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GOSS v. LOPEZ AND *WOOD v. STRICKLAND*: A STUDENT'S RIGHT TO DUE PROCESS AND LIABILITY OF SCHOOL BOARD MEMBERS

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On January 22, 1975 the Supreme Court in *Goss v. Lopez*[1] significantly extended preexisting and generally held concepts of due process in connection with short term suspensions of public school students. Only one month later in *Wood v. Strickland*,[2] the Supreme Court placed an additional burden on public school officials by altering well established rules concerning the immunity of public school officials from monetary damages when such officials act in derogation of a student's constitutional rights.

Federal jurisdiction in both cases was based on alleged violations of the fourteenth amendment and the once neglected Civil Rights Act of 1871.[3] A review of the development of the law relating to the protection of student's rights reveals the fourteenth amendment as the major constitutional vehicle for the preservation or expansion of such rights.[4] Although the amendment is limited by its terms to action taken by a state, it has been universally recognized that state action may encompass a broad spectrum of activities "including action by state officials under color of law, and by agencies of the state—such as school boards—performing official functions."[5]

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1. 419 U.S. 565 (1975).
2. 420 U.S. 308 (1975).
3. The suits were based specifically on alleged violations of the Civil Rights Act of 1871, ch. 22, § 1, now codified as 42 U.S.C. § 1983 (1970).
4. U.S. CONST. amend. XIV, § 1. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws."
5. 81 HARV. L. REV. 1045, 1056 & n.2.

The Civil Rights Act of 1871, chapter 22, section 1 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[6]

A plain reading of this section indicates an intention by Congress to hold anyone acting in disregard of the statute liable for money damages to persons aggrieved by the violation. Although the statute refers to "[e]very person who"[7] and not specifically to governmental entities such as school boards, the courts, consistent with their determination that state action may encompass a wide variety of circumstances, have broadened the ordinary connotation given to the word "person" to include governmental entities.[8]

The effect of the expansion of the concepts of "state action" and "person" has been to eradicate many of the privileges previously afforded by the centuries-old doctrine of sovereign immunity and its younger counterpart, official immunity. This article will briefly analyze the erosion of the doctrine of official immunity, specifically as it pertains to public school board members, and will, of necessity, include discussion of the evolution of the due process clause as it has affected the application of section 1983.

Since the due process clause can be invoked only when the state acts to deprive a person of what has been recognized as his rights to "life, liberty or property," the threshold question in this area has been whether or not a person has a "right" to a public school education. Over the years, the courts have broadened the traditional definitions given to life, liberty and property, which are considered to be constitutionally protected rights; and from this expansion, the term "protected interest" has evolved, i.e. an interest in life, liberty and property worthy of constitutional protection. In this regard, the Supreme Court has stated that an individual's protected interests

6. All future references to the Civil Rights Act of 1871, ch. 22, § 1 will be to 42 U.S.C. § 1983 (1970) or merely to § 1983.

7. 42 U.S.C. § 1983 (1970) (emphasis added).

8. *See, e.g.*, Scheuer v. Rhodes, 416 U.S. 232 (1974); Pierson v. Ray, 386 U.S. 547 (1967); Monroe v. Pape, 365 U.S. 167 (1961); Tenney v. Branhove, 341 U.S. 367 (1951).

> are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.[9]

Without question, a public school education through high school is a basic American principle,[10] and furthermore "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."[11] Thus it has been determined that an individual has a right to a public school education.

Having established that a public school education is a constitutionally protected right, the courts have zealously protected public school children from arbitrary and capricious action by public school officials. Part of the rationale for this attitude by the courts was stated by the Supreme Court in *West Virginia State Board of Education v. Barnette*[12] as follows:

> The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[13]

Although the right to an education is now a well established principle, a student remains powerless to invoke his right, absent an understanding of what "due process of law" means as applied to his right to attend school. The courts have yet to give a uniform definition as to what constitutes "due process" under any particular circumstance and it is doubtful that any such definition will emerge. As stated by the Fifth Circuit in *Dixon v. Alabama State Board of Education*,[14] a decision involving the expulsion of students from a state college,

> [w]henever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant

9. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).
10. Cook v. Edwards, 341 F. Supp. 307, 310-11 (D.N. Hamp. 1972).
11. Sheldon v. Tucker, 364 U.S. 479, 487 (1960).
12. 319 U.S. 624 (1943).
13. *Id.* at 637.
14. 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930 (1961).

> with due process of law. The minimum procedural requirements necessary to satisfy due process depend upon the circumstances and the interests of the parties involved.[15]

This statement reflects the Supreme Court's view that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."[16]

However, even without a definitive statement by the courts as to what action will be considered in compliance with due process, one can obtain some knowledge of the minimum requirements by examining the case law. At the heart of the concept of due process is the opportunity of the aggrieved party to be heard;[17] and basic to the opportunity to be heard is the right to be informed that a controversy is pending, otherwise the right to be heard, i.e. to be afforded due process of law, would be valueless.[18] Thus a minimum standard for compliance with due process consists of giving notice of the pending matter to the alleged violator and then giving such person the opportunity for a hearing.

In 1968, the United States District Court for the Western District of Missouri (en banc) issued a general order regarding student discipline in tax supported institutions of higher education.[19] While this order was directed toward colleges and universities, the distinction made between due process in the criminal sense and due process in its civil context, e.g. the expulsion or suspension of students, is of value. In this regard the court stated:

> In the case of irrevocable expulsion for misconduct, the process is not punitive or deterrent in the criminal law sense, but the process is rather the determination that the student is unqualified to continue as a member of the educational community. Even then, the disciplinary process is not equivalent to the criminal law processes of federal and state criminal law. For, while the expelled student may suffer damaging effects, sometimes irreparable, to his educational, social, and economic future, he or she may not be imprisoned, fined, dis-

15. 294 F.2d at 155. Since *Dixon* the lower federal courts have uniformly held that the due process clause is applicable to decisions made by tax supported educational institutions when the student's removal is for such a period as to constitute an expulsion. *See* Goss v. Lopez, 419 U.S. 565 (1975) & Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973).

16. Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961).

17. Grannis v. Ordean, 234 U.S. 385, 395 (1914).

18. Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950).

19. General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education, 45 F.R.D. 133 (W.D. Mo. 1968).

> enfranchised, or subjected to probationary supervision. The attempted analogy of student discipline to criminal proceedings against adults and juveniles is not sound.
>
> In the lesser disciplinary procedures . . . the lawful aim of discipline may be teaching in performance of a lawful mission of the institution. The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect, and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent.[20]

The above statement recognizes not only the distinctions in the nature of due process when disciplinary action is taken but also recognizes the competing interest of the state in conducting the education of students in its schools. The competing interests of students and of the state were also recognized in the landmark decision of *Tinker v. Des Moines Independent Community School District*[21] when the Court commented:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State.[22]

In determining whether a situation will give rise to the application of any due process requirements, the courts will generally look only to the "nature" and not the "weight" of the interest involved.[23] In examining the "nature" of the interest involved, the courts are looking to see if the interest of the aggrieved person is of such character as to fall within the scope of the fourteenth amendment's protection of life, liberty and property; whereas the "weight" of the interests involved refers to a balancing of conflicting interests, i.e. the interest of the school board in maintaining discipline in the school system and the student's interest in his right to an education. Thus, the courts first examine the nature of the interest involved to determine whether or not due process require-

20. *Id.* at 142 (footnote omitted).
21. 393 U.S. 503 (1969).
22. *Id.* at 511.
23. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 570-71 (1972).

ments should be applied. And, if it is ascertained that such interest requires due process, then, the courts will "weigh" all interests involved in prescribing the degree of the due process requirements.

In the *Goss* case, the Court, stating that "[t]he student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences,"[24] expanded generally held concepts of the due process clause by holding:

> 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.[25]

The Court, in the *Goss* case, concerned primarily with procedural due process issues, remained essentially silent as to the liability of the public school officials who suspended the students. The Court was, however, squarely confronted with this issue in the *Strickland* case and its decision coupled with the decision in *Goss* has justifiably concerned school board members.[26]

Traditionally, a school board member has been liable for damages only if he took action with malicious intent to deprive a student of his constitutional rights, or to otherwise injure him.[27] The basis for the qualified immunity granted public officials, i.e. "official immunity,"[28] is that of sovereign immunity which has been applied to all public agencies, institutions and political subdivisions of the state on the assumption that these entities perform governmental functions for the benefit of the state.[29] The rationale for official immunity was:

> (1) the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion; (2) the dan-

24. 419 U.S. at 579.

25. *Id.* at 581 (footnote omitted).

26. The Court specifically declined to hold that students faced with short-term suspensions must be afforded the right to counsel, the right to cross-examine witnesses or the right to call their own witnesses. The nature of the hearing outlined by the Court is most informal and under most circumstances should take place as soon as possible after the violation giving rise to the suspension. *Id.* at 583.

27. Wood v. Strickland, 420 U.S. at 322.

28. The term "official immunity" is used when the doctrine of sovereign immunity is applied in the context of officials who perform state functions.

29. *See* Annot., 33 A.L.R.3d 703, 724; Scheuer v. Rhodes, 416 U.S. 232 (1974).

> ger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good.[30]

The doctrine of official immunity has been limited to "acts or duties within the scope of the official's powers—the official must be acting on a matter within the ordinary exercise of his duties."[31] Certain officials are granted absolute imunity while acting within the scope of their duties while others such as school board members have only a qualified immunity.[32] For it is generally felt that to grant absolute immunity to all public officials would frustrate the purpose of the Civil Rights Act which was promulgated to provide redress to parties who had suffered from the abuse of power by public officials. As stated in *West Virginia State Board of Education v. Barnette*: "There are village tyrants as well as village Hampdens, but none who acts under color of law is beyond reach of the Constitution."[33] The philosophy of this statement as well as the history of official immunity indicates a continuing protective attitude by the courts toward citizens subjected to the vagaries of state officials.

In the *Strickland* case the Court restricted further the scope of official immunity when it held:

> [A] school board member is not immune from liability for damages under § 1983 if he knew or *reasonably should have known* that the action he took within his sphere of official responsibility would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury to the student.[34]

A cursory reading of the *Strickland* case might lead one to believe that school board members are now required to foresee the future and anticipate constitutional developments. However, such a belief would be erroneous as the Court, in recognizing the need for some immunity if school board members are to continue their vital role in the community, clarified its holding by stating:

> That is not to say that school board members are "charged with predicting the future course of constitutional law. . . .

30. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974).

31. Smith v. Losee, 485 F.2d 334, 342 (10th Cir. 1973); *see also* Wheeldin v. Wheeler, 373 U.S. 647 (1963).

32. U.S. CONST. art. I, § 6 grants absolute immunity to members of both houses of Congress with respect to any speech, debate, etc. made while Congress is in session; *cf.* McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968).

33. 319 U.S. at 638.

34. 420 U.S. at 322 (emphasis added).

> A compensatory award will be appropriate only if the school board member has acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith.[35]

The significance of *Strickland* is that a school board member will no longer be immune from suit under section 1983 if he knew or reasonably should have known that the actions taken by him would deprive a student of his constitutional rights. Prior to the *Strickland* decision, so long as the official did not act with malicious intent, the doctrine of official immunity was a bar to liability.[36] Now the official may not stand behind his defense of official immunity if his actions, in light of all the surrounding circumstances, cannot reasonably be classified as being made in good faith. As stated in *Strickland*, the standard of conduct for school board members is a mixture of objective and subjective tests:

> To be entitled to a special exemption from the categorical remedial language of § 1983 in a case in which his action violated a student's constitutional rights, a school board member, who has voluntarily undertaken the task of supervising the operation of the school and the activities of the students, must be held to a standard of conduct based not only on permissible intentions, but also on knowledge of the basic, unquestioned constitutional rights of his charges.[37]

In other words, the standard of conduct to which a school board member will now be held includes not only his own subjective "intentions," but also his "knowledge" (either actual or implied) of the "basic, unquestioned constitutional rights of his charges."[38] Thus a public school board member will be liable for damages if his actions are taken with a malicious intention to deprive a student of his constitutional rights, or if he acts "with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith."[39]

Given the overwhelming importance of public school education in the framework of our American system, this new standard, while further protecting a student from arbitrary action by a school board mem-

35. *Id.* (citation omitted).
36. Smith v. Losee, 485 F.2d 334, 340 (10th Cir. 1973).
37. 420 U.S. at 322.
38. *Id.*
39. *Id.*

ber, will probably leave the school board member the degree of immunity necessary for him to function effectively.

The *Goss* decision expanded the concept of due process to require an informal hearing in cases of suspensions for less than ten days; and this right to a hearing within the framework of *Strickland*, must be considered as a known and "unquestioned constitutional right" of a student. Thus a school board member cannot act in violation of this right without subjecting himself to liability. On the other hand, the due process requirements of *Goss* are so minimal and flexible, it is hardly probable that compliance will interfere with the day-to-day conduct of the schools.

The school board member, as a result of the *Strickland* and *Goss* decisions, will, however, face a dilemma when the due process requirements are not so clearly defined. So long as the suspension is for ten days or less, his course of conduct should be clear. But what should he do when the suspension is for longer than ten days but not long enough to be classified as an expulsion? Although he is not required to predict the outcome of future decisions according to *Strickland*,[40] he knows that something more than a rudimentary hearing is required. Since such actions are not as severe as a permanent expulsion, his course of conduct is not clear. Thus to be assured of permissible conduct, the school board member will tend to adopt procedures which will include a formal hearing in compliance with the procedural safeguards utilized in cases of expulsion which may be unduly burdensome on the school board member and the school administration.

This dilemma will eventually be resolved by further litigation, but until then, the school board member must act cautiously and diligently in prescribing disciplinary procedures. It remains to be seen whether as a result of these cases, a school board member will be subjected to a substantially increased amount of personal liability litigation and to what extent the courts will attribute knowledge of a student's constitutional rights to a school board member.

40. See text accompanying note 35 *supra.*