2-14-2017

Department of Attorney General

MEMORANDUM

To: Donald Marchildon, Director
Division of Secondary Vocational Education

From: Jeffrey Frankel
Assistant Attorney General

Date: February 14, 1990

Subject: Student discipline at vocational centers

This will respond to the September 14, 1987 and September 19, 1989 requests for legal advice which you relayed to me from Frederick St. Cyr, director of Sanford Regional Vocational Center ("SRVC"). As you know, the Department of the Attorney General does not provide legal advice to school administrative units. However, the issues raised by Mr. St. Cyr all relate to the participatory role of the sending schools in the policymaking decisions of the municipal school committee which operates a center. 1/ Because an interpretation of the state laws bearing on this matter goes to the heart of the support services which the Bureau of Adult and Secondary Vocational Education provides to the centers on a daily basis, I agreed to look into some of these issues for you, and on October 3, 1989 accompanied you to a meeting of the SRVC advisory committee to discuss them.

The basic message you and I carried to this meeting was that existing law contains the mechanism for a host municipality to share some of its policymaking authority with its sending schools. The same section which mandates the establishment of a vocational center advisory committee at each center also permits, but does not require, the committee to:

> . . . develop a cooperative agreement which shall delineate the duties and powers of the advisory committee and devise a

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1/ Title 20-A MRSA section 8301(3) provides:

> "Vocational center" means facilities or programs providing vocational education to secondary students. A center shall be governed by a single school administrative unit. It may serve students from other affiliated school administrative units. It may include satellite center facilities and programs.

formula for sharing costs. This agreement shall be renewed annually, with a copy being submitted to the commissioner.

20-A MRSA section 8404(3)(B)

Section 8404(3)(B) was added to the (pre-codification) education law in 1981. Its legislative history is uninformative. The thrust of the measure is to allow the host municipality to charge sending school units a portion of a center's operating costs. The quid pro quo is that the host municipality cedes to the sending units some measure of its authority to operate the center. The contours of this relationship are not specified in statute, and are left free for each center and its sending units to negotiate.

The SRVC has not adopted a cooperative agreement. You and I advised the committee that in the absence of an agreement, the Sanford School Committee retained sole authority to set attendance and disciplinary policies, but that if a cooperative agreement was reached, a different method of establishing and implementing these policies could be established.

At the meeting it became clear that the major issue of concern to the representatives of the sending units was the discipline of sending school students for infractions committed while in attendance at the center. Current practice has been for the SRVC director to exercise exclusive authority in this area. The advisory committee discussed several instances during the past several school years in which the director unilaterally terminated the attendance privileges of students from sending units without any due process hearing having been held by the Sanford School Committee. The sending school representatives charged that withdrawal of attendance privileges at the center was tantamount to an expulsion, which in their view triggered the student's right to a due process hearing before the Sanford School Committee. 2/ The Sanford superintendent, after noting that Sanford students were treated the same way, responded that in his view the exclusion of a student from vocational classes was not tantamount to an expulsion, but was more analogous to the exclusion of a student from a particular course or program. The student was still able to receive a free public education at the secondary school attended by students from his hometown. This limited type of exclusion, the Sanford superintendent stated, was not of such magnitude as to trigger due process concerns. The question presented here for discussion, then, is the extent to which a host municipality must provide due process protections to a student attending a vocational center before terminating or significantly limiting the student's attendance status at the center.

2/ They did acknowledge that in the absence of a cooperative agreement providing to the contrary, the holding of such a hearing lay entirely within the province of the Sanford School Committee.

The premise of debate at the September 19 meeting was that "expulsion" of a student is the threshhold for due process protection, and that unless an expulsion has occurred, no procedural protections need be provided. This perception may have its source in 20-A MRSA section 1001(9), the disciplinary provision of the Maine education law. Section 1001(9) authorizes a school board to expel a student, "after . . . due process." 3/ The section also allows a school board to authorize its principal to suspend a student for up to 10 days. The statute does not explicitly require due process in connection with a suspension; does not define the terms "expel" or "suspend"; does not attempt to fill in the void created between a 10-day suspension and an expulsion; and does not address the many other forms of disciplinary measures available. The bare language of the statute might lend itself to a reading that no due process need be provided unless there is an expulsion, and that while ejection from a vocational center might be more severe than a 10-day suspension, such action does not constitute an expulsion. The legal landscape, however, is more complex.

In Rudge v. S.A.D. 6, dkt. no. CV-77-140 (November 30, 1977) the Cumberland County Superior Court interpreted the statutory predecessor of section 1001(9) as allowing only the school committee to impose suspensions in excess of ten days and as also requiring that such suspensions, like expulsions, be accompanied by due process. I believe that this construction of the statute is correct, and also squares with the constitutional analysis offered below.

In Goss v. Lopez, 95 S.Ct. 729 (1975) the U.S. Supreme Court considered whether or not Columbus, Ohio school administrators had denied students due process by suspending them for 10 days without giving them any prior notice, opportunity for hearing, or any lesser opportunity to present their side of the story to the administrators. The suspensions were in accordance with an Ohio

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3/ Title 20-A MRSA section 1001(9) reads in its entirety:

> [The school board] shall expel any student who is deliberately disobedient or deliberately disorderly or for infractions of violence or possession, furnishing or trafficking of any scheduled drug as defined in Title 17-A, chapter 45, after a proper investigation of the student's behavior, and due process, if found necessary for the peace and usefulness of the school; and readmit the student on satisfactory evidence that the behavior which was the cause of the student being expelled will not likely recur. The school committee may authorize the principal to suspend students up to a maximum of 10 days for infractions of school rules.

statute which permitted principals to suspend students for up to 10 days without explicitly conferring any due process protections.

The Court held that where state law guaranteed a free public education, the "legitimate entitlement" created rose to the level of a property interest "which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause." 95 S.Ct. 735-36. To determine the amount of process that was due, the Court weighed the extent to which the student was deprived of that property interest (10-day suspension) against the type of notice and hearing "appropriate to the nature of the case." 95 S.Ct. 738. In a school setting, the Court reasoned, an appropriate notice and hearing procedure needed to accommodate such factors as the risk of error through informal, on-the-spot disciplinary penalties, the countervailing need of schools to preserve order and decorum in a learning environment, and the sheer volume of day-to-day disciplinary decisions.

The Court's resolution was hardly burdensome on school officials:

> Students facing temporary suspension . . . have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.
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> There need be no delay between the time "notice" is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is . . . Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should preclude removal of the student from school. We agree . . . that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . .
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> 95 S.Ct. 746

The Court stressed, however, that this particular application of the due process clause applied only to ordinary suspensions of not more than 10 days:

> . . . Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.
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> 95 S.Ct. 741

The following year, in Matthews v. Eldridge, 96 S.Ct. 893 (1976) the Court announced a conceptual framework for consideration of all claims alleging denial of procedural due process. Once it is determined that a protected property interest exists, the determination of how much process is due depends on a balancing of three distinct factors:

> ". . .[F]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the functions involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail . . . .
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> 96 S.Ct. at 903.

Thus while Goss v. Lopez provides a fixed measure of due process entitlement for suspensions of not more than 10 days, Matthews v. Eldridge provides the mechanism for evaluating due process claims arising from more severe discipline.

I have been unable to find any authority addressing due process concerns arising from termination of a student's right to attend a vocational center, or of a student's right to attend one facility of a multi-facility high school. The case law is, nonetheless, informative.

Short suspensions "plus"

Goss left open the possibility of additional due process being required even for suspensions not exceeding ten days. Some courts have ruled that the informal give-and-take meeting endorsed by Goss for short suspensions satisfied due process concerns even where the ensuing consequences were harsh. Thus in Keogh v. Tate County Board of Education, 748 F.2d 1077 (5th Cir. 1984), a principal proposed a 10-day suspension for unruly and disrespectful conduct after conferring with the student, even though final exams were scheduled to take place during the

suspension period. 4/ See also Angavine v. Gersen, dkt. no. CV-82-189, Me. Superior Ct., Oxford Cty. (Jan. 13, 1983) (informal due process sufficient for 5-day academic suspension and suspension from ski team for remainder of competitive season); Palmer v. Palmer v. Merluzzi, 868 F.2d 30 (3d Cir. 1989) (no due process violation where a 60-day athletic suspension was subsequently added on to a 10-day academic suspension originally imposed after informal conference with school officials).

In Lamb v. Panhandle Community School District No. 2, 826 F.2d 526 (7th Cir. 1987) the court took a different view. There the principal suspended a student for the final three days of the school year after the student admitted to drinking alcohol while on a class outing. Due to the suspension the student was barred from taking final exams and failed to graduate as a result. The court ruled that the principal's informal discussion with the student complied with Goss and declined to hold that any more elaborate pre-suspension safeguards were necessitated by the timing and consequences of the suspension. But the court went on to add that where a suspension is tantamount to expulsion a student must be afforded some subsequent opportunity (that is, subsequent to imposition of the suspension) to present a "mitigative argument" concerning the penalty imposed. This could occur at an expulsion hearing before the school board, or could even take the form of another meeting with the disciplining administrator. Although the Seventh Circuit did not characterize it as such, the requirement of some post-suspension process can be viewed as responsive to the Supreme Court's remark that something more than a conference alone might be required where a short suspension raises unusual concerns.

Suspensions in excess of ten days

A similar divergence of opinion is seen in cases where short-term suspensions "spilled over" into additional days. In Cole v. Newton Special Municipal School District, 676 F.Supp. 749 (S.D. Miss. 1987), aff'd 853 F.2d 924 (5th Cir. 1988) the student arguably received notice and an informal conference prior to serving a 10-day suspension. As a condition of reinstatement, however, the school board allowed her to be reinstated only on condition that she spend the six remaining days of the school year in a detention room in isolation from her classmates. The court refused the school district's request to rule that the additional, in-school suspension did not require due process above and beyond that which the student originally received:

> . . . Under certain circumstances, in-school isolation could well constitute as much of a deprivation of education as an

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4/ Although the school board later permitted the student to take the exams, the court specifically upheld the suspension initially ordered by the principal.

> at-home suspension. In other words, a student could be excluded from the educational process as much by being placed in isolation as by being barred from the school grounds. The primary thrust of the educational process is classroom instruction; in both situations the student is excluded from the classroom. This is not to say that any in-school detention would necessarily be equivalent to a suspension; it would depend on the extent to which the student was deprived of instruction or the opportunity to learn . . . .
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> 676 F.Supp. at 752.

Darby v. Schoo, 544 F.Supp. 428 (W.D. Mich. 1982) similarly found that although informal due process had been given so as to justify a short-term suspension, school administrators acted illegally by in essence transforming that penalty into a permanent expulsion prior to any action by the school board.

A contrary approach was taken in Matter of J.L.D., 536 S.W.2d 685 (Tex. Civ. App. 1976). There a series of three very brief suspensions following conference with the principal apparently resulted in the student being refused re-admission during the pendency of court hearings. Although the suspension period totaled at least 23 days, the principal had offered to re-admit the student if his mother came in for a conference. In light of that offer, the court did not feel that any more stringent due process was necessary in connection with the original suspensions.

Surprisingly, few reported cases discuss long-term suspensions originally imposed as such. An exception is Rudge v. S.A.D. 6, dkt. no. CV-77-140, Me. Superior Ct., Cumberland Cty. (Nov. 30, 1977). There the court sustained a suspension imposed on February 7, 1977 for the balance of the school year which was ordered by the school board following a full evidentiary hearing.

Expulsions

In the landmark (pre-Goss) case of Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), cert. denied 82 S.Ct. 368 (1961), the court ruled that due process required notice of the proposed sanction and opportunity for an adversary hearing before students could be expelled from a public college. The bulk of the secondary school expulsion cases decided since Goss have followed and elaborated upon Dixon in applying to such hearings many of the procedural safeguards available in contested administrative proceedings. See 2 Rapp, Education Law section 9.05[3] (1989); Valente, 1 Education Law - Public and Private sections 16.82 - 16.86 (1985)

Turning to the instant situation:

Maine law confers upon all persons entitled to receive a free public secondary education the "general right" to attend a vocational center or region (subject to the school's admission standards and the availability of space). 20-A MRSA section 8305(1), (2). Vocational centers must offer programs to eleventh and twelfth grade students. 20-A MRSA section 8305(3)(B). I understand from you that vocational courses make up approximately 25% of the secondary vocational curriculum. Several methods of scheduling the mix of academic and vocational courses exist. In the case of SRVC, juniors spend three morning periods at the center, and are bussed back to their academic high schools for the remainder of the school day. Seniors spend mornings at their academic high schools, and are bussed to SRVC for three periods in the afternoon.

Putting this in the context of Goss v. Lopez, it is clear that SRVC students possess a property right in their continued attendance at the center. It is also clear under Goss v. Lopez and 20-A MRSA section 1001(9) that with authorization from the school board the director may suspend a student from the center for up to 10 days for violations of center rules, at least where no special circumstances exist, so long as he has given the student prior notice and an opportunity to either admit the charge or present his side of the story.

To determine the quantum of due process necessary in connection with harsher discipline, the three-part framework for Matthews v. Eldridge becomes relevant. That entails a balancing of the nature of the right at stake, the risk of an erroneous outcome from the dispute resolution procedures chosen, and the public interest.

The Supreme Court's discussion of the nature of the right at stake was in actuality a discussion of the effects of deprivation of that right. A student ejected from SRVC for disciplinary reasons would presumably have to return to the academic high school in which he was also enrolled. I expect that in the majority of such cases the student's inability to complete the vocational courses in which he was enrolled at the time of his exclusion will prevent him from obtaining passing grades in those courses. Yet unless the exclusion occurs near the beginning of a semester, there is a real risk that the student will also be unable to pass the academic courses that are open to him. Further disruption would occur if the student is unable to resume the missed portion of the vocational curriculum in time to graduate with his class.

I am sure that summer school or some special assistance would be offered to help such students pass their courses. Yet in the rubric of Cole v. Newton Special Municipal School District, discussed above, the long-term exclusion of a student from SRVC for disciplinary reasons would nonetheless constitute a significant deprivation of instruction or opportunity to learn.

Whether or not such action is deemed equivalent to an expulsion 5/ it is unquestionably the harshest sanction a school committee can impose on students from sending schools. The potential impact of this action is so severe as to raise substantial doubt as to the constitutionality of imposing this sanction without more formal factfinding than a conference with the director.

In considering the amount of additional process due, possibilities range from higher level administrative review (say, a second conference with the superintendent), to an after-the-fact review hearing before the school committee, all the way to a pre-exclusion due process hearing by the school committee. The burden on local government increases at every step, particularly if the director has suspended a student for ten days and asks the superintendent to convene an exclusion hearing before the school committee prior to the expiration of the suspension period. However, the reliability of the outcome also increases at every step.

I am unfamiliar with the number of disciplinary hearings held by the Sanford School Committee and the degree to which this function has created logistical problems or taken the committee's attention from other necessary matters. In the absence of any real difficulties, my weighting of the three Matthews v. Eldridge factors strongly leans towards formal adoption of a disciplinary policy affording students the opportunity for an adversary hearing before the committee prior to any long-term exclusion from SRVC.

How "long" is long-term? Should the school committee consider providing notice and full prior hearing only for exclusions that exceed a fixed number of weeks or are permanent, while providing less comprehensive due process for exclusions falling below that threshhold but which exceed ten days? Viewed as a whole, the court decisions discussed in this memo would seem to ratify this approach. Title 20-A MRSA section 1001(9), though, provides tighter parameters. Adopting the construction placed on this statute by Rudge v. S.A.D. 6 (discussed above), any discipline in excess of ten days can only be imposed by the school board. Therefore, in Maine, due process options for exclusions in excess of ten days, however slight, still require school board involvement.

For penalties at the lower end of this range, could options include a post-exclusion school board hearing as discussed in Lamb v. Panhandle Community School District No. 2? Once again, the Maine statutory language forecloses this possibility. Title 20-A MRSA section 1001(9) permits school boards to expel a student ". . . after a prior investigation of the student's

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5/ See W.A.N. v. School Board of Polk County, 504 So.2d 529 (Fla. App. 1987) (under Florida statute, transfer for disciplinary reasons fell within the definition of "suspension").

behavior, and due process, if found necessary for the peace and usefulness of the school." My reading of this text is that the due process hearing must precede the expulsion and cannot follow it. Reading the constitutional and statutory requirements in tandem, my advice is that vocational centers make the pre-exclusion adversary hearing available whenever the cumulative impact of an exclusion 6/ will exceed ten days. 7/

If the Sanford School Committee wishes to integrate any of this into their existing discipline policies, I would be glad to discuss the matter with their counsel.

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Finally, I thought you might enjoy the following observations on student discipline, which were penned by Judge Meredith in Katchak v. Glasgow Independent School System, 690 F.Supp. 580, 584-85 (W.D. Ky. 1988):

> Finally, during the course of the hearing when the learned counsel for the plaintiffs was making reference on occasion to the Bard from Stratford-on-Avon, William Shakespeare, I told him I was surprised he did not summon up the words of the noted English poet, Alexander Pope, who said in his "Essay on Criticism: 'To err is human, to forgive, devine.'" Alas, he took the Court's advice and did so in his response to the defendants' motion to dismiss. However, the law on the issue at hand as stated in the Conclusions of Law more closely emulates something else Alexander Pope wrote in the Eighteenth Century. The lines I refer to were on a small card which was attached to the high school diploma which I received some twenty-five years ago and for some inexplicable reason remain indelible in my mind: "Tis education forms the common mind, just as the twig is bent the tree's inclined."
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> Education as we know it is just as crucial today in the development of any young man or young woman as it was in

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6/ Remember, with standing authority from the school committee the director may exclude students for the first ten days.

7/ This advice is consistent with an early post-Goss recommendation of the Maine Department of Educational and Cultural Services and Department of Attorney General that suspensions in excess of 10 days and expulsions be preceded by notice and opportunity for an adjudicatory hearing. See Student Suspension and Expulsion (June, 1975).

Pope's time. An integral part of that education is discipline. There are rules of discipline that each of us have to abide by throughout our lives, whether we are in high school, college, or adults required to obey the laws of our land. The two primary plaintiffs in question appear to be nice young men who can have very bright futures if they apply themselves and abide by the rules, be it in high school or life. All of us have made mistakes which we have had to pay for in some fashion. If we learn that lesson as "twigs," hopefully it will remain with us as "trees." I have to believe it is much more desirable to discover this basic principle sooner, when the stakes are lower, than later. Both the current law and Pope's aphorism on education seem to endorse that basic principle. I concur.

JF:lm

cc: Eve M. Bither
William Cassidy