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Expulsion in California Public High Schools— Due Process a Decade After Dixon

BETTY E. BOONE*

> *"No State . . . shall deprive any person of life, liberty or property, without due process of law . . ."*
>
> *—Fourteenth Amendment*

I. Introduction

Is a California public high school pupil entitled to notice and an opportunity for a hearing before being expelled for misconduct?

If so, then is he entitled to a full-dress judicial-type hearing, with any or all of the features of a civil or criminal trial, such as legal representation, confrontation and cross-examination?

If he is entitled to notice and an opportunity for a hearing, but not to a full-dress, judicial-type hearing, then what is the nature of the hearing to which he is entitled?

These and related questions are being posed increasingly by

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Note, the opinions expressed herein are those of the author, and do not necessarily represent the views of the Office of the County Counsel.

those in the educational and legal fields and are engendering a great deal of public interest. The answers may be gleaned from a study of history, the application of reason, and review of past decisions in the field of student discipline and it is the purpose of this article to suggest the answers through an exploration of these avenues.

Caveat: The goal of this article is limited to the examination of the state of the law as it pertains or would seem to pertain to California public high school pupil expulsions. *Suspensions* of California public high school pupils are the subject of extensive statutory provisions and are short term. They are not treated here. Neither are suspensions and expulsions of California grammar and junior high public school pupils treated here. Finally, it should be pointed out, suspension and expulsion proceedings—indeed, all disciplinary proceedings—at the junior college level are adequately (though not necessarily permanently) treated in the very recent California case of *Perlman v. Shasta Joint Junior College District Board of Trustees.*[1]

II. The California Statutory Plan for Public Schools

The Laws

At the outset one should be aware that the California Legislature has the constitutional duty and the power to maintain a system of free public education in California[2], that by statute the Legislature has delegated the local school boards of the various school districts the authority to operate the public schools[3] and to promulgate neccessary rules and regulations controlling student conduct[4], and that students are required to comply with such regulations[5] under pain of suspension[6], or, if necessary, expulsion.[7]

School boards are prohibited by Education Code section 10751 from permitting access to any written records of pupils, except as provided in the statute. They are generally required by the Brown Act[8] and Education Code section 966 to conduct their business in open and public meetings, but are authorized by Education Code sec-

1. 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970), petition for hearing by Cal. Sup. Ct. *denied* Sept. 24, 1970 [hereinafter cited as Perlman].
2. Cal. Const. art. IX, §§ 1, 5 (1879).
3. Cal. Educ. Code § 921 (West 1969).
4. *Id.* § 10604.5.
5. *Id.* § 10609.
6. *Id.* §§ 10607, 10607.5 deals with the limited duration.
7. Id. § 10604.3; *see* also *id.* § 10603 which deals with the specific authority to suspend or expel students for sale, use or possession of narcotics on and off campus.
8. Cal. Gov't Code §§ 54950-60.

tion 967, as an express exception to the Brown Act and Education Code section 966, to hold executive, that is, closed, sessions to "consider the expulsion, suspension or disciplinary action in connection with any pupil of the school district, if a public hearing would violate the non-disclosure provisions of Education Code section 10751." However, Education Code section 967 requires that before calling an executive session to consider pupil disciplinary matters,

> . . . the governing board . . . shall, in writing, by registered or certified mail or by personal service, if the pupil is a minor, notify the pupil and his parent or guardian . . . of the intent of the governing board . . . to call and hold such an executive session. Unless the pupil, or his parent, or guardian shall, in writing, within 48 hours after receipt of such written notice of intention, request that the hearing of the governing board be held as a public meeting, then the hearing to consider such matters may be conducted by the governing board in executive session.[9]

If a pupil is expelled, an inter-agency administrative appeal to the county board of education is available to the parent or guardian of the pupil under Education Code section 10608 and the county board, upon request, "shall hold a hearing thereon and render its decision. The decision of the county board of education shall be final and binding upon the parent or guardian and the governing board expelling the pupil."

Although no reported California case has squarely held that sections 967 or 10608 of the Education Code requires that a pupil be given notice of the charges and an opportunity to present a defense before being expelled from a public school, it is probable that such requirements would be held to be implied in the language of these sections. Assuming that California public school pupils have a right to notice and a hearing before being expelled, still no particular form of hearing is prescribed by statute, and neither the county board of education nor the school boards in California have the power to subpoena witnesses—for either side—or to compel the witnesses to testify if they do appear voluntarily.

Judicial Review

It can be expected that section 10608 of the Education Code will be construed as being the final administrative decision required before the parent or guardian of the expelled pupil can seek judicial

9. CAL. EDUC. CODE § 967 (West 1969).

review in the California courts.[10] Should the California courts determine that the final administrative decision is the result of a proceeding "in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the . . . board",[11] then administrative mandamus under the provisions of section 1094.5 of the California Code of Civil Procedure is the appropriate method to seek judicial review in the California courts.[12]

As we shall see, since the landmark decision in 1961 in *Dixon v. Alabama State Board of Education*,[13] a second alternative forum—the federal district court—is also available to review the expulsion under the Civil Rights Act.[14]

III. DIXON AND ITS HISTORICAL DEVELOPMENT

The Case and Its Rule

In the spring of 1960, several students at Alabama State College for Negroes were expelled ex parte by the Alabama State Board of Education after a series of student lunch counter sit-ins and mass demonstrations in Montgomery and Tuskegee, Alabama. The misconduct for which the students were expelled was, however, never definitely specified.

The students filed suit in the United States District Court for the Middle District of Alabama under the Civil Rights Act[15], seeking preliminary and permanent injunctions restraining the State Board of Education and others from obstructing their right to attend college.

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10. *See*, Noonan v. Green, 276 Cal. App. 2d 25, 31, 80 Cal. Rptr. 513, 517 (1969).

11. CAL. CIV. PRO. CODE § 1094.5(a) (West 1954).

12. For appropriateness of administrative mandamus *see* discussion in Goldberg v. The Regents of the Univ. of Cal., 248 Cal. App. 2d 867, 873, 57 Cal. Rptr. 463 (1967), [hereinafter cited as Goldberg], pet. for hearing by Cal. Sup. Ct. denied.

For a thorough discussion of CAL. CIV. PRO. CODE § 1094.5 (West 1954), *see* W. DEERING, CALIFORNIA ADMINISTRATIVE MANDAMUS (1966), published by Cal. Continuing Educ. of the Bar.

13. 294 F.2d 150 (5th Cir. 1961) *cert. denied*, 368 U.S. 930 (1961).

14. 28 U.S.C. § 1343.

15. 28 U.S.C. §§ 1131, 1343(3). The Act confers original jurisdiction upon federal district courts of any civil action authorized by law to be commenced by any person

> 1343(3). To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

The federal district court denied injunctive relief[16], assigning as reasons therefor:

1. The right to attend a public college is not in and of itself a constitutional right;

2. The right to attend a public college is conditioned upon the student's compliance with the rules and regulations of the institution;

3. The State Board of Education had the authority to and did establish reasonable rules and regulations for the government of the institution; and

4. "The courts have consistently upheld the validity of regulations that have the effect of reserving to the college the right to dismiss students at any time for any reason without divulging its reason other than its being for the general benefit of the institution."

The students, represented by several attorneys, including the now Mr. Justice Thurgood Marshall, appealed the decision to the Fifth Circuit. Reversing and remanding the case, the Circuit Court held that due process requires notice and "some" opportunity for a hearing before a student at a tax-supported institution of higher learning can be expelled for misconduct.

The Dixon Analysis

In the well-reasoned opinion written by Circuit Judge Rives, the Circuit Court declared at the outset:

> Whenever a governmental body acts so as to injure an individual, the Constitution requires that the act be consonant with due process of law.[17]

Demise of the Right v. Privilege and Waiver Arguments

Even while recognizing that the right to attend a public college is

16. Dixon v. Alabama State Board of Education, 186 F. Supp. 945, 951 (M.D. Ala. 1960). The district court relied upon Waugh v. Board of Trustees of the Univ. of Miss., 237 U.S. 589 (1915); Hamilton v. Regents of the Univ. of Calif., 293 U.S. 245 (1934); Lucy v. Board of Trustees (D.C. N.D. Ala. CA. No. 652); and the authorities referred to in 14 C.J.S. *Colleges and Universities* § 26 (1939); 55 AM. JUR. *Universities and Colleges* § 22 (1946); and 79 C.J.S. *Schools and School Districts* § 503(b) (1952).

17. Dixon v. Alabama State Board of Education, 294 F.2d 150, 155 (5th Cir. 1961) [hereinafter cited as Dixon].

not in and of itself a constitutional right[18], the *Dixon* court nevertheless dealt the underlying "privilege" argument a deadly blow by quoting from *Cafeteria and Restaurant Workers Union v. McElroy*

> One may not have a constitutional right to go to Bagdad, but the Government may not prohibit one from going there unless by means consonant with due process of law.[19]

The defendants contended that the parties—the student on the one hand and the college on the other—had entered into a voluntary relationship with each other, which relationship could be terminated at will by either; therefore, the students' "privilege" of attendance could be and had been conditioned upon their "agreement" to abide by the college's regulation which had the effect of reserving to the college the right to dismiss them ex parte if the relationship became unpleasant or difficult for the college. "Not so", according to the *Dixon* court. Relying upon the holdings of the Supreme Court in public employment cases,[20] the court rejected the "privilege" and "waiver" arguments out of hand, ruling:

> . . . the State cannot condition the granting of even a privilege

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18. *See* Ward v. Flood, 48 Cal. 36, 40 (1874) where defendant's brief points out:

> The right of admission to our public schools is not one of those privileges and immunities [under the Fourteenth Amendment]. They were unknown, as they now exist, at the time of the adoption of the Federal Constitution; that instrument is silent upon the subject of education, and our public schools are wholly the creation of our own State Constitution and State Laws.

See, to the same effect: Bradford v. Board of Education, 18 Cal. App. 19 (1912); Hamilton v. Regents of the University of California, 293 U.S. 245 (1934).

19. 367 U.S. 886 (1961).

20. In Wieman v. Updegraff, 344 U.S. 183, 192 (1952) the Court struck down the condition of a loyalty oath saying:

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

In Slochower v. Board of Higher Education of N.Y. City, 350 U.S. 551, 555 (1955) the Court struck down ex parte dismissal of teacher who had been fired for utilizing the privilege against self-incrimination, saying:

> To state that a person does not have a constitutional right to government employment is only to say that he must comply with reasonable, lawful, and non-discriminatory terms laid down by the proper authorities.

and in Shelton v. Tucker, 364 U.S. 479, 488 (1961) the Court struck down the condition that public school employees must file affidavits annually listing without limitation every organization to which they belonged or contributed for the preceding five years, saying:

> [E]ven though the government purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of the legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose.

upon the renunciation of the constitutional right to procedural due process.[21]

Private School Precedents Distinguished

Moreover, the Circuit Court found that the district court had erroneously relied upon precedent relating to *private* universities and upon the well-settled rule that the relations between a student and a private university are a matter of contract. Referring instead to the governing precedents for public colleges collected in 58 A.L.R.2d 903-20, the Circuit Court noted that "none held that no hearing whatsoever was required."[22]

The Procedural Due Process Balancing Test

To test whether the ex parte procedure observed the "rudiments of fair play", the *Dixon* court adopted the criteria suggested by Mr. Justice Frankfurter in his concurring opinion in *Joint Anti-Facist Refugee Committee v. McGrath*[23], and balanced the authority of the college to discipline students for misconduct against the valuable interest of the student to remain in school.

The Private Interest in Staying in School. In plain and powerful language the *Dixon* court described the precise nature of the private interest involved in the expulsion of a student from a tax supported institution of higher learning:

> It requires no argument to demonstrate that education is vital and, indeed, basic to civilized society. Without sufficient education the plaintiffs would not be able to enjoy life to the fullest, or to fulfill as completely as possible the duties and responsibilities of good citizens.
>
> . . . Surely no one can question that the right to remain at the college in which the plaintiffs were students in good standing is an interest of extremely great value.[24]

That the nature of this private interest has remained substantially

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21. Dixon, *supra* note 17, at 156.
22. *Id.* at 158.
23. Joint Anti-Facist Refugee Committee v. McGrath, 341 U.S. 123, 163 (1951), concurring opinion:
    1. The precise nature of the interest that was adversely affected;
    2. The manner in which this was done;
    3. The reasons for doing it;
    4. The available alternatives to the procedure that was followed;
    5. The protection implicit in the office of the functionary whose conduct is challenged; and
    6. The balance of hurt complained of and good accomplished.
24. Dixon, *supra* note 17, at 157.

unchanged over the last century is attested to by noting the answer which a Pennsylvania County Court in *Commonwealth ex rel. Hill v. McCauley*[25] gave in 1886 to the assertion that the courts may not inquire into a student's complaint that he has suffered unmerited injuries at the hands of his teachers so long as the teachers aver them to have been disciplinary in nature:

> This is a grave proposition when it is considered that there are tens of thousands of youth continually in attendance at colleges, many of whom are of mature age and any of whom may suffer degredation and irreparable injury to reputation as well as pecuniary loss, by the unjust action of a faculty.[26]

It is appropriate to digress at this point to consider the nature of the interest of public school pupils to remain in school. That California public school children have an equal or greater interest than do their college-level counterparts in remaining in school can not be denied. For example, in *Ward v. Flood*[27] the California Supreme Court in 1874, discussing the value of an education to public school children, recounted the common law duty to educate the children:

> The education of youth is emphatically their protection. Ignorance, the lack of mental and moral culture in earlier life, is the recognized parent of vice and crime in after years. Thus it is the acknowledged duty of the parent or guardian, as part of the measure of protection which he owes to a child or ward, to afford him at least a reasonable opportunity for the improvement of his mind and the elevation of his moral condition, and, of this duty the law took cognizance long before the now recognized interest of society and the body politic in the education of its members had prompted its embarkation upon a general system of education of youth. So a ward in chancery, as being entitled to the protection of the Court, was always entitled to be educated under its direction as constituting a most important part of that protection.[28]

Pointing out that the opportunity of a free public education was afforded to the youth of California by statute, enacted pursuant to the special mandate of the California Constitution,[29] directing that the Legislature provide for a system of common schools, the California Supreme Court in very blunt language said:

> The advantage or benefit thereby vouchsafed to each child, of attending a public school is, therefore, one derived and secured to it under the highest sanction of positive law. It is, therefore, a right —a legal right—as distinctively so as the vested right in property owned is a legal right, and as such it is protected, and entitled to be

25. Commonwealth *ex rel.* Hill v. McCauley, 3 Pa. County Ct. 77 (1886) [hereinafter cited as McCauley].
26. *Id.* at 86.
27. 48 Cal. 36 (1874) [hereinafter cited as Ward].
28. Ward at 51.
29. CAL. CONST. art. XIX, § 3 (1849); now CAL. CONST. art. IX, § 5 (1879).

> protected by all the guarantees by which other legal rights are protected and secured to the professor.[30]

No exhaustive review of the constitutions and laws of the several states is needed to find that California was not unique in early conferring upon its children the right to a public school education. In fact, much earlier—1845—the state of Massachusetts had already gone much further. By statute the parents, guardian or custodian of a child who had been refused admission to or excluded from the public schools of Massachusetts could recover damages in an action in tort against the town for unlawful exclusion.[31] At least since 1902, and perhaps before, school committes in Massachusetts have been prohibited by statute from permanently excluding a pupil from the public schools for alleged misconduct without first giving him an opportunity to be heard. And in Pennsylvania, at least since 1911, and perhaps earlier, boards of school directors have been authorized to suspend or permanently expel a pupil, but only after a "proper hearing."[32] It is probably safe to assume that today the public school children throughout the land enjoy a right under the constitutions of the several states to a public education, even though there is no federal constitutional right to attend the public schools.

The Power to Expel. The measure of the power to expel is the scope of judicial review to which it is subjected.

The traditional position of the state courts has been that the enforcement of disciplinary rules is committed to the school officials and not to the courts, and the courts will not interfere with the discretion of the school officials in matters which the law has conferred to their judgment, unless there is a clear abuse of that discretion, or arbitrary or unlawful action. In essence the state courts have adopted a policy of judicial restraint.[33]

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30. Ward at 50.
31. *See,* Morrison v. City of Lawrence, 181 Mass. 127, 63 N.E. 400 (1902); Jones v. City of Fitchburg, 211 Mass. 66, 97 N.E. 612 (1912); Lenord v. School Committee of Attleborro, 349 Mass. 704, 212 N.E.2d 468 (1965).
32. *See,* Geiger v. Milford Independent School District, 51 Pa. D. & C. 647 6 Mon. Leg. R. 73 (1941); and Mando v. Wesleyville School Board, 81 Pa. D. & C. 125, 35 Erie Co. L.J. 74 (1952) for conflicting decisions as to the meaning of a "proper hearing".
33. Morrison v. City of Lawrence, 186 Mass. 456, 72 N.E. 91 (1904) [hereinafter cited as Morrison]; State v. Clapp, 81 Mont. 200, 263 P. 433 (1928) (college students); State *ex rel.* Sherman v. Hyman, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied* 319 U.S. 748 (1942) (college students) [hereinafter cited as Hyman].

Until the *Dixon* decision, there existed a long-standing federal court doctrine of abstention. As late as 1959 the Second Circuit Court of Appeals affirmed the dismissal of the complaint in *Steier v. New York State Education Commissioner*[34] on the grounds of lack of jurisdiction over the subject matter. Steier, a student at Brooklyn College, a unit of the public school system of the State of New York, after being expelled, filed suit under the Civil Rights Act. The Second Circuit Court of Appeals said:

> Education is a field of life reserved to the individual states . . . . As so well stated by Judge Wyzanski in Cranney v. Trustees of Boston University, D.C., 139 F. Supp. 130, to expand the Civil Rights Statute so as to embrace every constitutional claim such as here made would in fact bring within the initial jurisdiction of the United States District Courts that vast array of controversies which have heretofore been raised in state tribunals by challenges founded upon the 14th Amendment to the United States Constitution. It would be arrogating to United States District Courts that which is purely a State Court function. Conceivably every State College student, upon dismissal from such college, could rush to a Federal judge seeking review of the dismissal.
>
> It is contrary to the Federal nature of our system—contrary to the concept of the relative places of State and Federal Courts.
>
> Whether or not we would have acted as did the Administrator of Brooklyn College in dismissing the plaintiff matters not. For a Federal District Court to take jurisdiction of a case such as this would lead to confusion and chaos in the entire field of jurisprudence in the states and in the United States.[35]

Circuit Judge Cameron of the *Dixon* court, in a strong dissent, recommended that the federal abstention doctrine be adhered to, warning that a departure "would result in a major blow to our institutions of learning" and that "[e]very attempt at discipline would probably lead to a *cause célèbre*, in connection with which federal functionaries would be rushed in to investigate whether a federal law had been violated."[36]

In opening the door of the federal judicial system to students by expanding the Civil Rights Act, the *Dixon* court took its cue from the United States Supreme Court. The Supreme Court had refused, with few exceptions, to interfere in the field of education prior to 1943, taking the position that the functions of education offices in states, counties and school districts were such that to interfere with their authority "would in effect make [the Court] the school board for the country."[37] Between 1943 and 1960 the Court had, however, increasingly departed from that position, particularly

34. 271 F.2d 13 (2d Cir. 1959).
35. *Id.* at 18.
36. Dixon, *supra* note 17, at 165.
37. Minersville School District v. Gobitis, 310 U.S. 586, 598 (1940).

where the Equal Protection Clause[38] or First Amendment Rights of students were involved. Warning of the departure, the Supreme Court in the 1943 "flag salute" case of *Board of Education v. Barnette*[39] said:

> 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 . . . . [N]one who acts under color of law is beyond the reach of the Constitution.

Against this background of diminishing judicial restraint, or, alternatively, increasing judicial involvement by the Supreme Court, the *Dixon* court, sitting in the South seven years after *Brown v. Board of Education*—in the midst of the student-led civil rights movement—conceded the governmental power to expel students for misconduct; however, it cautioned that the power was not unlimited, could not be arbitrarily exercised, and henceforth was subject to *federal* judicial review under the Civil Rights Act. As we shall see, it was the departure from the "hands off" policy of the federal courts, rather than the rule laid down in *Dixon*, which made it a landmark decision.

The Good Done v. The Injury Inflicted. The *Dixon* court reached the conclusion that in the absence of immediate danger to the public, or of peril to the national security, a school board should not deny students at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard. The chilling effect of a summary proceeding upon the students and others aware of the injustice far outweighs any possible good thought to be accomplished by a speedy, permanent removal of the students from the campus.[40]

The Skeleton: The DIXON *Guidelines*

> The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. '"Due process", unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' It is 'compounded of history, reason, the past course of

38. Brown v. Board of Education, 349 U.S. 294 (1954).
39. Board of Education v. Barnette, 319 U.S. 624, 637 (1943).
40. Dixon, *supra* note 17, at 157.

decisions . . .'[41]

For those attuned to the sophisticated adversary machinery of the courtroom and unfamiliar with the parental disciplinary machinery of the schoolroom, the *Dixon* guidelines may come as something of a surprise. It will be well to keep in mind as this discussion proceeds that just as there is a body of common law from which our judicial procedures have sprung, there is also a body of common law from which our present school laws have developed. Under the "common law of the schools" student disciplinary hearings have traditionally been conducted by a school teacher, or administrator, or disciplinary body in an informal atmosphere and in a "bifurcated" manner, with the teacher, administrator or disciplinary body first receiving information against the pupil, and then, requesting the pupil to come in and explain or refute the charges.

Although the *Dixon* court ushered in a new forum for reviewing school disciplinary cases and expressly placed the protective mantle of the federal constitution upon the proceedings, it did *not* depart from the existing majority view as expressed in the cases spanning the preceding sixty years when it developed, by way of dicta, the "rudimentary elements of fair play" which, in its opinion, would satisfy the minimum requirements of procedural due process in student expulsion hearings. As will become evident, these now oft-quoted and oft-adopted guidelines are quite definitely compounded of history, reason and the past course of decisions.

Guideline: The Hearing is Informal

Ought student disciplinary hearings be elevated to the procedural level of criminal or, at least, civil trials?

The state courts had wrestled with this question for many years. The majority had concluded "no". The dilemma which the question poses was aptly stated by a Pennsylvania Court of Common Pleas a scant 9 years before *Dixon*:

> While we recognize that expulsion or suspension from school is a serious thing to a child whose education is an important element of his development, we must also recognize that discipline is an absolute necessity in the operation of a school. A school with no discipline is no school at all. In this respect then, the welfare of the majority of the students must be made paramount to that of the individual. This is undoubtedly another reason why the legislature never intended full dress, formal hearings in matters involving school discipline. A contrary conclusion would undermine the entire disciplinary machinery of the school system.[42]

41. Cafeteria and Restaurant Workers v. McElroy, 367 U.S. 886 (1960).
42. Mando v. Wesleyville School Board 81 Pa. D. & C. 125, 128, 35 Erie

A half-century earlier, another Pennsylvania court, grappled with the problem and reached the opposite conclusion in *Commonwealth ex rel. Hill v. McCauley*[43], a case involving the expulsion of a college student. Relying on the common law governing judicial proceedings rather than the common law of the schools, the *McCauley* court rejected the *in loco parentis* doctrine as being inapplicable to college age students.[44] It also rejected the arguments that formal, judicial-type trials were contrary to long-standing "custom"; that they would result in the end of all discipline in educational institutions, impair the institutions' efficiency, and open the flood gates to a new and innumerable class of suitors in the courts. Holding that college-level students were entitled to full-dress judicial hearings, with the right to confront and cross-examine their accusers, the *McCauley* court in rather dramatic language declared:

> There need be no apprehension of such direful results from the declaration of the doctrine that the dismissal of students from colleges should be in accordance with those principles of justice which existed even in Pagan times, before the dawn of Christianity, and which are recognized as controlling in the determination of the rights of men in every civilized nation on the globe.[45]

Relying on school "custom", a circuit court in Ohio, in 1901 in *Koblitz v. The Western Reserve University*[46] tempered the *McCauley* rule and expressed what was to become the majority view with regard to public college students:

> . . . in determining whether a student has been guilty of improper conduct that will tend to demoralize the school, it is not necessary that the professors should go through the formality of a trial. They should give the student . . . every fair opportunity of showing his innocence. . . . Be careful in receiving evidence against him; . . . weigh it; determine whether it comes from a source freighted with prejudice; determine the likelihood by all surrounding circumstances, as to who is right, and then act upon it as jurors with calmness, consideration and fair minds. When they have done this and reached a conclusion, they have done all that the law

Co. L.J. 74, 77-78 (1952). The Pennsylvania statute required a "proper hearing" before expulsion of a public school pupil; the court was faced with determining whether a "proper hearing" meant a full-dress judicial trial.

43. 3 Pa. County Ct. at 84.

44. The *in loco parentis* doctrine ascribes to the relation between student and a teacher or dean or principal the relationship which exists between parent and child. The doctrine asserts there is no more justification for interference by the courts with the discipline in the former than in the latter relation. *See* Goldberg, *supra* note 10 (for the final demise of the doctrine in California as applied to university level students).

45. McCauley, *supra* note 25, at 87.

46. 21 Ohio C.C.R. 144, 157 (1901) [hereinafter cited as Koblitz].

requires of them to do.[47]

The *Koblitz* court's rationale was that the school authorities were not trying the student for a criminal offense as a civil court, and that they were helpless to pronounce the judgment of the civil authorities upon him. The only question which the school authorities were considering was whether it was detrimental to the good discipline and the good morals of the school to allow the accused student to remain in school.[48]

In the 1904 public school expulsion case of *Morrison v. City of Lawrence*,[49] the Supreme Judicial Court of Massacusetts recognized that the school committee was not such a special tribunal as had the power to summon or compel the attendance of witnesses or before whom witnesses could be compelled to attend and give evidence. Therefore, if an accused student summoned witnesses in his defense and they refused to come, their attendance could not be enforced, and even if the witnesses came voluntarily and then refused to testify, there was no power in the school committee to compel them to testify. Thus, so far as the student's case depended on the evidence of such witnesses, the student would have been remediless. The court concluded that the "hearing", which was required by the Massachusetts statute to be held before the school committee could permanently expel a public school pupil, did not have to take on all the formalities of a trial usual in a court of law, nor was it necessarily to be governed by the strict rules of evidence.

Echoing the Supreme Judicial Court of Massachusetts, the Supreme Court of Nebraska in 1907 in the public school expulsion case of *Vermillion v. State ex rel. Englehardt*[50] reached the conclusion that "no trial, in the sense of a judicial inquiry" was contemplated under the Nebraska statute. The *Vermillion* court asked the rhetorical questions: By what process is the attendance of witnesses to be assured? If they attend, who is to administer the oath or punish for a refusal to be sworn? What punishment could be inflicted upon those giving false testimony? The *Vermillion* court expressed the view that the proceeding was to be more like the action of an administrative board in making inquiry as to existing facts upon which the board was required to act, and concluded that the board could use its own judgment and pursue any course which, in its opinion, would fully inform the members of the board of the facts attending the subject matter of the inquiry.[51]

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47. *Id.* at 157.
48. *Id.*
49. *Supra* note 33.
50. 78 Neb. 107, 110; 110 N.W. 736, 737 (1907).
51. *Id.*

The Branch Appellate Court of Illinois, reviewing the expulsion of a public school pupil, held in 1913 in *Smith v. Board of Education*[52] that since the Illinois statutes prescribed no particular form of trial or hearing the school board was authorized to investigate the charges in a "reasonable and parliamentary way" and to suspend or expel any whom the board found guilty of violation of their reasonable and valid rules.

In *State v. Clapp*[53], a case involving the suspension of a college student in 1928, the full-dress judicial trial requirement of *McCauley* was soundly repudiated by a Montana court as being "wholly impractical and unworkable". The court pierced to the very heart of the problem when it pointed out that in the absence of the power to subpoena witnesses, to hold that the power of suspension could only be exercised after a full-dress judicial trial would be to hold that the power to suspend was practically ineffective, except where the witnesses voluntarily attended and testified. The court said: "Such a rule would be destructive of the power vested in the [board]."[54]

Citing *Clapp* and *Koblitz*, the Supreme Court of Tennessee in 1944 in *State ex rel. Sherman v. Hyman*[55] also repudiated the *McCauley* rule in reviewing the expulsion of medical students from the University of Tennessee, saying:

> This is not a proceeding in a court of law. . . . The case of *Commonwealth ex rel. Hill v. McCauley* is not in accord with the weight of authority and we do not choose to follow it.[56]

The *Hyman* court considered that it would be subversive of the best interests of the school and harmful to the community to subject student accusers to cross-examination.

If the *McCauley* rule was not dead at the time of the *Dixon* decision, *Dixon* inflicted the *coup de grace*, for the *Dixon* court described the hearing required by due process prior to expulsion in these general terms:

> The nature of the hearing should vary depending upon the circumstances of the particular case. The case before us requires some-

52. 182 Ill. App. 342, 346 (1913).
53. 81 Mont. 200, 263 P. 433 (1928).
54. *Id.* at 215-16, 263 P. at 437.
55. *Supra* note 33.
56. *Id.* at 108-09, 171 S.W.2d at 82.

> thing more than an informal interview with an administrative authority of the college. By its nature, a charge of misconduct . . . depends upon a collection of the facts concerning the charged misconduct, easily colored by the point of view of the witnesses. In such circumstances, a hearing which gives the Board or the administrative authorities of the college an opportunity to hear both sides in considerable detail is best suited to protect the rights of all involved. *This is not to imply that a full-dress judicial hearing, with the right to cross-examine witnesses, is required.* Such a hearing, with the attending publicity and disturbance of college activities, might be detrimental to the college's educational atmosphere and impractical to carry out. Nevertheless, the rudiments of an adversary proceeding may be preserved without encroaching upon the interests of the college.[57]

Guideline: Some Rudiments of an Adversary Proceeding are Necessary

To say that students may be expelled without full-dress judicial hearings is not to say that within the framework of the informal bifurcated hearing there is no procedural safeguard which can be afforded in lieu of confrontation and cross-examination or that *all* procedural safeguards known to a court of law may be denied.

Notice of the Charges. The *Dixon* guideline that "[t]he notice of the charges should contain a statement of the specific charges and grounds which, if proven, would justify expulsion under the regulations of the Board of Education"[58] merely reaffirmed the views consistently expressed in earlier state court decisions.[59]

Notice of the Names and Testimony of Accusers. Even though a student has no right to confront and cross-examine his accusers face to face, the *Dixon* court said he "should be given the names of the witnesses against him and an oral or written report on the facts to which each witness testifies."[60] This guideline is a combination of elements of the *McCauley* and *Hyman* guidelines and carries with it implicit recognition by the *Dixon* court of the "bifurcated" nature of the hearing, assuming as it does that before the student appears at the "hearing", the disciplinary body will have already received the information against him.

The reference in the *Dixon* guideline to furnishing to the student "an oral or written report on the facts to which each witness testifies" is better placed in perspective when one is familiar with the procedures used in *State ex rel. Sherman v. Hyman*[61] upon which

57. Dixon, *supra* note 17, at 158-59 (emphasis added).
58. *Id.* at 158.
59. *See* McCauley, *supra* note 25; Hyman, *supra* note 33.
60. Dixon, *supra* note 17, at 159.
61. Hyman, *supra* note 33.

the *Dixon* court obviously relied.[62] In *Hyman*, medical students at the University of Tennessee were ultimately accused of selling examination questions. When it first came to the attention of the administration that examination questions were being stolen and that some at least were being sold, a student council was formed to conduct an investigation and make its recommendations to the faculty disciplinary committee. The council consisted of students and the dean. During the course of the investigation, testimony was elicited from numerous students and the "finger of guilt" settled on the plaintiffs, who were called before the council and told that the council had evidence connecting them with the thefts and sales. Plaintiffs denied their guilt. The council recommended their expulsion. Plaintiffs were given notice to appear before the faculty disciplinary committee. No accusing witnesses appeared at this hearing; instead, the dean orally reported to the committee, in the presence of plaintiffs, the substance of the testimony that had been offered against the plaintiffs during the student council investigation. The plaintiffs were expelled. They appealed to the board of trustees. A special committee of the board was appointed to hear the appeal. No accusing witness appeared at the appellate hearing. Plaintiffs, through their counsel, demanded the presence of the accusing witnesses and the right to cross-examine them. The demand was denied. The dean orally reported the substance of the testimony against the plaintiffs. The expulsions were upheld, and plaintiffs filed suit in the state court. Relying upon *Koblitz, Clapp, Vermillion, Smith* and *Morrison*, the Supreme Court of Tennessee held that the proceedings had met the requirements of the law. In its guidelines, the *Hyman* court said:

> We think the student should be informed as to . . . the names of at least the principal witnesses against him when requested. . . . He cannot claim the privilege of cross-examination as a matter of right. *The testimony against him may be oral or written*, not necessarily under oath, but he should be advised as to its nature, as well as the persons who have accused him.[63]

The inherent injustice of an informal bifurcated hearing at which the pupil is given no information as to the names of his accusers and the testimony which they gave against him was well pointed

62. *See* also Morrison, *supra* note 30. The Morrison court approved the procedure where testimony offered against the pupil by the principal and the teachers was in the form of written rather than oral statements.
63. Hyman, *supra* note 33, at 108; 171 S.W.2d at 826.

up in *Commonwealth ex rel. Hill v. McCauley*[64] where the college student's expulsion was based upon information furnished by a fellow student to one member of the disciplinary committee, who, in turn, reported the information, but not the name of the informant, to his brethren on the committee. McCauley was then called in and told of the charges of misconduct against him and allowed to defend himself as best he could under the circumstances, but he was not told the name of the student informant or the nature of the second-hand testimony which the committee member had related to the balance of the Committee. The *McCauley* court decried:

> Such secondary evidence as that of . . . the student referred to, ought not to be and would not be received as competent testimony in the determination of the most trivial rights in the most petty tribunal in the land.[65]

Undoubtedly this kangaroo proceeding materially influenced the *McCauley* court in holding that a college student should be given a full dress judicial trial before being expelled for misconduct. The *McCauley* court said the student

> . . . was entitled to know what testimony had been given against him, and by whom it had been delivered, . . . and that the proofs be made openly and in his presence, with a full opportunity to question the witnesses and to call others to explain or contradict their testimony.[66]

Opportunity to Present Defense. The *Dixon* court said the student "should . . . be given the opportunity to present . . . his own defense against the charges and to introduce either oral testimony or written affidavits of witnesses in his behalf."[67] It is not enough for the school authorities merely to pay lip service to procedure. While it is not necessary that the student have actually presented a defense in order to satisfy the "rudiments of fair play"[68], he must have been given an *opportunity* to do so, and the opportunity must have been a *fair* one.[69] An opportunity may be completely valueless if relevant evidence, when offered in defense, is refused admission or those who otherwise would testify in behalf of the student are prevented from doing so by an action of the school officials who are hearing the case. The law presumes that when called upon, the school officials will listen patiently to the student's case as fully as the student wishes to present it, so long as such presentation does not range beyond the legitimate limit of the issues involved.

64. McCauley, *supra* note 25.
65. *Id.* at 83.
66. *Id.* at 82.
67. Dixon, *supra* note 17, at 159.
68. 81 Mont. at 215-16, 263 P. at 437.
69. Koblitz, *supra* note 46, at 157; *see* also Vermillion v. State, 78 Neb. 107, 110 N.W. 736 (1907).

On the one hand, the school authorities are required to grant the student a full opportunity to be heard upon the facts, to hear and consider the testimony of such witnesses as he might call, and permit him to fully present his case in such orderly manner as the school authorities may direct; on the other hand, if it appears that a fair opportunity to be heard has been given and the student has been allowed to present the merits of his case, then mere non-prejudicial error committed in the admission or exclusion of evidence will not be enough to make invalid a final adverse decision.[70]

When Findings are Required. Concluding its guidelines, the *Dixon* court said that "[i]f the hearing is not before the Board directly the results and findings of the hearing should be presented in a report open to the student's inspection."[71] Thus, *Dixon* recognized the long-standing custom in the schools to commit the discipline of the schools very largely, if not wholly, to the teacher.[72]

IV. Post-Dixon Developments

Introduction

In enunciating the rule that due process requires notice and some opportunity for a hearing before a student at a tax-supported institution of higher learning can be *expelled* for misconduct, *Dixon* relied, as we have seen, upon a long line of precedent involving suspensions and expulsions of students from public institutions of higher learning *and* expulsions of public school pupils in states where the public school pupil was by statute entitled to an opportunity for a hearing before being expelled.[73]

Expansion of Scope of Dixon Rule

Expansion Horizontally to Include All Public College Disciplinary Actions

It should come as no surprise that the state and federal courts since the *Dixon* decision in 1961 have applied the *Dixon* rule to public higher education disciplinary actions which were tantamount to

70. Morrison, *supra* note 33, at 457, 72 N.E. at 92.
71. Dixon, *supra* note 17, at 159.
72. Koblitz, *supra* note 46, at 155.
73. *See*, Dixon, *supra* note 17, at 157-58.

expulsion, such as "indefinite suspensions"[74] and "denials of applications for readmission or reregistration",[75] or to suspension[76]. It was to be less expected that the judiciary would also apply the *Dixon* rule to public higher education disciplinary actions involving probation and "suspension with immediate reinstatement", but at least one federal court has done so.[77]

Expansion Downward to Include Public Schools, But Limited to Expulsions and Long-Term Suspensions

In the decade since *Dixon* there have been but few reported cases dealing with a public school pupil's right to a hearing before being suspended or expelled, but those that have been reported clearly indicate that the judiciary is in the process of enunciating a general rule that due process requires notice and an opportunity for a hearing before a public school pupil may be subjected to a long-term suspension or to expulsion, whether or not the pupil is entitled under state law to a hearing before such a suspension or expulsion.

Less than three years after *Dixon,* the Fifth Circuit had before it the case of *Woods v. Wright, Superintendent of the Schools of the City of Birmingham*[78] involving Alabama public high school pupils, some of whom had been suspended ex parte on May 20 for the remainder of the school year and others who had been expelled ex parte, all for allegedly participating in an off-campus, peaceful demonstration against racial segregation in the City of Birmingham. A parent of one of the suspended pupils filed suit in the federal court under the Civil Rights Act, challenging the ex parte disciplinary

74. *See,* Knight v. State Board of Education, 200 F. Supp. 174 (M.D. Tenn. 1961); Due v. Florida A. & M. Univ., 233 F. Supp. 396 (N.D. Fla. 1963); Jones v. State Board of Education, 279 F. Supp. 190 (M.D. Tenn. 1968); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968).

75. *See,* Woody v. Burns, 188 So. 2d 56 (Fla. App. 1966); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966); Wright v. Texas Southern Univ., 392 F.2d 728 (5th Cir. 1968).

76. *See* Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967) (duration of suspension not reflected in reported case); Goldberg, *supra* note 10 (6-week suspension for one student; 5 month suspension for another); Baker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968) (duration of suspension not reflected in reported case); Buttny v. Smiley, 281 F. Supp. 280 (D. Colo. 1968) (suspension with permission to reapply at the end of semester) [hereinafter cited as Buttny]; Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wisc. 1968) (ex parte suspension with hearing only upon request); Sticklin v. Regents of the University of Wisconsin, 297 F. Supp. 416 (W.D. Wis. 1969) (ex parte suspension with hearing indefinitely delayed due to alleged danger to person and property).

77. Buttny, *supra* note 76.

78. 334 F.2d 369 (5th Cir. 1964).

action as constituting, *inter alia*, a deprival of due process of law. Appeal was filed in the Fifth Circuit upon the district court's denial of the requested temporary restraining order, and the Fifth Circuit granted an application for an injunction pending appeal by which the Superintendent and all persons in concert with him were enjoined from continuing to enforce the suspensions and expulsions. The denials of temporary restraining orders are usually not appealable, but in this case the Fifth Circuit determined that the denial of the temporary restraining order was a final and appealable order because the effect of the denial was to moot or nearly moot the claims since there was not sufficient time for the application on the preliminary injunction to be heard and acted upon before the end of the school year. In reversing the denial of the temporary restraining order, the Fifth Circuit did not have squarely before it at that time the question of whether the ex parte suspension and expulsions of public school pupils are violative of due process of law, but the action which it did take to protect the pupils, coupled with the language of the opinion, leaves little doubt that the Fifth Circuit was of the opinion that the Superintendent would be well advised to "recognize and concede the constitutional rights for which the appellants contend" and follow the court's suggestion to look toward a consent decree.[79]

In the much cited case of *Madera v. The Board of Education of the City of New York*[80] the Second Circuit Court of Appeals had before it in 1967 the question of whether a seventh grade pupil was entitled to have legal representation at a District Superintendent's "guidance conference" held to consider the situation of the pupil who was at the time under an ex parte administrative suspense pending a decision by the District Superintendent as to whether the pupil would be returned to the same school, or transferred to another school, or transferred to an adjustment school. Referring to the ex parte nature of the administrative suspense by the school principal, the court noted that under the law of New York there was no requirement that the school authorities grant a hearing prior to invoking the short term suspension power. The court conceded that the *Dixon* rule would apply in the case of public school pupils who are *expelled*, but found that the guidance conference was only a

79. *Id.* at 375.
80. 386 F.2d 778 (2d Cir. 1967).

preliminary investigation and pointed out that the demands of due process do not require a hearing at any particular stage in the disciplinary process so long as the requisite hearing is held before the final order of expulsion becomes effective. Having concluded initially that the guidance conference was not a "hearing" in the due process sense, the court then went on to hold that even if due process was applicable to the guidance conference, the parent and pupil were not entitled to legal representation.

In 1968 the California Court of Appeal, Fourth District, Division Two, affirmed the judgment of the trial court in denying a writ of mandate in *Akin v. Board of Education of Riverside Unified School District.*[81] Akin, a 15-year old male, had enrolled in September 1965 in one of the high schools of the respondent district. Shortly thereafter he was suspended (presumably by the high school principal) when he refused to shave his beard as required by the school board's clean-shaven policy adopted September 20, 1965. Akin attended a private school for the remainder of the 1965-66 school year and in March 1966 unsuccessfully appealed to the school board. In September 1966 he again endeavored to enroll. This time he was denied admission by order of the high school principal and the district superintendent because he refused to remove his beard. He filed suit in the state court seeking a writ of mandate ordering respondent school board to enroll him. The Court of Appeal *assumed* that a pupil enjoys a constitutional right peripherally protected by the First Amendment to wear a beard as a form of expression, but, applying the tri-fold test borrowed from the public employment case of *Bagley v. Washington Township Hospital District*[82], the court concluded that no alternative less subversive of Akin's right to wear a beard was available and upheld the school board's clean-shaven policy. Having so held the Court of Appeal then said, without elaboration:

> Furthermore, petitioner was not denied due process before his expulsion. He was afforded an opportunity to appear before the board and explain his reasons for desiring to wear a beard.

One interested in the issue of procedural due process can but assume from a reading of the reported case that this issue was a minor one at best. It is not clear at what stage Akin was given an opportunity to appear before the board or whether he availed himself of the opportunity, although one can conjecture that the Court of Appeal has reference to Akin's March 1966 appeal to the school board.

81. 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), pet. for hearing by Cal. Sup. Ct. denied.
82. 65 Cal. 2d 449, 501-02, 55 Cal. Rptr. 401 (1966).

Although the Court of Appeal in its closing remarks characterizes the case as one of expulsion, the opinion is silent as to the apparent failure of the pupil to exhaust his administrative remedies by appealing his expulsion to the county board of education under Education Code section 10608 before seeking judicial review.[83] It is clear, however, that the Court of Appeal was in accord with the principle that before expulsion of a public high school pupil, due process requires an opportunity for a hearing at which the pupil may make his explanations and present his defense.

The Federal District Court for the Southern Division of Missisippi experienced no difficulty in applying in 1969 the *Dixon* rule in holding that public school pupils have a right to notice and an opportunity to be heard before being expelled or suspended for long periods of time. In *Brown v. Greer*[84] several public school children were indefinitely suspended ex parte by the school principal for misconduct. Their parents were immediately notified of the action by mail and the reasons therefor and were advised of the right to a hearing before the school board. On November 1 the pupils' attorney sent a written demand for a hearing. At the regular meeting of the board on November 4, the Superintendent advised the board regarding the matter and recommended expulsions. The board proceeded to expel the pupils ex parte. A mandatory preliminary injunction was sought by the pupils to compel their readmission. The district court ordered the school board to conduct a hearing before December 30 with the pupils and their counsel present. At the conclusion of the court-ordered hearing the board rescinded its expulsion order and instead suspended the pupils for the balance of the school year. The pupils challenged the suspensions on the ground that the court-ordered hearing held by the school board had not complied with the requirements of due process. The court, testing the procedures at the court-ordered school board hearing against the *Dixon* guidelines, concluded that the hearing had been sufficient to meet the due process requirements.

Very recently the California Court of Appeal, Third District, applied the *Dixon* rule in *Perlman v. Shasta Joint Junior College District*[85] in reversing the trial court and upholding the three-day sus-

83. *Compare,* Noonan v. Green, 276 Cal. App. 2d 25, 80 Cal. Rptr. 513 (1969).
84. 296 F. Supp. 595 (S.D. Miss. 1969).
85. *Supra* note 1.

pension of a junior college student but affirming the trial court's reversal of his later expulsion. The court treated the case as involving university or college-level disciplinary action, and made no reference to the fact that the junior college is instead a part of the secondary schools of the California public school system.[86]

Putting the Flesh on the Bones of the Dixon Guidelines: The Present Scene

The informal nature of the expulsion hearing, protected as it was by the *Dixon* guidelines and the solid line of precedent behind them, survived the decade since *Dixon* virtually intact, and it is still the majority rule (including California) that a full-dress judicial trial is not required before expelling a student from a tax-supported institution of higher learning. It should follow then that a full-dress judicial trial is not required before taking *lesser* disciplinary action involving college students or before *expelling* public school pupils. Certain post-*Dixon* developments are worthy of being noted.

When Notice Excused. Under certain circumstances the requirement of notice may be excused. In a case involving disciplinary action which was tantamount to the expulsion of college students, *i.e.*, "denial of readmission", the giving of notice of the charges was excused where the school authorities were able to demonstrate that they had used their best efforts to inform the students of the nature of the charges against them and were precluded from doing so by the evasive action of the students and the students' failure to abide by a valid regulation requiring that they keep the university informed of their current mailing addresses. The Fifth Circuit said to hold otherwise would be to hold that a university could not take disciplinary action against a student who could not be contacted through his own fault.[87]

Form and Timeliness of Notice. When the courts have had opportunities to prescribe in advance the procedures to be followed in particular cases, the court-ordered procedures have included the requirements of a *written* form of notice served sufficiently in advance of the hearing to assure the student ample time to prepare his defense against the charges.[88] It is significant, however, that

86. CAL. EDUC. CODE § 22650; King v. Saddleback Junior College District, 425 F.2d 426 (9th Cir. 1970).
87. Wright v. Texas Southern University, 392 F.2d 728, 730 (5th Cir. 1968).
88. *See*, Esteban v. Central Missouri State College, 277 F. Supp. 649

when the courts have not had the opportunity to prescribe the procedures in advance, they have consistently upheld much less formal notice procedures, stating that the student did not show that he was thereby prejudiced in presenting his defense. For example, two days' written notice was sufficient in the indefinite college suspension case of *Jones v. The State Board of Education*[89]; oral notice to the student at the beginning of the hearing was sufficient in the suspension case of *Due v. Florida A. & M. University*[90]; and one hour's advance oral notice was sufficient in the three-day suspension in *Perlman v. Shasta Joint Junior College District Board of Trustees.*[91] It is undoubtedly the better practice to timely serve written notice of the charges, but the warning sounded by the District Court for the Northern District of Florida only two years after *Dixon* should not go unheeded:

> Procedures are subject to refinement and improvement in the never-ending effort to assure, not only fairness, but every semblance of fairness. More specific routines of notice and advisement may be indicated in this regard, but a foisted system of rigid procedure can become so ritualistic, dogmatic, and impractical as to itself be a denial of due process. *The touchstones in this area are fairness and reasonableness.*[92]

When Notice of Name and Testimony of Accuser May be Excused. While it is a general rule that the student is entitled to be told of the names and testimony of his accusers, it may not necessarily constitute a violation of due process not to divulge to him the confidential opinions of members of the faculty as to the student's fitness to remain in school. But where the contemplated disciplinary action is severe, such as expulsion, and the student would thereby be utterly precluded from defending against such unknown evidence, an evidentiary hearing by the district court is called for to look into the nature of the concealed evidence and the reasons for with-

(W.D. Mo. 1967) (suspensions); Schiff v. Hannah, 282 F. Supp. 381 (W.D. Mich. 1966) (denial of application to reregister); Marzette v. McPhee, 294 F. Supp. 562 (W.D. Wis. 1968) (suspension ex parte, hearing only upon request).

89. 279 F. Supp. 190 (M.D. Tenn. 1968).

90. 233 F. Supp. 396 (N.D. Fla. 1963).

91. *Supra* note 1. But the Perlman court noted: "It could very well be that where charges of infractions of college rules are more than one or require the presence of witnesses a more formal notice and proceeding would be required. . . ." *Id.* at 568.

92. Due v. Florida A. & M. University, 233 F. Supp. 396, 403 (N.D. Fla. 1963) (emphasis added).

holding it.[93]

Misconduct Need Not Violate any Written Rule. Under the common law of the schools, conduct which is disruptive of good order on the campus may properly lead to disciplinary action, whether the disciplinary powers are invoked under a published or unpublished rule or regulation.[94]

Hearing Need Not Await Outcome of Criminal Proceeding. Where the conduct which is the subject of the disciplinary action is also the subject of a criminal proceeding, the discipline imposed by the school community need not await the outcome of the criminal proceeding. Except for the application of constitutional limitations, the relationship between appropriate school rules and the laws of the outside community is entirely coincidental. The validity of one does not establish the validity of the other.[95]

No Right to a Public Hearing. A closed hearing does not violate the due process clause where it appears that the school officials considered it necessary to conduct a closed hearing in order to maintain discipline and order on the campus and to avoid interference with the educational functions.[96]

Combined Judge-Prosecutor Permitted. Due process does not forbid the combination of judging and prosecuting in administrative proceedings such as expulsion hearings. However, it is necessary to closely review the proceedings in order to protect the fundamental rights of the parties, and if the record of such proceedings shows bias and prejudice upon the part of the administrative body, its decision cannot be upheld by the courts.[97]

Combined Judge-Witness Permitted. The application of notice and hearing requirements to disciplinary proceedings presents somewhat of a theoretical dilemma when the school officials in charge of meting out the discipline are witnesses to a student's misconduct. But it does not constitute a violation of procedural due

93. Wasson v. Trowbridge, 382 F.2d 807, 813 (2d Cir. 1967) (expulsion of United States Merchant Marine Academy cadet).
94. Buttny, *supra* note 76, at 286 (suspensions, probation). *Cf.* Koblitz *supra* note 46, at 155 (expulsion); Wooster v. Sunderland, 27 Cal. App. 51, 148 P. 959 (1915) (expulsion of public school pupil).
95. Goldberg, *supra* note 10, at 885, 886, 57 Cal. Rptr. at 476.
96. Zanders v. Louisiana State Board of Education, 281 F. Supp. 747, 768 (W.D. La. 1968) [hereinafter cited as Zanders] (expulsion); Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968) (indefinite suspension). But, *see* CAL. EDUC. CODE § 967 which provides for public hearing upon request of parent or pupil in California public school system.
97. Perlman, *supra* note 1 (expulsion).

process for such school officials to determine what disciplinary action is to be taken.[98]

No Right to Counsel. By the weight of authority students have no *right* to be represented by counsel in a disciplinary proceeding, even in the severe case of expulsion.[99] Nevertheless, in a number of reported disciplinary cases the students have been permitted by the school to have legal representation at the hearing.[100] At least one federal district court in prescribing procedures to be used at a court-ordered rehearing before the college authorities included the right of the students to have counsel and to cross-examine witnesses, but limited the right of representation to advising the students at the hearing and prohibited the counsel from taking part in any cross-examination.[101]

Advising of Right to Remain Silent Not Required. School officals are not required to advise a student involved in a disciplinary proceeding of his right to remain silent.[102]

Hearing Not Subject to Strict Rules of Evidence. Consistent with the concept of an informal hearing, the strict rules of evidence are not applicable.[103] The testimony on behalf of either the school authorities or the student may be in the form of written statements and hearsay is admissible.[104] Although due process does

98. Wright v. Texas Southern University, 277 F. Supp. 110, 112 (S.D. Texas 1967), *aff'd* 392 F.2d 728 (5th Cir. 1968).

99. *See* Koblitz, *supra* note 46, at 154 (expulsion); Madera v. Board of Education of the City of New York, 386 F.2d 778, 779-80 (2d Cir. 1967) (guidance conference); Wasson v. Trowbridge, 382 F.2d 807, 810, 812 (2d Cir. 1967) (expulsion); Buttny, *supra* note 76, at 267 (suspension, probation); Barker v. Hardway, 283 F. Supp. 228, 234, 238 (S.D. W. Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968) (suspension); Perlman, *supra* note 1 (3-day suspension).

100. *See* Hyman, *supra* note 33 (expulsion); Woody v. Burns, 188 So. 2d 56, 58 (Fla. App. 1966); Zanders, *supra* note 96, at 749, 766 (expulsion); Jones v. State Board of Education, 279 F. Supp. 190 (M.D. Tenn. 1968) (indefinite suspension); Goldberg, *supra* note 10 (expulsion and suspensions).

101. Esteban v. Central Missouri State College, 277 F. Supp. 649, 651-52 (W.D. Mo. 1967) (suspensions).

102. Buttny, *supra* note 76, at 287 (suspensions, probations).

103. Goldberg, *supra* note 10 (expulsions, suspensions); Jones v. The State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968) (indefinite suspension); Moore v. Student Affairs Committee of Troy State Univ., 284 F. Supp. 725 (M.D. Ala. 1968) (indefinite suspension).

104. Goldberg, *supra* note 10 (expulsions, suspensions); Buttny, *supra* note 76 (suspensions, probation); Morrison, *supra* note 30 (expulsion of

not require that the student have an opportunity to confront and cross-examine witnesses against him, in the more recent cases such opportunities have been afforded.[105] The student has no right to assert the privilege against self-incrimination,[106] nor is he entitled to have evidence, such as marijuana, which was seized as a result of a search of his dormitory room, excluded under the illegal search and seizure provisions of the Fourth Amendment.[107] But disciplinary action cannot stand unless it is supported by "substantial evidence".[108]

Solving the Problems of Judicial Standards: What One Federal District Court Did

By September of 1968 the increased number of disciplinary actions being reviewed by the courts, the great interest of the public in student discipline, and the violence which erupted on the college

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public high school pupils); *see* guidelines in Hyman, *supra* note 33 and Dixon, *supra* note 16.

105. *See, e.g.,* Zanders, *supra* note 96 (expulsions); Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968), *aff'd* 399 F.2d 638 (4th Cir. 1968) (suspensions); Jones v. The State Board of Education, 279 F. Supp. 190 (M.D. Tenn. 1968) (indefinite suspension, witnesses not under oath); Buttny, *supra* note 76 (suspensions, probations. One witness testified against students by affidavit); Brown v. Greer, 296 F. Supp. 595 (S.D. Miss. 1969) (long term suspensions); Goldberg, *supra* note 10 (expulsions, suspensions); but *see* the court-ordered procedures in Esteban v. Central Missouri State College, 277 F. Supp. 649 (W.D. Mo. 1967) (suspensions) where the students but not their counsel were to be permitted to cross-examine.

106. Goldberg, *supra* note 10; Madera v. Board of Education of the City of N.Y., 386 F.2d 778, 780 (2d Cir. 1967).

107. The school has a reasonable right of inspection and the standard of "reasonable cause to believe" to justify search of dormitory rooms, even for the sole purpose of seeking evidence of suspected violations of law, is lower than the constitutionally protected criminal law standard of "probable cause". The Fourth Amendment does not prohibit reasonable searches when the search is conducted by a superior charged with responsibility of maintaining discipline and order or of maintaining security. Moore v. Student Affairs Committee of Troy State University, 284 F. Supp. 725 (M.D. Ala. 1968).

108. Jones v. The State Board of Education, 279 F. Supp. 190, 200 (M.D. Tenn. 1968) citing United States v. Bianchi & Co., 373 U.S. 709 (1963) wherein the Supreme Court, in holding that judicial review of an administrative decision under the Wunderlich Act is limited to a review of the record and that the court cannot conduct a de novo hearing at which it takes additional evidence, said:

> The term "substantial evidence" . . . has become a term of art to describe the basis on which an administrative record is to be judged by a reviewing court. This standard goes to the reasonableness of what the agency did *on the basis of the evidence before it,* for a decision may be supported by substantial evidence even though it could be refuted by other evidence that was not presented to the decision-making body. (Emphasis supplied by the Court). 373 U.S. 709, 715 (1963).

campuses in the 1960's impelled the *Esteban*[109] court, when faced with three major disciplinary cases, to issue an en banc order entitled "General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax-Supported Institutions of Higher Education"[110] in an attempt to clearly enunciate reliable standards which would henceforth be followed in the absence of exceptional circumstances in reviewing disciplinary cases.

The General Order sought to devise a type of "procedural yardstick" by which the court could measure the procedures required in any particular case against the degree to which the penalty imposed encroached upon the private interest of the college student in remaining in school. On its yardstick, such minor disciplinary actions as reprimand, restriction to campus, guidance counseling, suspension of social or academic privileges, probation and dismissal with leave to apply for readmission, called for few, if any, procedural safeguards because the good to be accomplished by the imposition of intricate, time-consuming, sophisticated procedures would obviously be far outweighed by the harm such procedures would do to the educational atmosphere as a result of frustrating the teaching process and rendering impotent disciplinary control. Moving up the "procedural yardstick," severe disciplinary actions such as a final expulsion, indefinite or long-term suspension, dismissal with deferred leave to reapply, called for (1) adequate notice in writing of the specific ground or grounds and the nature of the evidence on which the disciplinary proceedings were based; (2) an opportunity for a hearing of the student's position, explanations, and evidence; and (3) that the action be supported by substantial evidence. Since the severe cases involve only the determination of whether the student is qualified behaviorally to continue as a member of the school community and are not for punitive or deterrent purposes in the criminal sense, the "procedural yardstick" did not call for, except in a rare and exceptional case, any of the criminal law processes such as legal representation, a public hearing, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, application of principles of former or double jeopardy, compulsory production of witness and so on. The General Order also cautioned, however, that within limits of due

109. *Supra* note 95.
110. 45 F.R.D. 133 (1968).

process, the colleges and universities must be free to devise various types of disciplinary procedures relevant to their lawful missions, consistent with their varying processes and functions, and which do not impose unreasonable strain on their resources and personnel.

V. What to Expect Today in Expulsion Proceedings in California Public High Schools

From the foregoing review of the *Dixon* decision, its antecedents, and the cases following it in both state and federal courts, we may expect expulsion proceedings in California public high schools to encompass certain requirements and to be subject to certain limitations, among them the following:

Pupil Entitled to Due Process

The conclusion is inescapable that, whether attendance at a public high school in California be a "right" or a "privilege", the valuable interest which the high school pupil has in remaining in attendance dictates that he may not be expelled for misconduct except in a manner consonant with due process.

Due Process Requires Notice and Fair Hearing

The conclusion is also inescapable that, whether or not the pupil has a right under state statutes to notice and an opportunity for a fair hearing before being expelled, the Due Process Clause of the Federal Constitution confers that right upon him.

A Fair Hearing May Be Informal

The hearing to which the pupil is entitled is not a full-dress judicial-type trial. The disciplinary process is designed solely to determine whether he shall remain a member of the school community, and is not punitive or deterrent in the criminal law sense. He, therefore, has no *right* to legal representation, confrontation and cross-examination of witnesses, warnings about privileges, self-incrimination, compulsory production of witnesses, etc., although under Education Code section 967 he has a right to a public hearing, upon request.

The hearing to which he is entitled is informal and bifurcated, but he has a right to fair notice of the charges against him, notice of the names and testimony of his accusers, every fair opportunity to show his innocence (including the calling of voluntary witnesses in his behalf and the submission of written statements of voluntary wit-

nesses in his behalf), and to have the school authorities carefully weigh the evidence and act with calmness, consideration and fair minds in reaching their decision.

Right to Administrative Appellate Review and Judicial Review

Further, if he is expelled, he has a right to appeal the expulsion to the county board of education, and after exhausting all administrative remedies, he may, as a last resort, choose one of two forums for judicial review—the state courts by way of administrative mandamus or the federal courts under the Civil Rights Act.