court also held that cross-examination of witnesses is not a required prerequisite for constitutional validity of school discipline procedures.

In sum, the courts have recognized that the following elements of due process must be present in expulsion hearings:

1. Prior notice of the charges;
2. Notice of the witnesses to be heard;
3. A summary of the proof to be presented;
4. An opportunity to present evidence favorable to the student's position; and
5. The opportunity for a fair hearing.

The courts have also recognized that even these requirements need not be present if the student in fact admits his or her misconduct. Finally, at least one court has recognized that administrative witnesses in student expulsion hearings may be school decisionmakers.

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240. Eberhart, 920 F. Supp. at 1219.
The common thread running through these decisions is that due process in student expulsion hearings is a highly flexible concept and that the rigors of due process in the criminal setting simply do not apply in the student due process setting.

The cases reviewed also reflect that due process requirements for short-term suspensions are still being litigated in the courts. For example, in one case, the plaintiffs sought $1,000,000 in damages for a short-term suspension.244

A review of the cases involving short-term suspensions shows that none of these cases concern the concluding remark in Goss that even more due process could be required regarding short-term suspensions than the three elements required by Goss.245 Hence, at least in the last two years, the uncertainty explicitly introduced into the law on short-term suspensions by the United States Supreme Court has not been a cause of litigation. However, other uncertainties have been explored by the lower federal and state courts. These cases make it plain that hearings over and above those informal hearings required by Goss offered gratuitously by boards of education do not raise due process issues even if some errors occur in those hearings as long as the Goss procedures are followed.246 The courts have also held that the Goss procedures suffice for a combination of disciplinary penalties which include short-term suspensions along with other nonsuspension or expulsion penalties.247 The courts have also been confronted with the issue of the permissibility of holding a Goss type informal hearing after the student is removed from school and have upheld such a procedure if the student poses a danger to himself, herself, or others requiring immediate removal from school.248 Courts have also allowed Goss type hearings in these circumstances to take place over the phone.249 The courts have also recognized that a subsequent written notice of a short-term suspension may add reasons for the suspension to those shared in the informal Goss hearing at school and not violate due process as long as at least one proper reason for a suspension was given in the informal Goss hearing context.250 The courts have also held that Goss sets the minimum standards which school districts must follow, but that states may prescribe by statute additional requirements for short-term suspensions.251 At least in South Carolina,

244. Monticello Central, 652 N.Y.S.2d at 414.
245. See supra notes 235-38 and accompanying text; see infra notes 240-43 and accompanying text.
249. Driscoll, 82 F.3d at 386.
251. Richie, 933 S.W.2d at 378.
there is no implied statutory right to appeal a short-term suspension to a court.252 At least one court has held that a short-term suspension does not prohibit a juvenile court proceeding as double jeopardy for the same misconduct.253

Those recent court cases which have considered the issue have unanimously recognized that there is no constitutionally protected right to participate in co-curricular activities and hence no requirement of any kind of a hearing on such decisions.254

Due process requirements regarding reassignment to other schools is somewhat more complex. As long as a student is reassigned to a school which provides a basic education for the student, even if the school is an alternative school for disciplined students, the reassignment doesn’t implicate constitutional protections.255 At least one court has recognized that ten minutes in a time-out room for an eighth grader with no evidence of forcible restraint, physical harm or pain does not implicate property or liberty rights and therefore, no prior procedural due process is required.256 The courts are split on the issue of whether an in-school suspension for multiple school days rises to the level of a taking of liberty.257

3. Alternative Education Issues

Recent legislative amendments in Nebraska have required Nebraska schools to provide at least some form of alternative education or alternative programming for students who are expelled from school.258

252. Byrd v. Irmo High Sch., 468 S.E.2d 861, 865 (S.C. 1996). This decision contains an excellent review of decisions by other courts on requirements imposed on school districts as a result of Goss.
253. E.R.D., 551 N.W.2d at 240-41.
257. Piwonka., 961 F. Supp. at 169 (stating that a 5-day in-school suspension is a trivial deprivation of liberty not implicating procedural due process requirements); Orange, 950 F. Supp. 1365 (stating that a day-long isolation of students without access to lunch or toilet facilities does implicate liberty interests and require due process procedures).
At least one state supreme court has recognized that a state constitutional requirement that the state provide a “thorough and efficient system of free schools” mandates that alternative programs for expelled students be provided by the public schools.259 Because many states have a constitutional provision similar to that of West Virginia’s,260 the possibility remains that other states having a similar constitutional provision will be confronted with the arguments successfully made in the West Virginia case. At least one state other than Nebraska has also required by statute alternative educational programs for expelled students.261

4. First Amendment Issues

Several lower court decisions have picked up on the greater authority granted school districts in Fraser and Hazelwood. The United States Court of Appeals for the Ninth Circuit was confronted with a student who allegedly had threatened to kill a school employee.262 In deciding the issues before it, the Ninth Circuit held that threats of physical violence are not protected speech.263 The Ninth Circuit also developed a standard for determining when a comment is, in fact, a threat. The standard devised by the Ninth Circuit is that the language is a threat if a reasonable person in the position of the person making this statement would foresee that the person spoken to would interpret the speaker’s statement as a serious expression of intent to harm or assault.264

The United States Court of Appeals for the Eighth Circuit was confronted with freedom of expression issues raised by a high school student who had a small cross tattooed between her thumb and index finger.265 The Eighth Circuit held that such a tattoo is not protected speech when there is no intent to convey a particularized message or even if there was such an intent, the likelihood was not great that the message would be understood by those who viewed it.266 Despite its

260. William E. Thro, The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation, 19 J. L. & Educ. 219 (1990). Thro lists thirteen states other than West Virginia which have constitutional provisions requiring state provision of a thorough and efficient education (Maryland, Minnesota, New Jersey, Ohio and Pennsylvania) or a thorough system of education (Colorado, Idaho, Montana) or an efficient system of education (Arkansas, Delaware, Illinois, Kentucky and Texas). Id. at 244 n.134.
262. Lovell v. Poway Unified Sch. Dist., 90 F.3d 367, 368 (9th Cir. 1996).
263. Lovell, 90 F.3d at 371.
264. Id. at 372.
266. Stephenson, 110 F.3d at 1307 n.4 (citations omitted).
views on the free speech issues raised in the case, the Eighth Circuit nonetheless found in the student's favor because the school district regulation prohibiting gang symbols was unconstitutionally vague since there was no definition of the term gang in the school district's code of conduct.\footnote{267}

The Appellate Division of the New York Supreme Court applied the \textit{Tinker} standard rather than the \textit{Hazelwood} standard to dissemination of a non-school sponsored newspaper.\footnote{268} The paper apparently was thoroughly vulgar and contained at least one article inciting students to violent acts at school. The Appellate Division held, interpreting the First Amendment, that such a newspaper is not protected speech if school authorities had reason to believe it would substantially interfere with the work of the school or impinge on the rights of others.\footnote{269} One of the unanswered questions after \textit{Hazelwood} was whether the standard it enunciated, which gave greater authority to school officials to control speech, would also govern the dissemination on school grounds of non-school sponsored newspapers. At least the Appellate Division has answered that question in the negative.

Following the decision in \textit{Hazelwood}, a number of attempts were made, at least in Nebraska, to enact a statute granting school newspapers the kind of constitutional protection which existed prior to the \textit{Hazelwood} decision.\footnote{270} Whatever the merits of such statutes may be, a case before the Supreme Judicial Court of Massachusetts illustrates possible unanticipated side effects of such statutes.\footnote{271} Massachusetts had, prior to the \textit{Hazelwood} decision, enacted a statute granting students the right of free expression in the schools, provided that the exercise of this right does not cause any disruption or disorder in the school.\footnote{272} The Supreme Judicial Court of Massachusetts interpreted this statute as prohibiting enforcement of a school dress code forbidding students to wear clothing which "harasses, intimidates or de-means a group of individuals because of sex, color, race, religion, handicap, national origin or sexual orientation . . . . [or that][h]as com-

\footnote{267. \textit{Id.} at 1311.}
\footnote{268. \textit{Monticello Central.}, 652 N.Y.S.2d at 415.}
\footnote{269. \textit{Id.}}
\footnote{272. Pyle, 667 N.E.2d at 871. Massachusetts law provides in part as follows:}
\footnote{The right of students to freedom of expression in the public schools of the commonwealth shall not be abridged, provided that such right shall not cause any disruption or disorder within the school.}
\footnote{\textit{Id.} (quoting Mass. Gen. Laws ch. 71, § 82 (1994)).}
ments, pictures, slogans, or designs that are obscene, profane, lewd or vulgar" unless the clothing causes disruption or disorder. 273

At least one federal court has stated that the United States Supreme Court's decision in Fraser applies beyond school sanctioned speech. 274 The court upheld a five-day suspension from school for the use of vulgar fighting words between two students in the school cafeteria during the lunch period.

The lower courts' First Amendment decisions do not demonstrate a consistent application of the United States Supreme Court's decisions in Tinker, Fraser and Hazelwood. In the three cases in which the courts were confronted with instances of student violence or the threat of violence, the courts in each of these cases upheld the actions of school officials. 275 In the two cases in which the connection to disorder in the schools was more indirect, the courts refused to enforce school rules. 276 There obviously remains room for significant additional clarification of the inter-relationship between students' First Amendment rights and order and discipline in the schools.

5. Fourth Amendment Issues

One of the aspects of school discipline which is receiving considerable scrutiny from the courts currently is the whole issue of searches of students by school officials. In general, court decisions in this area have vested substantial discretion in school officials to make decisions about appropriate searches. However, the courts have not been unanimous in granting such discretion.

One of the key issues remaining after Vernonia School District 47J is the extent to which individualized suspicion may be dispensed with in school searches. 277 Particularly with respect to searches for weapons, the courts appear to recognize the need for random suspicionless searches. 278 Several courts have found this greater authority for school officials in the characterization of the role of school officials enunciated in Vernonia School District 47J. That is, courts have explicitly recognized that school officials play the role of guardian and tutor of the students committed to their care. 279 The United States Court of Appeals for the Eighth Circuit has specifically recognized that the standard for assessing searches by school officials is whether

273. Pyle, 667 N.E.2d at 870-71 (citations omitted).
275. See Heller, 928 F. Supp. at 789; Lovell, 90 F.3d at 367; and Monticello Central, 652 N.Y.S.2d at 412.
276. See Pyle, 667 N.E.2d at 869; Stephenson, 110 F.3d at 1303.
278. J.A., 679 So. 2d at 319-20; Pruitt, 662 N.E.2d at 551.
the search is one that a reasonable guardian and tutor might undertake. Of even greater significance is that the Eighth Circuit has determined that reasonableness in these circumstances does not turn on "hairsplitting argumentation."

The District Court of Appeals of Florida also recognized that in searching students, school officials played a custodial and tutorial role. Likewise, the Florida court recognized that violence is a real problem in the schools. In light of these two realities, the court upheld the random, suspicionless search for weapons of students. A similar conclusion was reached by the Superior Court of Pennsylvania. That court held that a search of all students for weapons did not violate the Fourth Amendment since violence was a problem not only in schools generally, but in the school district in question and the searches were well supervised and followed a uniform procedure. The court also held that prior notice to the students and to the parents of the school's search policy was not a prerequisite to a reasonable search although such prior notice certainly would be prudent.

The courts have also had to confront the issue of whether school officials who seize or grab students in the course of disciplining them or preventing harm to other students violate the Fourth Amendment's prohibition on unreasonable seizures. The United States Court of Appeals for the Seventh Circuit responded to a section 1983 action brought by a student whose teacher had momentarily grabbed her wrist and elbow to escort her from the classroom. In deciding the case, the Seventh Circuit held that a teacher or administrator who seizes a student does so in violation of the Fourth Amendment only when the restriction on liberty is unreasonable under the circumstances then existing and apparent. On the facts before it, the Seventh Circuit found that the grabbing of the elbow and the wrist of the student was not unreasonable. The student had been involved in an altercation in the classroom and the grabbing took place only to escort the student out of the room. Moreover the teacher let go of the stu-

280. Thompson, 87 F.3d at 982.
281. Id. at 983.
283. Id. at 320.
284. Id.
286. S.S., 680 A.2d at 1175-76.
287. Id. at 1176.
288. Wallace, 68 F.3d at 1011.
289. Id. at 1014.
290. Id. at 1015.
dent immediately when she asked him to.\textsuperscript{291} The court found the grabbing of the elbow and the wrist not disproportionate to the interference with the educational process caused by this student.\textsuperscript{292} The Seventh Circuit explicitly recognized that it was giving significant discretion to school authorities. The Court noted that:

   Public school teachers and administrators must have considerable latitude in performing their educational responsibilities, including maintaining order and discipline by reasonably restraining the liberty of students.\textsuperscript{293}

   In no uncertain terms, the Seventh Circuit faulted the plaintiff and her attorneys for bringing the litigation in the first place. The court labeled the litigation a denigration of the Constitution and a disservice to the schools, the federal courts and the public.\textsuperscript{294}

   The courts have also been confronted with the contours of what facts provide a school official reasonable suspicion to search a student. The Seventh Circuit in facing this issue granted significant discretion to school authorities to determine when a search was reasonable.\textsuperscript{295} This case involved a student with bloodshot eyes and dilated pupils and, upon testing by the school nurse, heightened blood pressure and pulse rates.\textsuperscript{296} The Seventh Circuit held that the bloodshot eyes and dilated pupils were sufficient indicators of the use of marijuana to make reasonable the medical assessment which showed the heightened blood pressure and pulse rates and also to make reasonable a search of the student's outer clothing.\textsuperscript{297} It was of no significance to the court that the student later took and passed a drug screen.\textsuperscript{298}

   In contrast, the District Court of Appeals of Florida found no reasonable suspicion to search a student when a school official observed a group of boys huddled together, one with money in his hand and the student who was later searched fiddling with something in his pocket.\textsuperscript{299} The court also found evidence regarding the student's prior record, his reported bad attitude and a growing drug problem in the school too scanty to change its holding.\textsuperscript{300} The Court was particularly mystified about how fiddling in his own pocket justified searching the

\begin{itemize}
\item 291. \textit{Id.}
\item 292. \textit{Id.}
\item 293. \textit{Id. at 1016.}
\item 294. \textit{Id.}
\item 296. Bridgman, 128 F.3d at 1147-48.
\item 297. \textit{Id. at 1149-50.}
\item 298. \textit{Id. at 1148.}
\item 300. A.S., 693 So. 2d at 1096.
\end{itemize}
The Appellate Court of Illinois enunciated its characterization of what is not reasonable suspicion. If a school official has only "an inchoate and unparticularized suspicion or hunch," he or she does not have reasonable suspicion.

Many courts have recently been confronted with the validity of school officials' use of metal detectors in searches of students. In response to such cases, the courts have generally upheld the use of metal detectors to screen for weapons. The courts have recognized metal detectors as a reasonable response to the problem of violence in the schools, particularly if there is evidence of violence in the particular school district in question. In this area, as in other search related questions since Vernonia School District 47J, the courts have recognized the special relationship between teachers and students as being a tutelary one. The courts have found that metal detectors are a reasonable device to help protect and maintain a proper educational environment. The courts have likewise recognized that requiring all students to walk through metal detectors provides no opportunity for unlawful discretion or harassment.

The courts have also been confronted with the issue of when it is reasonable to use metal detectors to search students. Because the use of metal detectors is a search, there must be a set of circumstances present at the school which makes such use reasonable. The United States Court of Appeals for the Eighth Circuit found the use of handheld metal detectors reasonable when school officials had received reports from a school bus driver of fresh cuts on the bus seats even if there was no history of a prior violence problem in the particular school involved. The particular search in question involved a search of all male students. The male students were required to remove their shoes and socks and empty their pockets. They were then searched with a metal detector. If the metal detector sounded, the students were patted down.

There is one somewhat troubling decision to the contrary. The Appellate Court of Illinois refused to find reasonable suspicion for a school security guard to require a student to go through a metal detector when all the security guard observed was the student turning to

301. Id.
303. Parker, 672 N.E.2d at 817 (citations omitted).
304. Pruitt, 662 N.E.2d at 540; J.A., 679 So. 2d at 316; Thompson., 87 F.3d at 979.
305. See Parker, 672 N.E.2d at 813; J.A., 679 So. 2d at 316.
306. Pruitt, 662 N.E.2d at 543.
307. Id. at 547.
308. Id.
309. Thompson, 87 F.3d at 983.
310. Id. at 980.
leave the school when he saw a long line of students waiting to pass through the metal detectors.\textsuperscript{311} The Court termed the suspicion caused by the student’s actions “a mere hunch.”\textsuperscript{312} The Court so held in the face of the security guard’s actually finding a gun on the student.\textsuperscript{313}

Although the decision by the Appellate Court of Illinois is to the contrary, the remaining court decisions clearly grant authority to school officials to use metal detectors in either a random or a uniform non-individualized suspicion manner provided there is some reasonable foundation for the school official’s suspicion that the metal detectors will turn up contraband.\textsuperscript{314} This reasonable suspicion may be based on violence in the school system or on more particularized concerns about weapons in the particular school.\textsuperscript{315}

Another key area for court decision-making is the question of whether police school resource officers are, as police officers, bound to follow the probable cause standard or whether the reasonable suspicion standard may be utilized by them in their capacity as school resource officers. The majority of courts which have confronted this issue hold that the reasonable suspicion standard applies to police school liaison officers.\textsuperscript{316} This is particularly true in circumstances in which these officers are requested to help by school officials.\textsuperscript{317}

Two recent court decisions are to the contrary, however. The Court of Appeals of New Mexico when confronted with a search conducted by an off-duty police officer working as a security guard at a school dance, held that, on the facts before it, the off-duty police officer was acting without any direction of school officials and was therefore functioning essentially as a police officer and would be required to adhere to a probable cause standard for searching students at the dance.\textsuperscript{318}

The United States District Court for the District of Kansas found on the facts before it that a police school liaison officer was acting more like a police officer than a school official in that he was directing the search of a student’s car as a police matter.\textsuperscript{319} Under these cir-

\begin{footnotes}
\footnote{311. Parker, 672 N.E.2d at 815-17.}
\footnote{312. Id. at 817.}
\footnote{313. Id. at 815.}
\footnote{314. See supra notes 186-222 and accompanying text.}
\footnote{315. Id.}
\footnote{316. Dilworth, 661 N.E.2d at 317; D.S., 685 So. 2d at 43; Pruitt, 662 N.E.2d at 540.}
\footnote{317. Ex rel. Angelia D.B., 564 N.W.2d 682, 690 (Wis. 1997).}
\end{footnotes}
circumstances, the police school liaison officer was required to have probable cause to search before the search was valid.320

6. Miscellaneous legal issues confronted by the courts

Under Neb. Rev. Stat. § 79-293 (Reissue 1996), Nebraska school officials are required to report to law enforcement authorities student misconduct governed by school rules which rises to the level of a known or suspected criminal law violation. This statute explicitly makes good faith reports by school officials to police authorities a privileged act for which the individual school official may not be civilly or criminally liable. The United States District Court for the Middle District of Alabama has also recognized such a privilege.321 It held that school officials' good faith reports to police of a student's criminal act are protected by a qualified privilege from any suit for libel or slander.322

The final significant area of court consideration of student discipline matters in the last two years concerns the role of parents in student disciplinary matters. Two courts have specifically addressed issues regarding parents. The Court of Special Appeals of Maryland considered and rejected the argument of the parents of a student who had been expelled for possession and use of a controlled substance, that the student's due process rights were violated because the school did not notify his parents before conferring with the student about the allegations against him.323 A similar argument was rejected by the United States District Court for the District of Massachusetts with respect to a short-term suspension of a student for multiple incidents of misconduct.324 The Court recognized that the parents, in making the argument, had cited no law in support of their position and that the Court itself could find none.325 The Court cited an earlier opinion of the U.S. District Court for the District of Kansas326 as follows, "when a student is suspended, it is the student who is entitled to due process because it is the student-not his parents-who has a right to a free public education."327

320. James, 959 F. Supp. at 1414.
322. Id.
325. Id.
327. Zehner, 921 F. Supp. at 859 (quotations omitted).
Hence, school officials, in disciplining students, do not simply stand in the place of the parents. In certain respects, school officials have greater authority than parents.

IV. CONCLUSION

This review of decisions by the lower courts since Vernonia School District 47J demonstrates that those courts have for the most part followed in fact and not just in word the developing rule of deference enunciated by the United States Supreme Court. This is a very hopeful sign for school officials and for anyone concerned with the education and safety of this nation’s youth. Nonetheless, the significant amount of litigation on student disciplinary decisions, particularly the number of cases dealing with short-term suspensions, reassignments to other schools and the imposition of other in-school penalties such as prohibitions on participating in co-curricular activities is very troubling. Inescapably, in a system which permits judicial review of school district decision-making regarding student discipline, there is an intrusion on the authority of school officials to properly handle disciplinary matters. Judicial review by its very nature is conducted on a case by case basis by courts reluctant to over generalize their findings, thus leaving unanswered many questions should future factual settings be somewhat different from those considered previously by the courts. A classic example of this is the United States Supreme Court’s decision in Goss. Instead of stating that the three-pronged due process procedures it set out in Goss applied to all suspensions from school of ten days or less, the Court added that “in unusual situations, although involving a short-term suspension, something more than the rudimentary procedures will be required.”

Aside from a court’s structural inability to legislate beyond deciding the particular case before it and the inherent vagueness of any general standard, any litigation is by its very nature intrusive into the proper discipline of students.

First, any litigation is a significant distraction for school officials from their other duties. Litigation not only takes time for litigation-related tasks, it also causes school officials to spend time explaining the litigation to the public. Litigation also causes school officials to worry not only about the actual courtroom experience itself but about explaining possible negative decisions to their superiors or to the public.

Second, any litigation causes serious public perception concerns for any public school. Most cases that actually go to decision before a

judge or jury have two sides to them. School cases are typically followed with great interest by the local news media. Allegations made by students and their parents are, therefore, often reported publicly. Those allegations have a significant possibility of coloring the perception of at least some parents or other residents of the school district, particularly if the school district’s response is not soon published in a manner as prominent as the student’s and parents’ allegations.

Third, school officials must also be concerned about various damage judgment and insurance related questions. Often, insurance companies defend school districts under a reservation of rights. Most insurance policies have significant deductibles. If there is a judgment against the school district, the costs not reimbursed by insurance must be paid for from otherwise very tight budgets.

Fourth, school districts must also be concerned with the payment of attorney’s fees. If there is a judgment against a school district in a suit under section 1983, the plaintiff is not only entitled to recover whatever damages he or she proves, but is also entitled to recover reasonable attorney’s fees. Often these attorney’s fees can be substantial. Likewise, the school district must be responsible for its own attorney’s fees unless these fees are otherwise covered by insurance. None of this money buys a textbook or pays a day’s worth of a teacher’s salary.

The education of our youth is critical to this nation’s future. A safe learning environment is critical to providing an appropriate education. There can be no doubt that safety is a real issue in our public schools today. It is likewise true that schools cannot function with-

329. Both the Spencer and Kolesnick cases resulted in extensive news coverage both by the local television media and by the Omaha World Herald.

330. The errors and omissions insurance policy for the Omaha Public Schools currently in force has a deductible of $25,000 per claim.


333. In recent litigation involving the Omaha Public Schools, a jury awarded the plaintiff student $25,000 in damages after it found the student had been sexually harassed by her teacher in violation of Title IX, Title 20 U.S.C. §§ 1681 to 1688 (1994). The student’s attorney has requested over $100,000.00 in fees for litigating the matter. See motion for attorneys fees on file with the U.S. District Court for the District of Nebraska in Kinman v. Omaha Public Schools, Case No. 8:93CV190.

334. See supra notes 186-222 and accompanying text.
out broad public support. Litigation clearly has the potential to undermine that broad public support.

It is likewise true that judicial proceedings are inherently ill fit for reviewing educator's decisions. The statutory procedures under Nebraska law clearly illustrate this. Judicial review is conducted on the record made before the school's hearing officer. That hearing is focused on whether a student violated a particular school rule and on what the specified or proper penalty is for that offense. There is no real opportunity or need in such hearings to put on evidence concerning the depth of the problem of school violence confronting schools nor to put on evidence concerning the background behind the particular rule in question. Nonetheless, when such rules come before courts for review, much broader social policy questions inevitably get raised.

It is likewise true that schools are an enterprise which all of us have, to one degree or another, experienced personally in our past. This personal experience tends to create the illusion of knowledge about the subject matter. Judges and juries are no exception. Yet the problems confronting the schools today are significantly different from the problems that confronted the schools twenty or thirty years ago. School officials, on the other hand, are present today in the schools working with today's youth and experiencing today's problems. In general, this more recent direct knowledge of how certain rules and punishments function in the school environment should clearly be recognized and deferred to by the courts.

It is also true that decision-making by educators, even without judicial review, is not unrestrained. For example, in Nebraska, the Legislature has not been bashful about prescribing the manner in which school officials must discipline students. The Spencer case clearly is responsible for the legislative directive that schools pay more attention to the education of expelled students than they had in the past. Likewise, it is true that the citizens of a particular school district elect the board members who govern the district. Moreover it is those school board members who hire, and fire, school officials. Should the citizens of a particular school district become concerned about the manner in which discipline is being meted out in the school setting, there is ready recourse to the board of education to solve the

336. For example, in Kolesnick v. Omaha Public School District, one of the critical issues which the court addressed, and indeed was forced to address, was whether education was a fundamental right under Nebraska law. Kolesnick v. Omaha Public School District, 558 N.W.2d 807, 813 (Neb. 1997). There was no testimony in the record in Kolesnick of any kind concerning the significance of education for an individual student or for the community collectively. The court made its decision on its own policy views, quite aside from any matter in the record.
problem. Courts should not see judicial review as the only way to resolve abuses of discretion by school officials.

In general, the lower federal courts and the state courts should be commended for their more recent decisions, most of which grant substantial discretion to school authorities to make student disciplinary decisions. Nonetheless, some further enhancement of the discretion granted to school officials is in order. The following three concluding suggestions would help solidify the trend in these recent decisions toward greater autonomy for school officials to make disciplinary decisions:

1. A court should always strive for clarity in deciding cases. This is particularly true with respect to the specification of the holding of the court. As much vagueness as possible should be eliminated in the articulation of the holding of the court.

2. A court should always err on the side of granting school officials authority to handle discipline in the schools. This does not mean that courts should look the other way when school officials do not follow their own prescribed policies or procedures or that a court should not intervene when school officials violate clearly established constitutional rights. It simply means that in articulating the contours of those constitutional or statutory rights of students, courts should be always cognizant of the common good of all of the students in the school, of the need for an atmosphere of decorum and respect in our schools and of school officials' superior knowledge regarding appropriate discipline.

3. A court should not hesitate to impose sanctions on frivolous cases. The costs of litigation, even successful litigation, described above are simply too high to permit the continued filing of meritless cases.