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Santa Fe Independent School District v Doe
No. 99-62. (Argued March 29, 2000—Decided June 19, 2000)
The "Student Speech is Not Public Speech" Loophole Has Been Closed

In its decision handed down on June 19, 2000, the United States Supreme Court finally closed the student speech "loophole" which has been asserted by the Fifth Circuit ever since the Supreme Court's decision in *Lee v Weisman*[1]. The case in which the Court accomplished this task was *Santa Fe Independent School District v Jane Doe*[2]. The issue before the court was the constitutionality of student led prayer prior to a football game.

The Santa Fe Independent School District is located in the southern part of Texas and educates approximately 4000 students. Prior to 1995, the Santa Fe High School student who held the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game. This one student did so for the entire season. In April 1995, suit was filed asking for a temporary restraining order to prevent the district from violating the Establishment Clause at the upcoming graduation ceremonies. The individuals instituting the suit in April 1995 included a Catholic student and mother and a Mormon student and mother.[3] In their complaint, the Does alleged that the district had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, praying over the public address system at school sponsored events, and distributing Gideon Bibles on school premises.[4] In its May 1995

order, the district court followed earlier 5th Circuit precedent by entering an interim order which allowed "non-denominational prayer" led by students without school district pre-approval at graduation ceremonies – the "student led loophole" of the 5th Circuit.

In response to the district court's order the school district adopted a series of policies dealing with prayer at school functions. Policies enacted in May and July for graduation ceremonies were used as a template for policies enacted in August and October dealing with prayer at football games. The final policy enacted in October was the policy up for consideration by the Supreme Court in the instant case. This policy, like the three that were enacted before it, authorized two student elections. The first election was to determine whether a prayer should be delivered. The second election chose the student to lead that prayer. Also like previous policies, there was no requirement that the prayer be nonsectarian and nonproselytising.[5] A fall back provision was written into the policy, however, which required the prayer to be nonsectarian and nonproselytising should the court determine such was required.

The district court did enter an order disallowing the first, open-ended policy. Relying on the Supreme Court's decision in *Lee*, the court found such a "message" to be distinctly Christian and potentially coercive to those attending the school event. When this decision was appealed to the Fifth Circuit Court of Appeals, the appellate court turned to Fifth Circuit precedent which allowed student led prayer at graduation ceremonies to solemnize the event. In finding for the Does, the court made a distinction between graduation ceremonies – significant, solemn, once in a life time event – and weekly football games – hardly considered a solemn event – therefore

prayer had no useful purpose before such an event. The appellate court reversed the district court's decision that nonsectarian and nonproselytising prayer could be extended to football games.

The question which was ultimately appealed by the school district to the Supreme Court was: "Whether the school district's policy permitting student-led, student-initiated prayer at football games violated the Establishment Clause?" In reviewing this issue, the Supreme Court appropriately turned to its decision in *Lee* stating:

> "The principal that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[6]

In response, the school district argued that the principal stated in *Lee* did not apply to the Santa Fe policy because the message being delivered was "private" student speech rather than "public" speech. While the Court agreed with the distinction between private and public speech, it did not view the pre-game prayer as private speech for several reasons.

First, the Court found such prayer to be authorized by government/school district policy and to be taking place on government/school district property at a government/school district sponsored event.

> "The Santa Fe school officials simply do not "evince either 'by policy or by practice' any intent to open the [pre-game ceremony] to 'indiscriminate use,' . . . by

> the student body in general. . . Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message . . .as we concluded in *Perry*[7], selective access does not transform government property into a public forum."[8]

Given the process of elections and only allowing those messages which the district deemed "appropriate" immediately took the policy out of the realm of a public forum. The majoritarian process enacted by the Santa Fe school district guaranteed that minority candidates would be effectively silenced. Moreover, no matter how many arguments were offered by the district as to it "hands-off" approach:

> "the realities of situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."[9]
>
> Even as the school district attempted to disentangle itself from participation in the religious

message to bolster its argument regarding private speech, the very words of the enabling policy stated otherwise. For example, the elections only took place because the "board has chosen to permit students to deliver a brief invocation and/or message."[10] The elections "shall " be conducted . . . upon advice and direction of the high school principal."[11] In addition, the policy by its very terms encouraged a religious message by stating that the purpose of the message was to

solemnize the event, promote good citizenship, and establish the appropriate environment – all of which are best achieved by a prayer.

> "Indeed, the only type of message that is expressly endorsed in the text is an "invocation" – a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy. The results of the elections described in the parties' stipulation make it clear that the students understood that the central question before them was whether prayer should be a part of the pre-game ceremony. We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment."[12]

The Court went on to list other indicia of school sponsorship (i.e. being read over the public address system which is undeniably in the control of the school officials, as well as the atmosphere of the school sponsored activity created by school cheerleaders, band members and football players all dressed in school colors, the school mascot, banners, and flags) which would lead the average person in attendance at the football game to believe that the prayer being offered was indeed delivered with the approval of the school district. "In this context, the members of the listening

audience must perceive the pre-game message as a public expression of the views of the majority of the student body delivered with the approval of the school administration."[13]

Second, student elections which determine by majority vote which First Amendment activities shall receive government/school district benefits are constitutionally suspect. Constitutional rights, fundamental rights, may not be subject to a vote to determine whether they will be upheld. Minority views must be treated with the same respect as the views of the majority. In the view of the Court, the elections provided for in the district policy were insufficient to safeguard the right of diverse student speech. Merely representing most of the students is not sufficient. The United States Bill of Rights guarantees that the rights of every individual are protected – not the rights of most.

Finally, the text and history of the policy reinforced the Court's opinion that prayer was, in actuality, encouraged by the school. The district that there did exist a secular purpose for the policy and that was to "foster free expression of private persons as well as to solemnize sporting events, promote good sportsmanship and student safety, and establish an appropriate environment for competition."[14] While normally the Court does give deference to the government/school district's claim of such a secular purpose, "it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one."[15] When look at Santa Fe's policy, all the evidence pointed toward supporting prayer. The district's approval of only an "invocation" was not necessary to further the stated secular purpose for a variety of other, non-religious messages could have provided the same. The fact that only one student was allowed to give a message, whose content was limited by the school district did little to further the district's claim that it was "free expression

of a private person."

Looking past the text of the policy toward its history, the Court was equally unimpressed with the district's claim of a secular purpose.

> "Most striking to us is the evolution of the current policy from the long-sanctioned office of "Student Chaplain" to the candidly titled "Prayer at Football Games" regulation. This history indicates that the District intended to preserve the practice of prayer before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observation, and in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state sponsored religious practice."[16]

Consequently, the Court held that a policy which either explicitly or implicitly encourages prayer over the public address system at a school sponsored event by a individual representing the student body and under the supervision of school faculty is not "private" speech and there is impermissible.

The next argument forwarded by the school district was that the football policy could be distinguished from the policy struck down in *Lee* for two reasons. First, there was no government coercion because the pre-game message was a product of student choice (the Fifth Circuit "student speech"

loophole). Second, there was no coercion because attendance at a football game is voluntary.

In response to the district's first argument, the Court reaffirmed that the evidence which failed to public speech into private speech under the previous argument, also failed to sustain an argument that there was no district coercion. The very fact that the district felt a need to hold a student election to see, first if a prayer should be given, and second who should give that prayer, indicated that the student body was not unanimous in its desire for prayer at football games.

> "The election mechanism, when considered I light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State."[17]

In previous decisions, the Court had already held that such debate over religion and well as the preservation and transmission of religious beliefs should be confined to the private sphere.[18] By encouraging religious division and debate through government sanctioned elections, the government/school district intruded into that private sphere. Under the Establishment Clause, for the government to do so is a violation of the First Amendment.

Regarding the district's claim that attendance at the football game was voluntary, the Court raised the point that for many students that was true. For some students, however, such

as cheerleaders, members of the band, and members of the competing team that was not the case. These students had made a commitment to be in attendance and some were even receiving class credit for participation. Moreover, as the Court had already affirmed in *Lee*;

> "The law reaches past formalism. To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football, if "formalistic in the extreme." We stressed in *Lee* the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense and easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "it is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price or resisting conformance to state-sponsored religious practices."[19]

In making this response to the district's argument, the Court reaffirmed the right of each and every student to voluntarily pray before, during, or after the school day. The line is crossed

and the Constitution violated when the school district, an arm of the state, sponsors, affirms or sanctions the specific religious practice of prayer.

The final argument advanced by the district was that since no message had yet been delivered under the policy, that the Does could not assume that any message delivered would be religious, and therefore the lawsuit was premature. The Court quickly dispensed of this argument by applying the *Lemon* Test. Under the first prong of that test, any state action must be invalidated if it lacks a secular legislative purpose. As the Court reviewed the purpose of the Santa Fe policy, it found that;

> "[T]he text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message – that of Santa Fe's traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech."[20]

The Court went on to take notice that this policy was a culmination of a long standing tradition in the Santa Fe school district of sanctioning student-led prayer. "We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer."[21] The final conclusion of the Court was, even if no prayer was ever offered under the October policy, the policy failed a facial

challenge and was thereby unconstitutional as a violation of the First Amendment to the United States Constitution.

With this decision, the Court finally and appropriately closed the loophole that the Fifth Circuit had attempted to poke through the Court's decision in *Lee*. Although Chief Justice Rhenquist, in his dissent, attempts to claim that the Court's decision essentially invalidates all student elections, indeed this is not the case. What the Court did do was put local school district on notice that merely handing off the decision regarding prayer and school functions to a sanctioned vote of the student body was not sufficient to eliminate the district's culpability. "We have concluded that the resulting religious message under this policy would be attributable to the school, not just the student. . . . For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subject to a school-sponsored prayer violates the Establishment Clause."[22]

This case should been seen as a warning to all of those school districts which continue to hold onto the misguided notion that if the students vote to pray at school functions, whether it be a sporting event, an assembly, or graduation, that such student action somehow shields the district from an Establishment Clause violation. The minute that the school district accepts that student election, whether it was done under a policy similar to Santa Fe's or was done in the absence of such policy, the school district is sanctioning that election. By doing so the school district is allowing that which is not to be allowed under the Constitution – voting on a fundamental right. It is not for a majority to decide whether any given citizen has the right to religious freedom, freedom of speech, freedom of assembly and the like.

As the Court stated, students have the right to volun-

tarily pray at any time during the school day or at school functions. They can pray as they sit down to lunch. They can pray before they take a test. They can pray as they walk between classes, or before the kick-off at the football game, or as they get behind the wheel of the driver's education car. The school district, however, cannot sanction, coerce or force religious orthodoxy on even one member of the school community. To do so not only is a blatant violation of the very principles of freedom on which this country is based, but it shows an intolerance which is unacceptable in any educator who claims to be concerned first and foremost with the student. Moreover, and perhaps the most disturbing, it shows extremely unchristian behavior from a group of individuals who have chosen to wear their Christianity like a banner. In school districts such as Santa Fe, which attempt to force a particular religious doctrine of the majority on all, everyone gets hurt. The integrity of the State is hurt. The integrity of Religion is hurt. And most devastating, the child who stands outside the mainstream is hurt.

ENDNOTES

[1] Lee v Weisman, 505 U.S. 577 (1992).

[2] Santa Fe Independent School District v Jane Doe, No. 99-62 (June 19, 2000).

[3] What is interesting to note is that in this very "Christian" district, attempts of the district to find out who had filed the suit were so harassing that not only were the families allowed to remain anonymous, but the district court

felt compelled to issue the following order: "Any further attempt on the part of the District or school administration, officials, counsellors (sic), teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FRO PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THSE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. Santa Fe Independent School District v Doe, No. 99-62, 2000 U.S LEXIS 4154, at *32, n1 (June 19, 2000).

[4] *Santa Fe*, 2000 U.S. LEXIS 4154, at *11. The district had also allowed students to read the following invocation at the 1994 graduation ceremony: "Please bow your heads. Dear heavenly Father, thank you for allowing us to gather here safely tonight. We think you for the wonderful year you have allowed us to spend together as students of Santa Fe. We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless t his ceremony and give us all a safe journey home. In Jesus' name we pray." *Santa Fe*, 2000 U.S. LEXIS 4154, at *11, n2.

[5] The October policy read as follows: "STUDENT ACTIVITIES: PRE-GAME CEREMONIES AT FOOTBALL GAMES." The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation

will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytising. *Santa Fe*, 2000 U.S. LEXIS 4154, at *11. N6.

[6] 505 U.S. at 587.

[7] Perry Ed. Assn. V Perry Local Educators' Assn., 460 U.S. 37 (1983).

[8] *Santa Fe*, 2000 U.S. LEXIS 4154, at *23.

[9] *Santa Fe*, 2000 U.S. LEXIS 4154, at *27, *28.

[10] *Id.* at 28.

[11]*Santa Fe*, 2000 U.S. LEXIS 4154, at *28.

[12]*Id.* at *29, *30.

[13] *Santa Fe*, 2000 U.S LEXIS 4154, at *32.

[14] *Santa Fe*, 2000 U.S. LEXIS 4154, at *34.

[15] *Id*. at *33.

[16] *Santa Fe*, 2000 U.S. LEXIS 4154, at *34, *35.

[17] *Id*. at *37.

[18] *See* Lee v Weisman, 505 U.S. at 589.

[19] *Santa Fe*, 2000 U.S. LEXIS 4154, at *38, *39. *See also*, *Lee*, 505 U.S. at 593-596.

[20] *Santa Fe*, 2000 U.S. LEXIS 4154, at *44.

[21] *Id*. at *45, *46.

[22] *Santa Fe*, 2000 U.S. LEXIS at *47, n.23.

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Attendance Policies: Is the Use of Academic Penalties Appropriate?

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Regular attendance by students is an issue which public schools have faced for decades. It is generally agreed among educators that, in order for a student to receive the full benefit of any type of instruction, that student must be in attendance regularly. Even the Illinois legislature recognizes the importance of regular attendance as is evidenced by the state truancy laws. To that end, most if not all school districts have attendance policies which impose a penalty of some type on those students who fail to attend class.

As a normal course of action, school district attendance policies usually differentiate between excused absences and unexcused absences. The Illinois School Code is silent as to what constitutes an excused or unexcused absence so school districts have wide latitude in making that decision. Excused absences usually include such things as illness, doctor's appointment, family emergency, and school sponsored activities. Many districts also allow excused absences for family vacations and hunting. When an absence is excused most districts' policies allow a certain number of days for the student to make up any work missed. Unexcused absences, however, are another story. As a general rule, after an excused absence not only is the student unable to make up any work missed, but often the student is penalized by some type of academic penalty. The question has arisen, and has been litigated, whether this use of academic penalties is appropriate. Is it fair for a school district to take away something which the student has fairly earned (i.e. a grade,

credit, ability to graduate, class rank, and ultimate acceptance to a university) because of the unrelated offense of being absent without and excuse?

Academic Penalties

Academic penalties are forms of student punishment which penalize, restrict, or even prevent a student from successfully progressing through his or her academic program.[1] These penalties may be in the form of reduction or denial of credit, reduction or denial of a letter grade or, in more severe cases removal of the student from the class or expulsion from school. While the use of academic penalties have always been a common practice in the public schools, such use tends to be more closely scrutinized by the courts. The reason for this close scrutiny is,

> "because very serious, potentially permanent harm can result from such actions, and because significant property and liberty interests may well be at stake . . .A student might be denied admission to college, entry into a program of study, or access to a field of employment because of a lowered grade point average or academic dismissal from school. Thus, in probably no other area of student discipline is it so important that the penalty be in line with the nature and gravity of the offense."[2]

Because of the constitutional implications, specifically potential claims of denial or procedural and/or substantive due process, before implementing academic penalties for unexcused absences school districts should serious consider whether the punishment fits the crime.

Substantive due process claims have been employed

most often to challenge the use of academic penalties. Under a substantive due process claim, a "reasonableness standard" is used to determine whether the penalty is directly related to the violation. Challenges have been made, however, that such policies also violated procedural due process. The students' position is that academic dismissal or a reduction in grades would have an adverse effect up their right to attend school (property interest under the 14th Amendment) or would create damage the students' reputation (liberty interest under the 14th Amendment.)[3] Two cases in Illinois, *Knight v Board of Educe.*[4] and *Hamer v Board of Educ. of Tp. High Sch. Dist. No. 113*[5] have addressed this issue of using academic sanctions as a punishment for unexcused absences.

Knight v Board of Education

Plaintiff, Kevin Knight, was a senior at Tri-Point Community Unit School District No. 6J. On April 25 and 26, 1974 Kevin failed to attend classes. These absences were considered unexcused. Under a school district policy stating that "Under an unexcused absence, makeup work shall be done without credit and grades shall be lowered one letter grade per class."[6] Kevin's grades were alleged in the complaint to have been lowered two grades per class (one grade for each day of unexcused absence) for the final quarter.[7] In his complaint, Kevin contended that,

> "the consequences imposed upon him as a result of the refusal of the school administration to excuse the absences deprived him of substantive due process of law and equal protection of law contrary to the Fourteenth Amendment and Article 1, Section 2 of the Illinois Constitution of 1970."[8]

The remedy which he requested was that the district recompute his grades for the quarter without giving consideration to the absences, that his old grades be expunged, and that the district policy be declared void and unenforceable.

In its response, the school district stood by its policy stating that it considered truancy to be a serious problem at the school and that grade reduction appeared to be the most effective method to combat that problem. Corporal punishment had been considered but discarded as too drastic and unworkable. After-school detentions had also been considered but because of the high percentage of students who were transported to and from school on buses (approximately 80% of the student body), this remedy also was considered unworkable. In ruling for the school district, the trial judge made note of his personal disagreement with the policy but stated that he did not find it to be patently unreasonable or arbitrary thus allowed it to stand.[9]

The court in deciding *Knight* appeared to have a difficult time applying past precedent and seemed to avoid making a decision whenever possible. First, after discussing the United States Supreme Court case of *Goss v Lopez*[10] the court stated that Kevin was entitled to the protection of procedural due process. Under the case of *Wood v Strickland*[11] Kevin was also entitled substantive due process. After recognizing the due process rights of the plaintiff, however, the court went on to make the following statement:

> "In the case under consideration the incident of the receipt of an education claimed to be impaired was not the opportunity to attend class but the receipt of grades, a measure which is considered by institutions of higher learning in determining who to admit and by employers in deciding who to hire. In *Goss v Lopez*

> the Court noted the impairment of educational and employment opportunities that arise from a permanent school record of derogatory information about a pupil. The same is true of lower grades. Despite the analogy that can be drawn between the effects of pupil expulsion and the reduction of a pupil's grades, however, we are most reluctant to intervene in the grading process. Few courts have done so."[12]

After stating this reluctance, the court continued with a sigh of relief that while it felt that the policy in question was harsh that the policy had been rescinded thus rendering the question of its appropriateness moot. Although courts to have the power to rule on a moot point if the court feels it is a matter of public interest, the court in this instance chose not to rule upon the validity of the rescinded rule.

The court, however, did go on to decide whether the actual grading which occurred under the policy violated Kevin's substantive due process. Where Kevin's grade was dropped one grade for the quarter the court did not find "the reduction in plaintiff's grade by one letter grade for the period of one quarter of the year in three subjects in consequence of two days of truancy to be so harsh as to deprive him of substantive due process."[13] The court went on to comment that it felt any damage was remote given that Kevin was admitted the next year to a junior college, the only school to which he applied, and eventually dropped out. Oddly enough, after this discussion, the court states, "Nevertheless, we deem the subsequent disadvantage he might receive from the lower grades to be a sufficient showing of damage to a property right."[14]

After making the statement that the district's policy was a damage to Kevin's property right, the court never

returned to that discussion. Instead it went on to deny other arguments made by the plaintiff and the *amici curiae* regarding a possible deprivation of the student's substantive due process. In coming to the decision that there was a rational connection between the grade reduction and Kevin's truancy to satisfy the requirements of both equal protection and substantive due process, the court stated:

> "In determining whether there is a rational basis between misconduct of pupils and the grades given to them we must determine what the grades are taken to represent. Most high school grading systems have commingled factors of pupil conduct with scholastic attainment in rendering grades. It is difficult to see how grading in physical education can be sensibly done without consideration being given to the pupil's conduct and effort. These factors are often considered in other subjects as well. Particularly among inept students, it is common to give a higher grade to those who attend class and try than to the laggard truant. Several of the teachers testifying here indicated that they considered effort and conduct in determining grades. Truancy is a lack of effort and plaintiff here exhibited a lack of effort. There was, therefore, a sufficiently rational connection between the grade reduction he was given and his truancy to satisfy the requirements of both equal protection and substantive due process."[15]

Using this reasoning, the court affirmed the ruling of the lower court and let the lowered grades stand.

Unfortunately for Kevin, the one dissenting judge showed a great deal better legal reasoning in his short but

effective dissent.

> "The majority opinion persuasively states a case for a result exactly opposite the conclusion reached. The rule of the school district required that for each day of unexcused absence, makeup work be done without credit and the academic grade be lowered one letter grade per class. Either the superintendent or the principal in his discretion would determine whether the absence was excused or unexcused. If the determination was made that the absence was unexcused, the teachers would be notified and the grades were to be lowered. The record shows that this arbitrary policy was enforced at times but not at al times. In this particular case, one teacher at a vocational center did not follow the policy – did not lower the grade; the other three teachers involved applied the policy only half way. Each of them testified that they thought the rule of the school interfered with their prerogative as a teacher and that it was harsh.
>
> The majority opinion seems to argue that courts are not a proper forum for interfering with the internal affairs of school districts, and I agree. It was long ago determined, however, that constitutional rights are not shed upon entrance through a school door. (*Tinker v Des Moines Independent Community School District*, 393 U.S. 503). It has also been determined that the fourteenth Amendment applies to the States and protects all of us against instrumentalities of the States as well as the State itself. This includes boards of education. (*West Virginia State Board of Education v Barnette*, 319 U.S. 624.) It has also been determined that a person's good name, reputation,

honor, or integrity constitutes a protectible interest. I know of no *de minimis* rule in this area. (*Board of Regents v Roth*, 408 U.S. 564).

In *Goss v Lopez*, 419 U.S. 565, we find the basic constitutional guidelines applicable to, and, in my opinion, determinative of, this case. Plaintiff has a constitutional right and that constitutional right was taken away by an arbitrary rule without any semblance of procedural due process. The rule itself was a denial of substantive due process. We are not invited to look at the weight of the interest asserted but only to determine whether the interest sought to be protected is of such a nature as to require protection.

In this case, the plaintiff's quarterly grades were reduced; the record is clear that the reduction of the quarterly grades adversely affect the final grade. The final grade constitutes a record that purports to measure academic attainment. We should take judicial notice of the fact that prospective employers as well as institutional of higher learning concern themselves with true academic achievement.

I would reverse the judgment of the circuit court of Livingston County and remand this case with directions to enter a judgment declaring the rule invalid."[16]

Hamer v Board of Education of Township High School District No. 113

Plaintiff, Elinor Hamer, was a high school student at Deerfield High School in District 113. On Friday,

September 19, 1975 Elinor left school during her lunch period because of an emergency. She did not advise any teacher or staff member that she was leaving. On the following Monday, Elinor returned with a note from her mother excusing her absence the previous Friday. Elinor presented the note to the school authorities and which time she was informed by an administrative assistant that because she had left school without informing either a teacher or staff member that her absence was unauthorized. As a punishment for an unauthorized absence, Elinor's grades in the three courses which she missed on the afternoon of her absence would be reduced by 3%. Some of her teachers did lower her grade as required by the board policy. Others refused to do so. The grade reduction did reduce her final cumulative average and did affect her class standing.

In her complaint, Elinor challenged the legal sufficiency of the grade reduction penalties imposed by the school on a wide range of statutory and constitutional grounds, including but not limited to, a violation of both her substantive and procedural dues process under both Federal and state constitutions. Plaintiff also alleged in her complaint that, "[T]he sanction to which she objects was devised solely by her school administrator and is applied differently in the various departments of he school and by the teachers and administrators to the students who become subject to it."[17] The defendant school district moved to dismiss the complaint stating that it failed to state a cause of action and that the plaintiff had no standing because she had failed to allege injury from the district's actions.

In deciding the case, the court reviewed past precedent including *Goss v Lopez*, and both the majority and dissenting opinions in *Knight v Board of Education*. In

reversing and remanding the case back to the Circuit Court of Lake County, the court stated:

> "It is our view plaintiff is entitled to be heard on the question of whether the grade reduction sanction for unauthorized absence is an approved policy of the Board; what, if any, procedural remedies are available to plaintiff before such a serious sanction may be applied; and whether its application arbitrarily and capriciously results in a grade reduction without a subjective determination of a classroom teacher. In our view plaintiff's complaint is sufficient to require appropriate response by the Board and hearing to determine whether her right to due process has been violated by procedural infirmities or substantively by the application of arbitrary grade reduction penalties have no reasonable relationship to the disciplinary objectives sought to be attained by the Board."[18]

Implications for School Administrators

Neither the court in *Knight* nor the court in *Hamer* held that academic penalties as a punishment for unexcused absences were unconstitutional. Therefore, one could say that school districts may, at their discretion, adopted policies which provide some type of academic penalty for unexcused absences. What the Illinois courts have said is that such penalties do have the potential to deprive students of substantive and/or procedural due process. Moreover, as far back as the 1970s, the State Board of Education through the office of that State Superintendent has advised against implementing such punishment as inappropriate. With that

in mind, the following should be kept in mind when drafting such a policy:

1. Academic penalties are a serious form of punishment reaching far beyond the quarter, semester, or year in which the student was absent. Such punishment has the very real potential of causing permanent damage to both the property and liberty interest of the student, thereby requiring strict adherence to both procedural and substantive due process.
2. Academic penalties, as with all punishment, must be applied fairly and consistently. There must be minimal discretion by administrators and teachers to avoid even the appearance of arbitrary or capricious enforcement.
3. Academic penalties for unexcused absences is really dealing with apples and oranges. The student has worked and has **earned** a specific grade in a course. To take away an earned grade because of an absence which the administration deems to be unexcused appears on its face to lack the rational relationship necessary to prove substantive due process. No academic penalty is given to the student who is regularly absent because of school activities, yet that student misses just as much if not more actual instruction. It is much more appropriate to use academic penalties for academic wrong doing (i.e. cheating on an exam or failing to do the work assigned.)

4. The severity of the academic penalty should correspond to the gravity of the offense. A "reasonable person" criterion should be employed in determining the amount and nature of the punishment.[19]
5. Give sufficient notice to the students that academic penalties will be attached for specific offenses. Put it right in the student handbook that attendance is considered crucial to obtain the full benefit from any course or instruction. One possibility is to have a certain number of points attach to daily attendance. If the student isn't there, excused or unexcused, the student is not awarded those points. Or, so as not to punish excused absences, all of the students start with a certain number of attendance points at the beginning of the year. If the student has an unexcused absences a certain number of attendance points are deducted from that bank. There are numerous strategies to encourage attendance without running into due process questions. Whatever strategy is chosen, make sure the students understand the rules from the first day of class.
6. In any instance of punishment which has the potential of depriving students of property or liberty, students should be afforded procedural due process prior to the imposition of the penalty. The greater the punishment, the more elaborate the procedural due process which is required.

ENDNOTES

[1] DAVID J. SPERRY ET AL., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM 27 (2nd ed. 1998).

[2] *Id.* at 27.

[3] *Id*. at 29, 31.

[4] Knight v Board of Educ. 348 N.E.2d 299 (Ill. App. Ct. 1976).

[5] Hamer v Board of Educ. of Tp. High Sch. Dist. No. 113, 383 N.E. 2d 231 (Ill. App. Ct. 1978).

[6] 348 N.E.2d at 301.

[7] In actuality, Kevin's grades were not lowered two grades per class. During that quarter Kevin was enrolled in four classes – Business English, photography, physical education and food products management. The last course was not taught at the school but at a vocational center in a nearby town, Pontiac, Illinois. The teacher at the vocational school made no change in Kevin's grade. The teachers in the other three courses lowered Kevin's grade one but not two letter grades. The photography grade was lowered from a B- to C, business English from a C to a D, and physical education from a B to a C.

[8] 348 N.E. 2d at 301, 302.

[9] 348 N.E.2d at 302. It is interesting to note that a superintendent of an adjacent district agreed with the policy

but the coordinator of student affairs at the office of the State Superintendent testified that he considered the rule to be poor educational policy and that a more reasonable method of imposing sanctions for truancy would be to give the truant a failing grade for the day and to supplement the punishment with detention. 348 N.E.2d at 302. The American Civil Liberties Union and the Illinois State Board of Education joined plaintiff as *amici curiae* to argue that the policy did indeed violate Kevin's right to due process.

[10] Goss v Lopez, 419 U.S. 565 (1975).

[11] Wood v Strickland, 420 U.S. 308 (1970).

[12] 348 N.E.2d at 303.

[13] 348 N.E.2d at 304.

[14] 348 N.E.2d at 304.

[15] 348 N.E.2d at 304,305. It is interesting to note some holes in the court's logic in this argument. First, the court states that it does not want to be the forum for determining the best educational policy. Yet, it seems to patently ignore the statement made by the representative of the State Superintendent – the one person who undeniably has the power to set educational policy – that academic penalties are an inappropriate punishment for unexcused absences. Second, the court continues to refer to Kevin's truancy. Under the definition of truancy in the Illinois School Code, however, Kevin was not truant. He merely was absent without a valid excuse for two days, yet the court has branded him as a "laggard truant."

[16] 348 N.E.2d at 306.

[17] 383 N.E.2d at 234.

[18] 383 N.E.2d at 235.

[19] DAVID J. SPERRY ET AL., EDUCATION LAW AND THE PUBLIC SCHOOLS: A COMPENDIUM 33 (2nd ed. 1998).

Rush v Board of Education of Crete-Monee Community Unit School District No. 201-U

No. 98-MR-993

Trading Detention Time for Electric Shocks is Not an Acceptable Form of Discipline

Facts of the Case

Plaintiff, Phillip Rush, taught the small engine classes in District No. 201-U for 16 years. During this time, he permitted selected students to trade their first class detention for a shock from a small engine. When one student who was given the option of taking the shock in lieu of detention asked Rush whether he would take the shock, Rush said no because it might stop his pacemaker. In reality Rush had no pacemaker but just didn't like the electricity. The effect of the shock was that the student's arm would go numb for several minutes and then tingle for approximately 30 minutes. When this practice was finally reported to the school in 1997, the school nurse examined as student who had been shocked but could find no signs of damage. A physician who examined the boy could also find no signs of damage.

In any event, the Illinois Department of Children and Family Services did find these shocks to be evidence of abuse. Rush, however, successfully appealed the finding after a physician testified that a student could not be hurt by a shock from a small engine. The Will County Regional Superintendent suspended Rush's teaching certificate for nine months anyway. Rush was also terminated from his employment at District 201-U. During a teacher tenure dismissal hearing the hearing officer upheld the termination. The trial court affirmed the decision of the hearing officer.

Decision of the Court

In his complaint, Rush asserted that as a tenured teacher he could be dismissed only if his conduct was irremediable. In deciding this question, the court followed a two-part test set down by the Illinois Supreme Court to determine whether a tenure teacher may be dismissed. Under that test, a tenure teacher could be dismissed only if (1) damage was done to the students, faculty, or school; and (2) if damage was done, if the damage could not have corrected by warning the teacher.

Regarding the first part of the test, the court found that the use of shocks was not an isolated incident and that damage was done to the students who were shocked. The shocks were physically painful and had lingering effects of sleeplessness, irritability, emotional distress, and migraine headaches. Students who had experienced the shocks had a loss of self-esteem, decreased their ability to have a positive involvement in education, and increased their misbehavior and need for discipline in school. There was also evidence that these incidents damaged the reputation of the school with negative publicity and parental concern for the safety of their children.

Moving to the second part of the test, the court also found that Rush had been duly warned that corporal punishment, including shocks, was not permitted in the district. Knowing that such behavior was forbidden, Rush took affirmative steps to insure that these "trades" were not discovered. For example, he only offered the trade to students who he did not feel would tell their parents. He administered the shocks outside of class time and did not

make a written record of the discipline.

Given that both parts of the test were met, the court upheld Rush's dismissal.

Implications for Administrators

The lesson from this case seems fairly self-evident. Corporal punishment in any form is not allowed. Trading shocks for detention is obvious. Other practices still used in many school districts may not seem so obvious. One common practice occurs in physical education where a student is required to do push-ups, sit-ups or run laps until they are near exhaustion. On its face, this practice would appear to meet the criteria of the test used in *Rush*. Verbal abuse and/or humiliation in front of peers could also rise to the level of an offense warranting dismissal of even a tenured teacher. We no longer live in 1960 where students were at the mercy of sadistic teachers. The courts have recognized that students have rights and deserve to be treated in a humane manner. Corporal punishment, which is simply inflicting pain for the purpose of punishment, has no place in our schools in any form whatsoever.

Board of Education of Oak Park and River Forest High School District No. 200 v Kelly, E

No. 99-1589

T.H., a minor, and L.H. and S.H. v Board of Education of Palatine Community Consolidated School District No. 15

No. 00-1361

Facts of the Case

The decision rendered here really dealt with two separate cases with similar facts. In both cases, the school districts which were paying for the private education of handicapped children as defined under the IDEA were asking for the state to reimburse them for the cost of that private education. Consequently, the question before the court was "Does the Individuals with Disabilities Education Act, 20 U.S.C. Sec. 1400-87, entitle a local school district to reimbursement from the state for some or all of the expense when the district must reimburse parents for a child's private education?"

After hearing the cases, the magistrate judge in the Oak Park/River Forest case directed the state to pay for Kelly E.'s private education and half of her parent's legal expenses. The decision was based on the following two reasons. First, the magistrate viewed the state as a guarantor of every local school district's compliance with the IDEA and therefore responsible for part of the cost. Second, the magistrate concluded that state statutes and regulations offering to pay for private placement were not generous enough to comply with a 1993 case, *Florence County School District v Carter*, 510 U.S. 7, which the

magistrate interpreted to call for state reimbursement of local districts' expenses for private education.

In contrast, the district judge in the Palatine case declined to order the state to contribute toward the cost of the home education. It was the belief of the judge that if the school district was so concerned about its ability to recoup expenses for the education of a handicapped child, it should have worked harder to develop an appropriate placement which was approved by the state. The district judge disagreed with the magistrate judge that the state must either ensure local districts' compliance or ensure their compliance costs. While the districts have accepted the decision, they now believe that the state should reimburse them for the expense.

Decision of the Court

After reviewing numerous state and federal statutes, the court was still at a loss to find statutory authority for the ruling of the magistrate. The magistrate had cited the following Illinois statute as supportive of his position:

> "ILCS 5/14-7.02:
>
> A school district making tuition payments pursuant to this Section is eligible for reimbursement from the State for the amount of such payments actually made in excess of the district per capita tuition charge for students not receiving special education services . . . If a child has been placed in an approved individual program and the tuition costs including room and board costs have been approved by the Review Board, then such room and board costs shall be paid by the appropriate State agency subject to the provisions of Section 14-8.01 of this Act.

Relying heavily on the wording of the IDEA, the court came to two conclusions. First, that under the wording of Sec. 1411(g) of the IDEA, any school district that receives less than the allocation prescribed by that section is entitled to a remedy under Sec. 1403(b) of the IDEA. Second, if the local district has received its full allocation for a given year, it is not entitled to more.

The statutory allocation formula gives local districts a stipend per disabled pupil. Neither Oak Park nor Palatine contended that the state of Illinois failed to distribute to them their full allocation under this formula. Therefore, the monetary responsibility of the state as mandated by the IDEA was met. The court recognized that states may agree to pay more out of their own budget, but that is a policy decision for the state, not for the federal courts. Although the court felt that an argument could be made that ILCS 5/14-7.02 demanded such state contribution, if the state legislature refused to enforce it that way, the court was powerless to enforce state laws against the state itself.

The decision in the Palatine case was affirmed. The judgment in the Oak Park case was vacated for entry of a new judgment wherein the State would not be required to reimburse the Oak Park/River Forest district for any portion of Kelly E's private education or her parent's attorney fees.

MEMORANDUM

FROM: Elizabeth T. Lugg, J.D., Ph.D.
Editor, Illinois School Law Quarterly

TO: Subscribers and Contributors

RE: Change of Format for *the Illinois School Law Quarterly*

Given the changing society in which we live in today, the Illinois School Law Quarterly has decided to rise to the challenge and take advantage of the technology available to it. With this issue, the Illinois School Law Quarterly ends its tradition as a print journal. Starting in the near future, with a target date of Winter 2001, the Illinois School Law Quarterly will change its format to an on-line journal, published as a service of the Center for the Study of Educational Policy, Department of Educational Administration and Foundations. The Illinois School Law Quarterly will be able to be found at:

http://www.coe.ilstu.edu/islq/.

For those of you who have been subscribers and contributors, we give you our greatest thanks and appreciation and invite you to visit the Illinois School Law Quarterly On-Line.

Mission Statement

The primary purpose of the Illinois State School Law Quarterly is to provide a forum for the interchange of ideas, theories, and issues on various aspects of school law among practitioners, professors, and attorneys. The emphasis is on analyzing issues in school law for the purposes of developing new theories to explain current and past developments in the law and to provide the theoretical framework which can be used to anticipate and predict future developments in school law.

Illinois State School Law Quarterly is published every Fall, Winter, Spring and Summer by the Department of Educational Administration and Foundations and the College of Education, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

Annual subscription price is $24.95 per year for single copies. This publication is not produced for the purpose of rendering legal advice or services. Expressed points of view of the Editor, Associate Editor, and contributors represent personal opinion and not that of the University, College, or Department. All inquiries should be directed to Editor, *Illinois State School Law Quarterly*, Illinois State University, Campus Box 5900, Normal, IL 61790-5900.

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