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CURRENT ISSUES IN ILLINOIS SCHOOL LAW: THE CONSUMER'S PERSPECTIVE

Patrick A. Keenan*

The theory and practice of providing educational services are frequently divergent and Professor Keenan's article focuses upon the more important aspects of this divergence—school organization, student discipline, teacher and administrator termination, and special education classification. The author advocates the recognition of students as consumers, rather than as inmates of the educational system. The practitioner, after reading Professor Keenan's article, will be better prepared to argue for some legal resolution of the disparity between what the public intends its educators to do and what is actually being done in our educational system.

INTRODUCTION

ERIK Erikson opines that the deadliest of all sins is the mutilation of a child's spirit.¹ The Supreme Court has instructed us that first amendment rights are available to teacher and students, neither of whom shed their constitutional rights at the school-house gate.² Erikson's moral point is presently far from the Justices' tentative statement about what should be obvious. The appearance of such a statement and similar ones in the holdings of the several courts portends at least the hope of a convergence of opinion. The era of a supposedly benign, too often perverse dictatorship of the school board and school administration under the doctrine of *in loco parentis* is being drawn, kicking and screaming, to a close. The schools are very slowly becoming defeudalized and perhaps even a scintilla

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1. *INEQUALITY IN EDUCATION*, No. 11 at 56 (March 1972). Erikson's entire quote follows: "Some day, maybe, there will exist a well-informed, well-considered, and yet fervent public conviction that the most deadly of all possible sins is the mutilation of a child's spirit; for such mutilation undercuts the life principle of trust, without which every human act, may it feel ever so good and seem ever so right, is prone to perversion by destructive forms of conscientiousness."

2. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969).

democratized. This article examines from the consumer's (*i.e.*, the student's) perspective some of the legal steps, taken and poised, in the process as it is happening in Illinois schools.

The article begins with background information, including the institutional structure. (Section I). Section II concentrates on students' rights to free expression and due process. Educators' rights are treated in Section III. The new special education rules are described in Section IV. The remainder, particularly Section V on *Serrano*,³ *Rodriguez*⁴ and their progeny of broken promises, gets rather short shrift.

Each of the subjects considered is extremely complex and an appropriate subject for a separate article. This article emphasizes the plight of the younger student, the Illinois secondary school pupil, quoting from the higher education sources as needed. In general, judicial extensions of students' constitutional rights tend to reach all schools regardless of whether the original civil rights plaintiff was a high school or college student.

All the cases cited are not from Illinois, for the body of constitutional law applied to the school is growing, and decisions from other states or federal circuits may be directly and presently applicable to Illinois schools by Illinois courts.

The number of reported cases in the school law area is still relatively small, given the corporate complexity of the education monopoly, its boards, its politics, its economics as well as the enormous body of statutes, rules and customs controlling the entire area. One reason is the previously silent (where noise equals litigation and legal sophistication) nature of the consumers. High school students can't afford lawyers—though teachers often can.

Yet the decisions are coming in, perhaps regrettably. The school superintendents' function should be something other than constantly determining how to avoid litigation—an often counterproductive, contra-educational pursuit with shrinking success usually inversely proportional to effort.⁵

3. *Serrano v. Priest*, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

4. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1 (1973).

5. A symptom of this failure is the appearance of a new section in the Illinois statutes defining school board duties authorizing or mandating the purchase of liability insurance specifically to protect employees from judgments in civil rights cases. See, *e.g.*, ILL. REV. STAT. ch. 122, §§ 10-22.3, 34-18.1 (Supp. 1972).

In this survey of school law, admittedly presented from the consumer perspective, it is hoped that both observers and practitioners will find material that proves useful. The scope is somewhat beyond a strict 1973 Survey as this is the first annual installment on the subject, and is therefore comprised of some background and considerable omission. Perhaps next year's chapter need not be so impressionistic.

I. BACKGROUND AND INSTITUTIONAL STRUCTURES

Section I contains some historical notes on Illinois education laws and legal machinery, the present organization of the state's educational establishment, and the current statutory scheme with some of its most recent changes.

Illinois has had universal and compulsory education since 1883.⁶ Like their counterparts throughout the land, Illinois legislators, school boards, and school administrators have grounded their action on a widespread and, until quite recently inviolable, set of philosophical and legal assumptions. It's good for all children to go to the same public school. The legislature can dictate the curriculum. The school stands in the shoes of the parents as the prime medium of inculcation of a God-given moral, political and economic system and its concomitant discipline. The teacher's word is law. The local school board, elected by parents, friends and neighbors, exercises its benevolent stewardship of the school's finances and sex education courses. Students study, teachers teach. Truancy and other problems are dealt with and education must then happen.

Illinois school machinery grew up on these assumptions as the present establishment naturally reflects. Some familiarity with the confusing array of institutional structures and school districts is an essential precondition for usefully discussing the law which enables and controls them.

A. *Elementary and Secondary School Structures*

As recently as 1945 there were approximately 12,000 school districts in Illinois.⁷ Legislation enacted to stimulate the consolidation of school districts has successfully reduced their number to its pres-

6. Ill. Laws [1883] at 167.

7. Elementary school districts are numbered under 200 (District 63, 89, 151), secondary school districts under 300 (District 204, 209, 218) and junior college

ent level of slightly over 1,000. Despite this reduction, the complex organization of the state's public school system continues to bewilder many practitioners. The Illinois School Code, chapter 122 of the Illinois Revised Statutes, enables several different types of school districts:

1. Community consolidated school districts, community unit school districts, and consolidated school districts.⁸
2. High school districts, non-high school districts (that is districts which contract out all their secondary level students to other public schools).⁹
3. Special charter districts.¹⁰
4. Districts for cities with a population of less than 1,000.¹¹
5. Districts for cities with a population not less than 1,000 and not more than 500,000.¹²
6. Districts for cities with a population not less than 100,000 and not more than 500,000.¹³
7. Districts for cities with a population greater than 500,000.¹⁴
8. Special purpose districts for purposes of providing special education or other unique educational resources.¹⁵ Article 13, as recently amended, provides for a new district within the Department of Corrections.¹⁶
9. Special education cooperative districts.¹⁷

The designation of a particular school district depends upon several factors including tax base, population, nature of the educational re-

districts over 500 (Junior College District 504, 505). The district numbers are often preceded by the name of a town, township or locality, and followed by the county where it is situated.

8. ILL. REV. STAT. ch. 122, § 11 (Supp. 1972).
9. *Id.* § 12.
10. *Id.* § 32.
11. *Id.* §§ 10-1 *et seq.*
12. *Id.* §§ 10-10 *et seq.*
13. *Id.* §§ 33-1 *et seq.*
14. *Id.* §§ 34-1 *et seq.*
15. *Id.* §§ 14-1 *et seq.*
16. *Id.* §§ 13-40 to 13-45.
17. *Id.* §§ 10-22.31, 22.31a.

sources and the boundary characteristics of the individual area. Once designated, the school district becomes subject to a particular set of statutory provisions affecting both the operation and the funding of its educational facilities. A description of the legal and political processes utilized in determining the type of school board in a district is beyond the scope of this article.¹⁸

The Supreme Court has declared that Illinois school districts are quasi-municipal corporations¹⁹ with no inherent powers. They are entirely creatures of the General Assembly which is the source of all their powers.²⁰ School districts do not own the educational facilities located within their boundaries. Such facilities are the property of the state and as such are subject to legislative disposition. The General Assembly may consolidate,²¹ divide,²² or otherwise alter school districts²³ and has complete control over their configuration.²⁴

The school board governs the school district. Statutory provisions define the qualifications for membership and the procedure for the election of board members.²⁵ They are not paid and act from motives of public service. The board members control all financial matters, let bids and have autonomous authority to enter into contracts. They determine who sells the district its fuel, supplies, services, land, new construction, and they choose its legal counsel.

18. For more detailed descriptions, see ILL. INST. OF CONT. LEGAL EDUC., SHORT COURSE FOR ILLINOIS SCHOOL ATTORNEYS, SCHOOL BOARD ORGANIZATION 1-18 (1972).

19. *People v. Furman*, 26 Ill. 2d 334, 186 N.E.2d 262 (1962).

20. *Dato v. Veron Hills*, 62 Ill. App. 2d 274, 210 N.E.2d 626 (1965).

21. *Dixon v. Community Unit School Dist. No. 3*, 2 Ill. 2d 454, 118 N.E.2d 241 (1954).

22. *Id.*

23. *People v. Deatherage*, 401 Ill. 25, 81 N.E.2d 581 (1948) (contraction); *Bd. of Educ. of Spaulding School Dist. No. 58*, 32 Ill. 2d 342, 205 N.E.2d 459 (1965) (annexation).

24. *Community Unit Dist. No. 6 of Macon and Christian Counties v. County Bd. of School Trustees of Sangamon County*, 9 Ill. App. 2d 116, 132 N.E.2d 584 (1956). The General Assembly has provided procedures by which a new district can be created. ILL. REV. STAT. ch. 122, § 7 *et seq.* (1971).

25. ILL. REV. STAT. ch. 122, §§ 10-10, 9-1 (1971). Chicago Board of Education members are not elected but appointed by the mayor, ch. 122, § 34-3. The fact that Chicago schools are governed by political appointees while all others are subject to the control of elected officials and the electorate was held not to be a violation of equal protection in *Latham v. Bd. of Educ.*, 31 Ill. 2d 178, 185-86, 201 N.E.2d 111 (1964).

Board members also control the more mundane matters of school administration such as the hiring and firing of teachers, the discipline of students, and establishment of appropriate educational programs.

The Superintendent of the Educational Service Region (ESR), formerly the County Superintendent of Schools, supervises and in theory exercises some control over the public schools within a designated region. The Superintendent, elected under the provisions of the Illinois School Code, has the authority to inspect school operations and to receive financial and attendance reports from the treasurers of the various school boards under his supervision.²⁶

The Office of the Superintendent of Public Instruction (OSPI) has the responsibility for the general supervision of all public and some private Illinois schools.²⁷ Specifically, OSPI may issue rules and regulations to implement educational legislation, act as legal advisor to the public school system, and set standards for the recognition of schools. Additionally, the Code requires the OSPI to provide a variety of other services such as research, grant administration, and organizational assistance.

B. Higher Education Organization

The Illinois system of public higher education is administered through five independent agencies. These are:

1. Board of Regents of Regency Universities.²⁸
2. Board of Governors of State Colleges and Universities.²⁹
3. University of Illinois.³⁰
4. Southern Illinois University.³¹

26. ILL. REV. STAT. ch. 122, § 3-14.11 (1971).

27. *Id.* §§ 2-3 *et seq.*

28. ILL. REV. STAT. ch. 144, §§ 301-311 (1971). Included are Illinois State University, Northern Illinois University, and Sangamon State University.

29. ILL. REV. STAT. ch. 144, §§ 1001-1009 (1971). Included are Chicago State University, Eastern Illinois University, Governors State University, Northeastern Illinois University, and Western Illinois University.

30. ILL. REV. STAT. ch. 144, § 22-488. Included are the Urbana, Chicago Circle and Medical Center campuses.

31. ILL. REV. STAT. ch. 144, §§ 600-695. The Carbondale and Edwardsville campuses of Southern Illinois University are included.

5. Junior College Board.³²

The Board of Higher Education (BHE) is charged with coordination and supervision of these agencies.³³ Duties of the BHE include approval of new units of instruction, budget recommendations, research and master planning. In order to perform these duties, the BHE has the authority to inspect books, records, and files of the various agencies involved in public higher education.³⁴ The BHE from time to time undertakes special duties of system-wide importance such as manpower planning and administration of various grant programs.

The Board of Higher Education is a fairly strong and active coordinating board. It would be misleading, however, to assume that the BHE exerts anything even resembling complete control over the public higher education system. In essence, the BHE defines the broad goals to which the various universities respond with specific programs. The BHE reviews such programs and determines whether or not they are appropriate in view of overall system goals. The BHE does not design specific programs to be initiated by the various colleges and universities.

C. *New Structures*

The 1970 Constitutional Convention of the State of Illinois called for the establishment of a State Board of Education to supplant the now existing Office of the Superintendent of Public Instruction.³⁵ Initial legislation implementing that resolution was signed into law in August of 1973. The State Board of Education will consist of seventeen members selected on a regional basis. Initially Board

32. ILL. REV. STAT. ch. 144, §§ 189 *et seq.* The Board supervises thirty-eight junior college districts each with its own board and staff.

33. *Id.* §§ 182, 189, 190.

34. *Id.* § 192.

35. ILL. CONST. art. X, § 2 reads:

State Board of Education—Chief State Educational Officer. (a) There is created a State Board of Education to be elected or selected on a regional basis. The number of members, other qualifications, terms of office and manner of election or selection shall be provided by law. The Board, except as limited by law, may establish goals, determine policies, provide for planning and evaluating education programs and recommend financing. The Board shall have such other duties and powers as provided by law. (b) The State Board of Education shall appoint a chief state educational officer.

members will serve either two, four or six year terms. Subsequent terms will be for six years. Vacancies will be filled by the Governor with the advice and consent of the Senate. Members will be limited to not more than two six year terms.

The full powers and duties of the Office of the Superintendent of Public Instruction shall pass to the new State Board of Education by 1975. In the interim, the State Board of Education shall function in an advisory capacity to the Office of the Superintendent of Public Instruction, having full access to records and staff now maintained by the Superintendent. The State Board of Education will begin by designing the legislative package necessary to accomplish the constitutional goal. Three members of the new Board and three members of the now existing Board of Higher Education will be appointed to a joint Education Committee. The joint Education Committee will be responsible for "developing policy on matters of mutual concern to both elementary, secondary and higher education such as Occupational and Career Education, Teacher Preparation and Certification, Educational Finance, Articulation between Elementary, Secondary and Higher Education and Research and Planning."³⁶

This legislation has the potential to change considerably Illinois' system of public education. The State Board of Education is free to define its scope of activities and its relationships with local school boards and state agencies by submitting appropriate recommendations to the General Assembly. At a minimum, the new Board assumes the powers of the Office of the Superintendent. Additional powers can be requested.

The establishment of the Joint Education Committee provides an administrative device to coordinate the entire spectrum of public educational activities. Though it seems to be very much the child of the State Board of Education and the Board of Higher Education, the Joint Education Committee must submit annual reports to these two Boards *and* to the General Assembly. This power to directly report to the General Assembly may give the Joint Education Committee a significant degree of authority in the coordination of public educational activities.

36. ILL. REV. STAT. ch. 122, §§ 1A-1 to 1A-4 (Supp. 1973).

Of the enormous body of statutes dealing with Illinois schools, only a very small portion have been construed by the appellate or federal courts. A check of *Shepard's Citations* indicates only a small number of court opinions, whose paucity is grossly disproportionate to the byzantine complexity of the legislative maze of the School Code (ch. 122) and Higher Education Law (ch. 144).

Virtually all of the governing bodies, and many of the governing persons, involved in Illinois education are authorized by the statutes to promulgate and enforce rules and make or review decisions based on the laws and regulations. Arguably, due process would require all regulations to be written, published, and available free or for copying.³⁷ These rules and most of the decisions have the power, color and force of law. When faced with a case or question involving a law, rule, regulation or decision, the practitioners must first isolate the level, legal effect and authorization for its promulgation. The individual with the authority to take the action must also be identified. This simplistic advice is much easier to give than to follow because the educational machinery is well versed in the bureaucratic arts of obfuscating and diluting the credit or blame for any act and of permanently losing or burying the rules by which it was accomplished. Framing a legal issue with a part of the public educational establishment can be very frustrating but not impossible. The process could include sending information copies of all correspondence to the OSPI and Superintendent of ESR with a cover letter reminding them of their review, appeal, and controversy-settling functions.³⁸

II. THE RIGHTS OF ILLINOIS STUDENTS

It is difficult to ascertain the current state of the Illinois law of student rights and discipline, and almost impossible to speculate on the mundane reality of student rights and discipline in Illinois schools. If, from the civil libertarian perspective, the schools have in theory just entered the eighteenth century, the reality is still medieval.

This section attempts first to give a basic outline of the current law of substantive student rights. The following section considers

37. ILL. REV. STAT. ch. 122, § 10.7 (1971).

38. *Id.* at §§ 2-3.8, 3-2.

the procedures which are supposed to be observed in visiting discipline upon the students, with a glance toward a few of the specific infractions which invite such visitation.

Since the Supreme Court's 1969 decision in *Tinker v. Des Moines Independent Community School District*,³⁹ the courts, or at least some of them, have recognized that students are in fact citizens of the United States and that the public schools of the land, teaching respect for the Constitution, must acknowledge its existence beyond that of a mere historical curiosity. Students do have certain rights, but the catalog, enumeration, scope and incidents of these rights are elusive. They have been established by a painful series of appellate court decisions, mostly federal, which patiently instruct school administrators, board members and sometimes trial judges that teachers and students do not shed their constitutional rights at the school-house gate.⁴⁰

Students' rights can be categorized as those clustered about the first amendment, those protected by the due process clause, and those which find other legal or constitutional bases. Violations of the equal protection clause are rampant throughout the public schools, but vindication of many of them has become a confusing and problematical pursuit since the Nixon Court's pronouncement in *San Antonio Independent School District v. Rodriguez* that education is not among the rights either explicitly or implicitly protected by the Constitution.⁴¹ Note that the due process rights are addressed in the section on student discipline.⁴² The students' first amendment rights are engaged in cases concerning student newspapers, hair and dress codes, and, occasionally, access to speakers or materials that say things which offend the politics or sensibilities of the school administration.⁴³

39. 393 U.S. 503 (1969). A precursor of *Tinker*, *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), wherein the Court upheld a student's right to refuse to pledge allegiance to the flag, went practically unnoticed for the intervening quarter century.

40. 393 U.S. 503, 506 (1969).

41. 411 U.S. 1, 35 (1973). It may, however, be protected under the Illinois Constitution. See article X thereof and a ringing dissent by Justice Marshall, 411 U.S. at 70.

42. One of the best works on students' rights, from the students' view is S. HANSEN & J. JENSEN, JR., *THE LITTLE RED SCHOOL BOOK* (1971).

43. First amendment rights of teachers are discussed in the text accompanying notes 164-192, *infra*.

The general rule is that a student's free expression—oral, written, or symbolic—cannot be proscribed so long as the expressive activity (distributing a newspaper, wearing long hair) is not reasonably expected to disrupt the normal educational processes of the school. This is the "forecast rule" of *Tinker*.⁴⁴ This rule generally holds true in both high schools and colleges, but the threshold of what is likely to disrupt the normal educational processes is relatively lower in Illinois high schools. In colleges, the doctrine of *in loco parentis* is dead. In high schools it is perhaps only moribund.

A. *Limitations on Student Speech and Press*⁴⁵

Despite the Supreme Court's application of first amendment principles of free speech to the public high school context,⁴⁶ and the Court's traditional view that the freedom to distribute a publication without prior censorship is protected by the first amendment,⁴⁷ the majority of circuit courts hold that prior censorship of student publications is constitutionally permissible if supported by sufficient procedural safeguards. The Seventh Circuit, however, adheres to a minority position that pre-publication censorship of student publications is an unconstitutional prior restraint of free speech.

In *Tinker v. Des Moines Independent Community School District*⁴⁸ the Supreme Court declared that there must be reasonable parity between speech freedoms enjoyed by public school students and first amendment freedoms applicable to the general society. Schools are not totalitarian enclaves.⁴⁹ While undoubtedly in a special class, students are neither inmates in a jail nor patients in a hospital where extraordinary restrictions of free speech may be necessary.⁵⁰ Student speech-related conduct⁵¹ may not be prohibited absent a showing that such conduct would cause a substantial inter-

44. 393 U.S. 503, 511 (1969).

45. For a good discussion from the journalist's viewpoint, see Roth & Riley, *The Bill of Rights and the Student Press*, CHICAGO JOURNALISM REVIEW 3-6 (January, 1973).

46. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969).

47. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

48. 393 U.S. 503 (1969).

49. *Id.* at 511.

50. *Id.* at 512 n.6.

51. In *Tinker*, the students wore black armbands to protest the Vietnam war.

ference with requirements of proper discipline in the operation of a school.⁵²

The freedom to distribute a publication without censorship has long been associated with the first amendment.⁵³ As applied to student publications, however, some courts have held that prior restraints of free speech are not unconstitutional per se, but can be imposed if accompanied by reasonably specific procedural safeguards. The Second Circuit, in *Eisner v. Stamford Board of Education*,⁵⁴ saw no constitutional bar to a school policy requiring prior approval of student publications so long as approval procedures and criteria were well-defined and the time period involved in the approval process was definite and not excessive.⁵⁵ In *Quarterman v. Byrd*,⁵⁶ the Fourth Circuit struck down a policy requiring pre-distribution approval of student publications, not because of concerns for the per se constitutional invalidity of such prior restraints, but because the policy did not specify the criteria upon which approval or denial would be based, and because the procedures for expeditious review of the decision were not defined.⁵⁷

Similarly, the Fifth Circuit, in *Shanley v. Northeast Independent School District*⁵⁸ held that there was nothing unconstitutional per se in a requirement that student publications be approved by school officials prior to distribution⁵⁹ but that such a policy must be reasonably specific as to means by which students are to submit proposed materials, the time period during which approval is to be granted or denied, and the procedure for review of the school official's decision.⁶⁰

The *Eisner*, *Quarterman* and *Shanley* courts viewed *Tinker* as permitting school officials to intervene in student speech-related con-

52. 393 U.S. at 511.

53. *New York Times v. United States*, 403 U.S. 713 (1971); *Organization for a Better Austin v. Keefe*, 402 U.S. 415 (1971); *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931).

54. 440 F.2d 803 (2d Cir. 1971).

55. *Id.* at 810-11.

56. 453 F.2d 54 (4th Cir. 1971).

57. *Id.* at 59.

58. 462 F.2d 960 (5th Cir. 1972).

59. *Id.* at 969.

60. *Id.* at 978.

duct when a forecast of substantial disruption could be made. That intervention could take the form of pre-distribution approval of student publications so long as sufficient procedural safeguards were insured. Recognizing that such policies constituted prior restraints, these courts argued that prior restraints are not unconstitutional per se but could be applied in special circumstances.⁶¹

The Seventh Circuit has taken a thoroughly different approach. Utilizing the cases of two Illinois high school student underground newspapers writers, the court has effectively established freedom of the student press. In *Scoville v. Board of Education*⁶² the appellate court overturned the expulsion of Ray Scoville for his publication of *Grass High* holding:

High school students are persons entitled to First and Fourteenth Amendment protections. States and school officials have "comprehensive authority" to prescribe and control conduct in the schools through reasonable rules consistent with fundamental constitutional safeguards. Where rules infringe upon freedom of expression, the school officials have the burden of showing justification

. . . .

However, the district court had no factual basis for, and made no meaningful application of, the proper rule of balancing the private interests of plaintiffs' free expression against the state's interest in furthering the public school system.⁶³

About a year thereafter a student at Bowen High School in Chicago repeated almost exactly Scoville's trick and published *The Cosmic Frog* without procuring prior permission. The Chicago Board of Education repeated the Peoria Board's overreaction and suspended him. Surprisingly, in clear violation of the *Scoville* rule, the suspension was sustained by the district court.⁶⁴ The Seventh Circuit, perhaps irked at having to repeat itself, spoke in no uncertain terms by holding that the Chicago Board of Education Regulation 6-19, which required prior approval for distribution of student publications, was an unconstitutional prior restraint on free speech and that disciplinary action for violation thereof must be reversed.

The Seventh Circuit in *Fujishima v. Board of Education*⁶⁵ took

61. See *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 806 (2d Cir. 1971).

62. 425 F.2d 10 (7th Cir.), cert. denied, 400 U.S. 826 (1970).

63. *Id.* at 13-14.

64. Civil No. 71-566 (N.D. Ill. 1971).

65. 460 F.2d 1355, 1357 (7th Cir. 1972).

direct issue with the *Eisner* interpretation of *Tinker* and bluntly declared it to be "unsound constitutional law."⁶⁶ The *Tinker* forecast rule is a proper formula for determining when the requirements of school discipline justify *punishment* of students for the exercise of their first amendment rights. It is not a basis for establishing a system of censorship and licensing designed to prevent the exercise of first amendment rights.⁶⁷

The Seventh Circuit's vigorous rejection of prior restraints of student speech in the face of contrary opinions in the Second and Fourth Circuits indicates that, short of a Supreme Court resolution of the issue, Illinois practitioners can expect federal courts in the Seventh Circuit to be quite receptive to student challenges of pre-distribution approval regulations. While the boards of education may make reasonable regulations as to the time, place and manner of distribution, they cannot prohibit distribution, and the burden of showing the reasonableness of the rules will be placed on the boards. Regulations which seek to mete out post-publication discipline to students who distribute obscene or libelous material may not be precluded under *Fujishima*. Clearly pre-publication censorship is prohibited in Illinois schools.⁶⁸

Unfortunately, the Seventh Circuit's declaration of the law does not execute itself, and various sorts of prior restraints on student publication and limitations on their distribution persist. The OSPI could provide a significant service by publicizing and enforcing the first amendment, in particular the prohibition against prior censorship of and punishment for distribution of the student press. The current Superintendent, Dr. Michael J. Bakalis, has from time to time promised to do this, and to promulgate a code of rights and conduct for Illinois students. Such a code has not yet appeared, and while

66. *Id.* at 1359.

67. *Id.*

68. *Id.* The First Circuit may share the Seventh Circuit's aversion to prior restraint of student speech. In *Riseman v. School Community of the City of Quincy*, 439 F.2d 148 (1st Cir. 1971), the court struck down a regulation prohibiting the distribution of advertising materials in school facilities. As applied, the regulation also prohibited the distribution of student publications. The First Circuit voiced concern that the regulation did not reflect an effort to minimize the adverse effect of prior restraints and struck down the policy. The court did suggest that school officials could require that students file a copy of printed materials prior to distribution.

the first several drafts of the OSPI's *magnum opus*, the *Illinois Program for Evaluation, Supervision and Recognition of Schools*, addressed the rights of students in some detail, the final form contains four pages of rather flabby generalities about responsibilities in a democracy, government of laws not of men, etc.⁶⁹ The only statement about the critical subject of students' freedom of expression is the following quib—rather a thin restatement of the robust thunder of *New York Times*, *Tinker*, *Scoville* and *Fujishima*:

The right of free expression is fundamental in a free society. Though a student has this right, it must be exercised in a responsible manner so as not to interfere with the rights of other members of the school community or to disrupt the educational process.⁷⁰

B. *First Amendment Rights of Students (Continued):
Hair and Dress Codes*

Under the general provisions of chapter 122, sections 10-20.5 (duty of board to adopt and enforce necessary rules), 10-22.6 (power of board to suspend and expel) and 24-24 (maintenance of discipline), school board members appear to be authorized to make rules governing student appearance. It is never clear what qualifies the board members to serve as arbiters of public taste. Consequently, an extraordinarily large number of suspensions and expulsions result from the subject of student dress—a subject unworthy of the amount of time and ink it traditionally commands, and a grossly insufficient reason for removing a student from his classroom or athletic squad. The most frequently litigated problem in the area of student appearance concerns school board policies regulating the hair length of male students. Illinois courts, as well as federal courts of the Seventh Circuit, limit the authority of school boards to regulate hair length to instances where such a regulatory policy can be justified as necessary to the proper operation of a school.

In *Laine v. Dittman*⁷¹ the Second District Appellate Court reviewed a suspension of a high school student for noncompliance with the

69. OSPI CIRCULAR SERIES A, ch. XI RIGHTS AND RESPONSIBILITIES, § 11-1 at 52-55 (1973).

70. *Id.* at 54.

71. 125 Ill. App. 2d 136, 259 N.E.2d 824 (1970).

school's grooming code. School officials claimed suspension was necessary to preserve order in the school.⁷² The court, however, saw no substantial disturbance in the operation of the school resulting from the suspended student's hair style.⁷³ Referring again to the forecast rule of *Tinker* and the language to the effect that the exercise of freedom often results in hazard, the appellate court entered the potentially revolutionary ruling that minor disturbances are not sufficient to justify abridgement of a student's right to wear his hair in a manner prohibited by a school grooming code.⁷⁴ The case is revolutionary because it hints that the proper application of the *Tinker* test is an objective one—according to an outside judicial perspective. Thus *Laine* may require that the determination of whether student conduct is likely to substantially disrupt the educational process must be made objectively, not by an excitable dean of discipline.

The Seventh Circuit declares its tonsorial views in *Breen v. Kahl*.⁷⁵ A student's right to wear hair in a particular manner is an ingredient of personal freedom protected by the Constitution and applicable to the states through the due process clause of the fourteenth amendment. School officials who seek to regulate that freedom bear a substantial burden of justification. The doctrine of *in loco parentis* cannot, standing alone, justify punishing a student in violation of a hair grooming code. A subsequent Seventh Circuit case, *Crews v. Cloncs*,⁷⁶ lengthens the *Breen* rule. School board hair length regulations must be specific to the problems created by long hair and may be no broader than actually necessary. If disturbances occur as a result of the presence of a long-haired student, school officials may not take action against the long-haired student if they have not attempted to restrain those students actually creating the disturbances. Health and safety aspects of hair length regulations must apply to both male and female students. Thus, school officials in the Seventh Circuit are considerably limited in the manner in which they may regulate student hair lengths.⁷⁷ The Seventh Circuit views

72. *Id.* at 139, 259 N.E.2d at 825.

73. *Id.* at 142, 259 N.E.2d at 827.

74. 125 Ill. App. 2d at 143, 259 N.E.2d at 827.

75. 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970).

76. 432 F.2d 1259 (7th Cir. 1970).

77. Subsequent to *Breen* but prior to *Crews*, the District Court for the Northern

choice of hair style as a fundamental right and due process requires that restrictions upon the exercise of that right be supported by some compelling governmental interest.⁷⁸

The Seventh Circuit's analysis of the student hair length problem has been shared by other circuits. In *Bishop v. Colaw*⁷⁹ the Eighth Circuit defined the liberty to control personal appearance as ranking high on the spectrum of social values and held that regulations of that liberty must be shown to be necessary.⁸⁰ The Third Circuit in *Stull v. School Board*⁸¹ ruled that personal choice of hair style is implicit in the liberty assurance of the due process clause of the fourteenth amendment and, absent a showing that hair length caused a disruption, created a hazard, or affected academic accomplishment, school board regulation of student hair style violates due process.⁸² The Fourth Circuit struck down "guidelines" for student hair length in *Massie v. Henry*⁸³ stating that the right of a student to choose his hair style was an aspect of the right to be secure in one's person guaranteed by the due process clause and, absent a showing of justification, the "guidelines" would not be permitted.⁸⁴ A somewhat less stringent justification test was proposed in the First Circuit. In *Richards v. Thurston*,⁸⁵ the court found that the suspension of a student for failing to cut his hair violated the student's liberty protected under the due process clause of the fourteenth amendment.⁸⁶ A restriction of such a guaranteed liberty could be upheld

District of Illinois upheld a school board regulation of hair length where the regulation was seen as non-discriminatory on its face and in its enforcement and where no restriction on freedom of expression resulted from enforcement. *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970). *Livingston* seems almost indistinguishable from an earlier case in the district, which struck down nearly the same regulation. *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

78. *Crews v. Cloncs*, 432 F.2d 1259 (7th Cir. 1970).

79. 450 F.2d 1069 (8th Cir. 1971).

80. *Id.* at 1075.

81. 459 F.2d 339 (3d Cir. 1972).

82. *Id.* at 347.

83. 455 F.2d 779 (4th Cir. 1972).

84. *Id.* at 783. A showing that violence was threatened was not sufficient justification where there was no evidence that disrupters could not be effectively disciplined. See also *Rumler v. Bd. of School Trustees*, 437 F.2d 953 (4th Cir. 1971).

85. 425 F.2d 1281 (1st Cir. 1970).

86. *Id.* at 1284-85.

only if the state's countervailing interest was either "self-evident or . . . affirmatively shown."⁸⁷

While the substantive due process argument has been successful in defeating hair length regulations in many circuits, it has received a different interpretation in others. The Tenth Circuit rejected the contention that substantive due process applies to student hair length regulation. In *Freeman v. Flake*⁸⁸ the Tenth Circuit held that high school hair regulation cases "are not cognizable in federal courts."⁸⁹ The Fifth Circuit in *Karr v. Schmidt*⁹⁰ rejected the concept that choice of hair style is a fundamental right.⁹¹ Hence, only a minimum test of rationality was to be applied in determining the due process implications of a hair grooming regulation.⁹² The Fifth Circuit went on to add that in the future constitutional challenges to student hair length regulations were to be dismissed for failure to state a claim upon which relief could be granted.⁹³ Similarly, the Sixth⁹⁴ and Ninth⁹⁵ Circuits have not applied substantive due process tests to public school hair regulations.

There has been considerable variety in the constitutional challenges to hair length regulations; freedom of speech,⁹⁶ privacy,⁹⁷ and

87. *Id.* at 1286.

88. 448 F.2d 258 (10th Cir. 1971), *cert. denied*, 405 U.S. 1032 (1972).

89. *Id.* at 261.

90. 460 F.2d 609 (5th Cir. 1972).

91. *Id.* at 615.

92. *Id.* at 616-17.

93. *Id.* at 618. The issue of student hair length regulation has obviously troubled the Fifth Circuit. Prior to *Karr*, the Fifth Circuit held that the touchstone for sustaining hair length regulations was the demonstration that such regulations "are necessary to alleviate interference with the educational process." *Griffin v. Tatum*, 425 F.2d 201, 203 (5th Cir. 1970). Shortly after *Griffin*, the Fifth Circuit upheld a school grooming code on the grounds that the rule was founded on a rational basis. *Stevenson v. Bd. of Educ.*, 426 F.2d 1154, 1158 (5th Cir. 1970), *cert. denied*, 400 U.S. 957 (1970). In *Karr*, the Fifth Circuit adopted still another view—those challenging hair length regulations have the burden of showing the regulation to be wholly arbitrary. 460 F.2d at 617. The *Karr* rule was, however, not held applicable to college campuses and the Fifth Circuit refused to extend the *per se* rule of *Karr* to a public junior college regulation of student hair style. *Lansdale v. Tyler Junior College*, 470 F.2d 659 (5th Cir. 1972).

94. *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir. 1970), *cert. denied*, 400 U.S. 850 (1970).

95. *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971), *cert. denied sub nom.*, *Olf v. East Side Union High School Dist.*, 404 U.S. 1042 (1972).

96. Courts have held that hair length lacked communicative value or that long

equal protection⁹⁸ issues have been raised but have had little success. The courts have usually resolved hair length cases through a due process analysis. The gradual acceptance of long-haired males in society may, however, already have precluded further development of due process or other arguments against the imposition of regulation of student hair length.⁹⁹

Finally, with the sole exception of the probably defunct *Livingston v. Swanquist* decision,¹⁰⁰ no cases have come to this writer's attention where the male hair length regulation was challenged as being repressive legislation serving no compelling state interest and which prima facie violates equal protection solely on the basis of sex. Some Illinois courts may be receptive to a challenge on these grounds, particularly since the recent Cook County Circuit Court decision striking down the Chicago transvestite ordinance¹⁰¹ on equal protection grounds.

C. *Due Process Rights of Students: Proceedings to Suspend or Expel*

It is settled law and fashionable for courts to restate the proposition that school expulsion proceedings need not provide all the trappings of due process essential to a criminal or judicial trial¹⁰² be-

haired students had no intent to communicate. See *Karr v. Schmidt*, 460 F.2d 609, 614 (5th Cir. 1972); *Freeman v. Flake*, 448 F.2d 258, 260 (10th Cir. 1971), cert. denied, 405 U.S. 1032 (1972); *King v. Saddleback Junior College Dist.*, 445 F.2d 932, 938 (9th Cir. 1971), cert. denied, 404 U.S. 1042 (1972); *Richards v. Thurston*, 424 F.2d 1281, 1283 (1st Cir. 1970).

97. Courts have held privacy arguments inapplicable to hair length regulations. See *Karr v. Schmidt*, 460 F.2d 609, 614 (5th Cir. 1972); *Freeman v. Flake*, 448 F.2d 258, 261 (10th Cir.), cert. denied, 405 U.S. 1032 (1972); *King v. Saddleback Junior College Dist.*, 445 F.2d 932, 938 (9th Cir. 1971), cert. denied, 404 U.S. 1942 (1972).

98. There is considerable division in the treatment of equal protection arguments. See, e.g., *Karr v. Schmidt*, 460 F.2d 609 (5th Cir. 1972); *Massie v. Henry*, 455 F.2d 779 (4th Cir. 1972); *King v. Saddleback Junior College Dist.*, 445 F.2d 932 (9th Cir. 1971); *Griffin v. Tatum*, 425 F.2d 201 (5th Cir. 1970); *Jackson v. Dorrier*, 424 F.2d 213 (6th Cir.), cert. denied, 400 U.S. 850 (1970); *Livingston v. Swanquist*, 314 F. Supp. 1 (N.D. Ill. 1970); *Miller v. Gillis*, 315 F. Supp. 94 (N.D. Ill. 1969).

99. For a recent discussion of comparative merits of the various constitutional challenges to hair length regulations, see 47 TUL. L. REV. 407 (1973).

100. 314 F. Supp. 1 (N.D. Ill. 1970).

101. Mun. Code of Chicago, § 192-8 (1972). *City of Chicago v. Meldros, Williams, et al.*, Nos. 73-H-262784, 262785, 262787, Circuit Court of Cook County, Municipal Dep't, First District, reset before Judge Jack Sperling, December 7, 1973.

cause of an implicit assumption that the possible sanction is not as damaging as a criminal or juvenile conviction. The courts, however, never examine the assumption.

While no thorough statistical study exists, many observers are of the opinion that an expulsion from high school is a considerably greater handicap than a juvenile or misdemeanor conviction. It is speculated that a student who is suspended or expelled finds his or her chance of graduating reduced by a half or more, and students lacking a high school diploma labor under a lifelong economic and social disability. A lesser criminal conviction has a way of fading into the background of youthful indiscretion; lack of a diploma creates a lifelong stigma. Furthermore, certain students who are expelled fare far worse than others since not all school districts provide for alternative education, even though the Code apparently so requires such provision according to the following analysis.

The new Illinois Constitution provides that: "A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities."¹⁰³ The Code provides that local school boards have a duty "to establish and keep in operation in each year during a school term of at least the minimum length . . . a sufficient number of free schools for the accommodation of *all* persons in the district over the age of 6 and under 21 years, and to secure for *all* such persons the right and opportunity to an equal education"¹⁰⁴ The Special Education Article defines "Mal-adjusted Children" as "children between the ages of 3 and 21 years who because of social or emotional problems are unable to make constructive use of their school experience and require the provision of special services designed to promote their educational growth and development."¹⁰⁵

The suspension and expulsion statute provides in part that "[t]he Department of Mental Health shall be invited to send a representative to consult with the board at [a meeting to consider disciplining a student] whenever there is evidence that mental illness may be

102. See, e.g., *Betts v. Bd. of Educ.*, 466 F.2d 629, 633 (7th Cir. 1972) and cases cited therein.

103. ILL. CONST. art. X, § 1.

104. ILL. REV. STAT. ch. 122, § 10-20.12 (1971) (emphasis added).

105. ILL. REV. STAT. ch. 122, § 14-1.03 (1971).

the cause of expulsion or suspension."¹⁰⁶ The definitions of "mentally ill" and "maladjusted" child appear to overlap. Furthermore the Superintendent of Public Instruction in his *Program* for evaluating all Illinois schools, declares that:

No child, whether disruptive to a school system or not, should be deprived of an education. These children who cannot function in the traditional school setting should have access to alternative programs of instruction.¹⁰⁷

Finally, any adult who wilfully seeks to interfere with or prevent the daily attendance of a citizen under 16 may be an accessory or conspirator to the crime of truancy.¹⁰⁸

These pronouncements, read together, would seem to make it impossible for an Illinois student to be expelled outright, that is, to have his right to an appropriate education at public expense withdrawn. Several school boards have recognized this and provide a range of alternatives, including night or early morning classes, co-op credit, home study, and transfer to another school or district with a comity arrangement. No thorough list of the types of alternatives now available or the districts offering them exists, though there were rumors to the effect that Cook County Educational Service Region (ESR) Superintendent, Richard J. Martwick, was compiling one. Expelled students and their attorneys should demand alternative education in all cases. To the extent they are denied, while other districts continue to service their expelled students, they may find a remedy under the equal protection clause.

Little information about student disciplinary action is currently available. While each local board's minutes probably reflect suspensions and expulsions, the statistics are not centrally collected in any useful form, despite the clear duty of the Superintendent of the ESR's to keep such records.¹⁰⁹

Wholly outside the official school discipline system is the "push-out" phenomenon. A student who is regarded as a troublemaker is

106. ILL. REV. STAT. ch. 122, § 10-22.6(d) (Supp. 1972). To date no *student* has ever invited a DMH representative to his expulsion proceeding on the theory that there is evidence that the cause for the expulsion or suspension is the mental illness of the school administrators or board members.

107. ILLINOIS PROGRAM FOR THE EVALUATION, SUPERVISION AND RECOGNITION OF SCHOOLS, OSPi CIRCULAR SERIES A, CH. XI RIGHTS AND RESPONSIBILITIES, § 11-1 at 54 (1973).

108. ILL. REV. STAT. ch. 122, §§ 22-1 to 22-11 (Supp. 1972).

109. ILL. REV. STAT. ch. 122, §§ 3-14.2, 3-14.11, 3-15.11 (1971).

slated for a "parent conference" or "staffing." At the meeting the superintendent, dean of discipline, psychologist, and a teacher or two confront the student and his parents and in effect say: "Ok, do you want to walk out, or do we have to throw you out?" Unfortunately, the predictable result usually occurs. It is much easier and less expensive than a full due process hearing. In fact, if this procedure fails the school may contend the meeting was the hearing. Students faced with this situation should challenge the school's proceeding, appearing with parents *and* an attorney if possible. The student should charge the school with violating the provision of the Illinois School Code dealing with the right to a full due process hearing. Such a ploy is attempted when a student has a series of minor rule infractions making him or her a nettlesome administrative problem, although no single provable act of "gross disobedience or misconduct" is present to serve as the basis for a "legal" expulsion.¹¹⁰

In the course of the writer's experience defending many expulsion cases the following personal observations have emerged:

1. School discipline proceedings are kangaroo courts where the word of an adult is truth, the word of a teenager a lie, and the judgment of the hearing officer often dictated by the administration or board. Often the hearing officer is a teacher, or worse, an attorney generally retained by the board to advise it on, *inter alia*, how to expel students fairly and permanently.
2. The discipline process is unconcerned with the interests or even the rights (except to avoid litigation) of the student facing discipline. Collectively, the discipline laws and regulations are a surgical tool to excise a difficult administrative problem.
3. All disciplinary infractions must be violations of either one of two categories of rules: (a) rules designed to protect the health and safety of persons and to protect the educational process to the extent objectively necessary, for example, rules against battery, theft, carrying weapons, drug abuse, and generally those acts whose proscriptions are found in the criminal code; (b)

110. ILL. REV. STAT. ch. 122, § 10-22.6 (Supp. 1972).

rules designed to serve the convenience, prejudice, or whim of the school administration, for example, rules against talking in halls, wearing long hair, posting notices without prior approval, using vulgar language, holding hands, etc. The majority of disciplinary actions are occasioned by violations of the second type of rule. Furthermore, the tone of a school's disciplinary atmosphere and number of disciplinary transactions is entirely in the control of the school, not the students. There are many hopelessly porcine school administrators who positively invite "inappropriate" behavior.¹¹¹

4. Most school board members make (or rubber-stamp) disciplinary decisions to suspend and particularly to expel with a rather self-satisfied relief that they have done their employees a service by removing a difficult problem from the school. They refuse to consider the damage or potential damage sustained by the expellee, whose chances of return and graduation may be reduced by 50 to 75 per cent. The difference in lifetime income between the graduate and expellee is never considered in a discipline vote. The rhetoric is usually quite the opposite: by ridding the school of a "troublemaker" the board not only is protecting the right to education of the students still in school, but also is helping the malefactor—doing it for his own good. An understanding of the operation of this principle has always escaped this writer: how can truncating the student's education advance his educational interests?¹¹²

The above generalizations may seem overdrawn. In defense it is proposed that there are perhaps only two dozen Illinois lawyers who have defended expulsion actions before school boards. A dozen

111. The writer, who is a teacher, met several of these individuals when invited to speak to a meeting of high school disciplinarians. When he tried to make these same observations several of the deans suddenly advanced down the aisle and attempted to remove him forcibly from the room. *Chicago Sun-Times*, Feb. 23, 1973, at 14, col. 1.

112. This question has been approached in a song by Pete Seeger, *The Grateful Folks of Ben Tre* (1970).

of them were consulted on the above observations. Their agreement is unanimous.

Practitioners who appear on student's behalf before school boards and their hearing officers should be apprised of the attitudes which lurk there. The legislature in its wisdom has thrice insulated school board members from suit for any action taken in disciplinary matters.¹¹³

Students and their lawyers who seek review of a school board decision to suspend or expel will find the scope of review extremely narrow and the road arduous. The School Code is not subject to the provisions of the Administrative Review Act.¹¹⁴ The prescribed mode of resolving controversies arising under the Code, that is, review by the Superintendent of the Educational Service Region, chapter 122, section 3-10, and appeal to the State Superintendent, chapter 122, section 2-3.8, has so far been closed by administrative fiat to students seeking review of an expulsion. The Superintendents of the ESRs and the OSPI either simply ignore students' petitions for review of a controversy arising from an expulsion, or declare the curious principle that a contested expulsion is not a controversy arising under the School Code. Neither an appellate court nor the Attorney General has yet expressed an opinion.

There remain two alternatives. First is a federal civil rights action under section 1983,¹¹⁵ if there is a fairly flagrant violation of a federal right such as due process (expulsion with no hearing at all)¹¹⁶ or freedom of expression (expulsion for peaceful distribution of an underground newspaper).¹¹⁷ When brought, these actions often succeed. However, Illinois school boards, particularly those in Chicago and areas where legal aid lawyers are located, have been well educated in due process rights and, to a lesser degree, first amendment rights. The student who has a due process hearing and

113. ILL. REV. STAT. ch. 122, §§ 10-22.6(a), (b), (c) (Supp. 1972). See text at note 121, *infra*.

114. ILL. REV. STAT. ch. 110, §§ 264-69 (1971).

115. 42 U.S.C. § 1983 (1970); 28 U.S.C. § 1343 (1970).

116. *Mayo v. Bd. of Educ.*, Civil No. 70-2323 (N.D. Ill., filed Sept. 29, 1970); *Black v. Holt*, Civil No. 71-287 (N.D. Ill., filed Jan. 27, 1971).

117. *Fujishima v. Bd. of Educ.*, 460 F.2d 1355 (7th Cir. 1972); *Scoville v. Bd. of Educ.*, 425 F.2d 10 (7th Cir.), *cert. denied*, 400 U.S. 826 (1970).

is then expelled on incompetent or false testimony or erroneous judgment by a hearing officer often has no federal remedy.

The second way to get review of an expulsion is to file a petition for common law administrative review in the state courts. The student must ask the circuit court for what is in effect a writ of certiorari to the board which expelled him.¹¹⁸ The grounds for such a petition to be sustained—for a writ to issue—are quite narrow: there must be a showing of clear error on the face of the decision. The court will not review or rehear the evidence of gross disobedience or misconduct heard by the board. In the rare case where the record is void of any evidence to sustain the expulsion, the court may order the student returned to school.¹¹⁹

In the entire student rights area there are only a few trial court decisions and virtually no case law outside the federal reports. One explanation is that high school students facing expulsion do not hire lawyers, and those who do will probably never get to court. This last point needs emphasis. Despite the lopsided state of the law and the realities of the power relationships, the appearance of prepared counsel at an expulsion proceeding is a fearsome and formidable bargaining point with all but the most experienced school boards. Board members and district superintendents are terrified of lawsuits, and are often willing to effect a compromise.¹²⁰ De-

118. See *Bruce v. Dep't of Registration and Educ.*, 26 Ill. 2d 612, 187 N.E.2d 711 (1963); *Fenyas v. State Employees' Retirement Sys.*, 17 Ill. 2d 106, 160 N.E.2d 810 (1959); *Funkhouser v. Coffin*, 301 Ill. 257, 133 N.E. 649 (1922).

119. *Waller v. Bd. of Educ.*, 71 L 14865 (Cir. Ct. Cook Cty. 1971). The court issued a preliminary injunction on November 23, 1971.

120. A graphic description of this fear appears in an oft quoted, widely distributed article by George Trietzenberg, now Superintendent of Cook County High School District 218, wherein he cautions against "pushing the panic button" when faced with the Constitution. The article, "How to Live with Due Process," welcomed as a *tour de force* by administrators beleaguered by the Constitution, has the following synopsis:

Within the last decade high school students have gained the same legal prerogatives enjoyed by any citizen under the First and Fourteenth Amendments. Principals have been slow to adapt to the change. Some fear that it will destroy their ability to maintain necessary discipline. Such is not necessarily the case, says Mr. Trietzenberg. He lists pitfalls to guard against if the administrator's prerogatives are to be preserved.

See Trietzenberg, *How to Live with Due Process*, 55 BULLETIN OF THE NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, No. 352 at 61-68 (February 1971).

In an exercise of chillingly efficient legal service to school administrators, one Chicago law firm has prepared a kit of all the legal forms and procedures calcu-

spite the attempts to insulate the boards from lawsuits, there remains an ample quiver of attacks yet to be unleashed by imaginative advocates and their student clients. What follows is a description of the present, still largely unchallenged, shoddy expulsion system.

The Code authorizes Illinois school boards to suspend or expel students guilty of "gross disobedience or misconduct."¹²¹ The law

lated to result in an expulsion which will be airtight against due process attacks. See materials prepared by Scariano & Gubbins, June 1, 1973.

121. ILL. REV. STAT. ch. 122, § 10-22.6(a)(b)(c) (Supp. 1972), reads:

Suspension or expulsion of pupils. (a) To expel pupils guilty of gross disobedience or misconduct, and no action shall lie against them for such expulsion. Expulsion shall take place only after the parents have been requested to appear at a meeting of the board, or with a hearing officer appointed by it, to discuss their child's behavior. Such request shall be made by registered or certified mail and shall state the time, place and purpose of the meeting. The board, or a hearing officer appointed by it, at such meeting shall state the reasons for dismissal and the date on which the expulsion is to become effective. If a hearing officer is appointed by the board he shall report to the board a written summary of the evidence heard at the meeting and the board may take such action thereon as it finds appropriate.

(b) To suspend or by regulation to authorize the superintendent of the district or the principal or dean of students of any school to suspend pupils guilty of gross disobedience or misconduct and no action shall lie against them for such suspension. The board may by regulation authorize the superintendent of the district or the principal of any school to suspend pupils guilty of such acts for a period not to exceed 10 school days. Any such suspension shall be reported immediately to the parents or guardian of such pupil along with a full statement of the reasons for such suspension and a notice of their right to a review, a copy of which shall be given to the school board. Upon request of the parents or guardian the school board or a hearing officer appointed by it shall review such action of the superintendent or principal. At such review the parents or guardian of the pupil may appear and discuss the suspension with the board or its hearing officer. If a hearing officer is appointed by the board he shall report to the board a written summary of the evidence heard at the meeting. After its hearing or upon receipt of the written report of its hearing officer, the board may take such action as it finds appropriate.

(c) To suspend or by regulation to authorize the superintendent of the district or the principal of any school to suspend pupils guilty of gross disobedience or misconduct on the school bus from riding the school bus and no action shall lie against them for such suspension. Such suspension shall continue until it has been reviewed by the school board, or a hearing officer appointed by it. At such review the parents or guardian of the child may appear and discuss such suspension with the board or its hearing officer. If a hearing officer is appointed by the board he shall report to the board a written summary of the evidence heard at the meeting. The board may take such action thereon as it finds appropriate upon the board's hearing or the written report of its hearing officer.

(d) The Department of Mental Health shall be invited to send a rep-

relating to expulsion theoretically requires that the parents of a student be requested to meet with the school board or a hearing officer appointed by the board to discuss the student's behavior. At the meeting the parents will be told of the reasons for expulsion and the date on which expulsion is to take place. Suspension procedures are specified in greater detail in the statute than are expulsion procedures. Students guilty of gross disobedience or misconduct may be suspended by a district superintendent, a principal, or a dean of students for a period not to exceed ten days.

Theoretically, parents of a suspended student must be immediately notified of the suspension, the reasons supporting the action, and their right to a review of the suspending official's actions before the school board or a hearing officer appointed by the board. After such a review, the board may take whatever action regarding the suspension it considers appropriate. In fact, the hearing officer's report may not have been given to the parents and their attorney until the school board meeting, after the meeting, or ever. While no appellate court has held this failure to be a fatal defect in the due process requirement, practitioners faced with this situation should vigorously argue for, and may get, a postponement of the case until another school board meeting. This postponement provides the practitioner with an opportunity to review and a chance to rebut or discredit a hearing officer's adverse report—a leap in judgment most boards are incapable of making since they are predisposed to expel. Secondly, it allows the errant student to spend another two weeks or a month pursuing his or her studies even further into the semester.

There is no question that school boards have the authority to suspend or expel students.¹²² The state has, however, not seen fit to describe in detail the procedures by which students are to be expelled or suspended. Given such latitude, local school boards may and do adopt procedures that do not satisfy the due process requirements set down by the federal courts. Recently, the Illinois statute and the expulsion procedures of a local school board were

representative to consult with the board at such meeting whenever there is evidence that mental illness may be the cause for expulsion or suspension.

122. *Scoville v. Bd. of Educ.*, 425 F.2d 10, 13 (7th Cir. 1970); *Whitfield v. Simpson*, 312 F. Supp. 889, 894 (E.D. Ill. 1970); *Smith v. Bd. of Educ.*, 182 Ill. App. 342, 346 (1913).

unsuccessfully challenged in three separate cases.¹²³ In *Linwood* an expelled student maintained that the terminology "gross disobedience and misconduct" was too vague to satisfy constitutional due process standards. The Seventh Circuit held that the terms "gross disobedience and misconduct" were permissible when the terms served as a basis for a more specific definition of proscribed conduct by the local school board.¹²⁴ The student went on to challenge the constitutional sufficiency of the procedures used in his expulsion. The Peoria Board, however, had provided a detailed scheme of expulsion procedures, which included

timely and adequate notice of the charges, with a reasonable opportunity to prepare for and meet them; an orderly hearing in keeping with the nature of the subject matter involved; the right to be represented by counsel, to call and examine witnesses, to cross-examine the opposing witnesses; and consideration of the evidence by an impartial tribunal with action based thereon.¹²⁵

The student did not receive, but claimed a right to

a public hearing; appointment of counsel at public expense; process to compel the attendance of witnesses; proof of the charges beyond a reasonable doubt; . . . a unanimous decision . . . a hearing under procedures which include rules providing that the student is to be furnished within a reasonable time prior to the hearing with a list of the names and addresses of the witnesses who are to testify, and information with respect to the testimony each will give; providing that the hearing is to be conducted by a panel of impartial persons other than the board members, each of whom will be present during all the testimony; and requiring that the decision is to be made in the form of a written opinion incorporating findings of fact upon which it is based.¹²⁶

Since, as the *Linwood* court stated, "due process in the context here involved is not to be equated . . . with that essential to a criminal trial or juvenile court delinquency proceeding"¹²⁷ the expelled stu-

123. *Linwood v. Bd. of Educ.*, 463 F.2d 763 (7th Cir. 1972); *McGee v. Bd. of Educ.*, Civil No. 71-2030 (N.D. Ill. 1972) (dismissed without opinion); *Whitfield v. Simpson*, 312 F. Supp. 889 (E.D. Ill. 1970).

124. 463 F.2d 763, 768 (7th Cir. 1972). The court, by a feat of logic peculiar to appellate tribunals, distinguished *Linwood* from its prior decision in *Soglin v. Kauffman*, 418 F.2d 163 (7th Cir. 1969) wherein it had declared the University of Wisconsin disciplinary rule which proscribed "misconduct" by students as vague and overbroad and in violation of first and fourteenth amendment rights. 463 F.2d at 767. The successful plaintiff in *Soglin* not only remained in school, but was elected mayor of Madison, Wisconsin in 1972.

125. 463 F.2d at 770.

126. *Id.*

127. *Id.* See also *Madera v. Bd. of Educ.*, 386 F.2d 778 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961).

dent could not claim, under due process, that the procedure used in his expulsion was unconstitutional.¹²⁸

The Chicago Board of Education's approach to the questions of student discipline and due process differs in at least two respects from those taken by other Illinois boards. First, Chicago public school administrators faced with a discipline problem have a number of options unavailable to the enforcers of acceptable behavior in smaller districts. Errant Chicago students can be sent initially to "social adjustment" classes within the same school, then to a tougher social adjustment classroom in another nearby school. From there he may go to a "continuation school" and finally to a residential school (in reality, a jail) and always remain a student of the Chicago school district.¹²⁹

Secondly, the Chicago Board of Education is the subject of a special article in the School Code, chapter 122, section 34-1 *et seq.* which grants certain powers exclusively in the Chicago Board. Included in these specially listed powers is the authority to establish rules and regulations which have the force of ordinances, for the proper maintenance of a uniform system of discipline for both employees and pupils, chapter 122, section 34-19. This authority has been exercised and the Board has promulgated and published its Rules.¹³⁰ Contained therein are Regulations 6.8 and 6.9 which respectively provide for the expulsion and suspension of Chicago Public School students. These Regulations make no reference to the statute which prescribes the due process to be followed in suspension and expulsion proceedings¹³¹ and make no provisions to secure the student's right to constitutional due process. Section 6-8 authorizes expulsion upon a finding that a student is a distinct detrimental influence or unable to profit from further school experience. Section 6.9 authorizes suspension of a student for less than one month for gross disobedience or misconduct.¹³² Notwithstanding the

128. *Linwood v. Bd. of Educ.*, 463 F.2d 763, 770 (7th Cir. 1972).

129. ILL. REV. STAT. ch. 122, §§ 34-117 to 34-129 (1971), *as amended*, (Supp. 1972).

130. RULES OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO (1972).

131. ILL. REV. STAT. ch. 122, § 10-22.6 (Supp. 1972).

132. RULES OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO § 6.9 (1972).

Expulsions of Pupils-Cause. Whenever a pupil in any school is found by the school authorities to be a distinct detrimental influence to the conduct

political realities, the Code did not envision that the Chicago Board could operate wholly within an article 34 vacuum, with no reference whatsoever to the balance of the laws governing Illinois schools. The last paragraph of section 34-18, which sets out the Chicago Board's duties, tentatively acknowledges that

[t]he specifications of the powers herein granted are not to be construed as exclusive, but the board shall also exercise all other powers that may be requisite or proper for the maintenance and the development of a public school system, not inconsistent with the provisions of this Code which apply to all school districts.¹³³

A reasonable interpretation would be that the Chicago Board cannot pass rules which are inconsistent with or in derogation of the law. The Chicago Rules (except for the 30-day suspension, unknown in the Code proper) might be salvaged if the "protections" of the Code were implemented. Such is not the case. In many cases the Chicago Board expels or transfers with no notice or hearing whatsoever.

Unfortunately, the one challenge to the Chicago scheme which has been completed did not reach either the statutory interpretation question or the obvious equal protection challenge arising from the different treatment of Chicago students. In *Betts v. Board of Education of the City of Chicago*,¹³⁴ Goldie Betts, a student, admitted misconduct to a school official. At a subsequent meeting, Betts' mother was told by two school officials that Goldie was to be transferred to a continuation school—an action tantamount to expulsion. On appeal, Ms. Betts raised the equal protection argument for the first time contending that the procedural safeguards afforded her were not comparable to those required by Illinois statutes in areas

of the school, or to be unable to profit or benefit from further experience in his school, he may be transferred to special educational facilities in the school system or may be excused from further attendance, or excluded from school by the General Superintendent of Schools.

Id. § 6.8.

Suspension of Pupils—Cause. For gross disobedience or misconduct a pupil may be suspended temporarily by the principal for a period not exceeding one school month for each offense. Every such suspension shall be reported immediately to the District Superintendent and also to the parent or guardian of the pupil, with a full statement of the reasons for such suspension. The District Superintendent shall have authority to review the action of the principal and to return the suspended pupil.

Id. § 6.9.

133. ILL. REV. STAT. ch. 122, § 34-18 (1971).

134. 466 F.2d 629 (7th Cir. 1972).

other than Chicago. The Seventh Circuit dismissed this argument on the technical grounds that she had failed to raise it at trial and it was *dehors* the record on appeal, but noted that upon remand the district court could entertain such an argument if the disparity in treatment of students threatened with expulsion could not be reasonably related to some legitimate state goal.

Betts further argued that her treatment did not accord with procedural due process. The Court reasoned that since Ms. Betts had admitted to conduct which was gross by any standard (turning in a series of false alarms), the Rules as applied to her case were not unconstitutional on due process grounds. Thus, a full hearing on her guilt or innocence was not essential. An opportunity to present a mitigative argument was required, but the meeting between Ms. Betts' mother and school officials should have been sufficient for this purpose.¹³⁵

On remand to the district court, Judge Julius Hoffman presiding, the *Betts* case was compromised and no final opinion issued. The case raises more questions than it settles, and there are numerous, yet untried, attacks on the Chicago Board of Education's discipline rules. The chilling Kafkaesque language of Rule 6-8 which describes a student "to be a distinct detrimental influence to the conduct of the school, or to be unable to profit or benefit from further experience in his school" fairly cries out for challenge.¹³⁶

The Chicago Parental Schools, which are effectively maximum security prisons to which serious truants are summarily committed for twelve week sentences at Thursday "hearings" in the Cook County Juvenile Court, are likely to be torpedoed pursuant to recent legislation calling for their re-evaluation.¹³⁷

135. *Id.* at 633-34. The court also denied claims that compulsory education laws forbid expulsion, and that unemployed students could not be assigned to continuation schools.

136. One such challenge is the case of *Zehowicz v. Bakalis*, 73 Ch. 3266 is now pending in the Circuit Court of Cook County, County Dept., Chancery Division. See also *P.U.S.H. v. Carey*, 73 C 2522 (N.D. Ill. filed Oct. 2, 1973).

137. ILL. REV. STAT ch 122, § 34-117 (Supp. 1972), amending ILL. REV. STAT. ch. 122, § 34-117 (1971) to read: "There may be established and maintained one or more parental or truant schools. . . ." The former language was "[t]here shall be. . . ." Subsequent sections of this law established a citizen evaluation committee to review the schools, their concept and utility and report to the legislature by early 1974. Administrators hint that the schools may be phased out. At the moment a contract for their operation has been let to Northern Illinois University,

Regarding the general state of the Illinois law of school suspensions and expulsions, the Seventh Circuit has not yet fully defined the specific characteristics of expulsion or suspension procedure that satisfy procedural due process. Expulsion or suspension procedures need not be as formal as those involved in criminal determinations. Some opportunity for hearings upon factual matters and upon arguments in mitigation of punishment are required. While procedures in various school districts may vary, some attention must be given to equal protection aspects of disparate treatment.¹³⁸ The law remains confusing, stacked against the student, and largely irrational, but still conducive to creative manipulation by advocates who seek to vindicate the right of every student to a free public education.

The hearings are too often a sham, but the possibility exists for some objective judgment by the hearing officer if he is unrelated to and insulated from the expelling board. The office of the Cook County ESR from time to time provides hearing officers for suspension and expulsion proceedings. Practitioners whose clients have received notices of expulsion should try vigorously to arrange for the participation of a hearing officer from this source. In the event of a loss, alternative educational services should be demanded and somehow extracted from the victors.

which presumably has some special expertise in an approach to the problem of truancy. The University also needs the use of the CPS parking lot.

138. Some attention should be given to procedural due process criteria being developed in other jurisdictions. On the nature of the notice of hearing given to the student or parent, see *Wright v. Texas S. Univ.*, 392 F.2d 728 (5th Cir. 1968); *Wasson v. Trowbridge*, 382 F.2d 807 (2d Cir. 1967); *Jones v. State Bd. of Educ.*, 279 F. Supp. 190 (M.D. Tenn. 1968), *aff'd*, 407 F.2d 834 (6th Cir. 1969); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967); *Perlman v. Bd. of Trustees*, 9 Cal. App. 3d, 88 Cal. Rptr. 563 (1970); *Sherman v. Hyman*, 180 Tenn. 99, 171 S.W.2d 822 (1942), *cert. denied*, 319 U.S. 748 (1943); *Texarkana Independent School Dist. v. Lewis*, 470 S.W.2d 727 (Ct. Civ. App. Tex. 1971). On the nature of the hearing required in expulsion or suspension actions, see *Madera v. Bd. of Educ.*, 386 F.2d 778 (2d Cir. 1967); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961); *Moore v. Student Affairs Comm.*, 284 F. Supp. 725 (M.D. Ala. 1968); *Barker v. Hardway*, 283 F. Supp. 228 (S.D. W.Va. 1968); *Buttny v. Smiley*, 281 F. Supp. 280 (D. Colo. 1968); *Esteban v. Central Mo. State College*, 277 F. Supp. 649 (W.D. Mo. 1967), *aff'd*, 415 F.2d 1077 (8th Cir. 1969), *cert. denied*, 398 U.S. 965 (1970); *Perlman v. Bd. of Trustees*, 9 Cal. App. 3d 873, 88 Cal. Rptr. 563 (1970); *Goldberg v. Regents of the Univ. of Cal.*, 248 Cal. App. 2d 867, 57 Cal. Rptr. 463 (1967); The 9th Circuit has retreated; *Black Coalition v. Portland School Dist. No. 1*, 484 F.2d 1040 (9th Cir. Sept. 25, 1973).

The very existence of a phenomenon so nihilistic as outright expulsion from the only public schools available in a society committed to universal free education and the compulsory partaking thereof, is symptomatic of the hypocrisy rampant in public institutions generally. High school students perceive it but, in their youth, fail to understand it. Their naivete is shared.

III. THE RIGHTS OF ILLINOIS EDUCATORS

Institutional infringements on the constitutional rights of free expression and due process are not directed solely at students. School teachers, and more recently Illinois school administrators, have stirred up a spate of cases which continue to cause school board members to pine for the good old days when adhesion contracts could be relied upon to withstand the tinkering of the constitutionalists.

This section considers certain rights of educators guaranteed by the fourteenth amendment due process clause and the first amendment guarantee of freedom of expression. There follows a brief consideration of the expanded, but not yet congruent, rights of administrators. Some questions concerning educators' right to organize and strike are considered elsewhere in this *Survey*.¹³⁹

Most of the activity in state and federal courts regarding teachers' rights upon termination¹⁴⁰ fall into two main categories: cases concerning the reasons for the termination, asking whether there was a nexus of causation between the termination and the exercise of rights protected by the first amendment, and cases concerning termination procedure asking whether the teacher was entitled to a hearing under the due process clause of the fourteenth amendment itself, despite the failure of the statute to grant such a right. While litigation concerning the reasons for termination would appear to affect tenured and nontenured teachers nearly equally, litigation concerning procedural due process affects nontenured teachers almost exclusively.¹⁴¹ Not surprisingly, most suits of the second type have

139. See Goldstein, *Labor Law, 1972-73 Survey of Illinois Law*, 23 DEPAUL L. REV. 382 (1973).

140. As used here, "termination" includes both dismissals during a school term and a failure to renew the teaching contract for the following term.

141. Like most states, Illinois accords greater procedural protection to tenured teachers than to their nontenured counterparts. ILL. REV. STAT. ch. 122, §§ 24-11, 24-12 (1971).

been brought by nontenured teachers, though a second factor comes into play. School boards can weed out the mavericks during a new teacher's probation period. For any given year there are probably fewer disgruntled terminations among the army of tenured teachers than among the current crop of first or second year recruits.

*A. Termination Procedures: Due Process Rights*¹⁴²

The Illinois School Code provides that a tenured teacher has the right to a public hearing to be held before the effective dismissal date, to be present with counsel, to cross-examine witnesses and to offer evidence and witnesses in his own behalf.¹⁴³ The hearing is a substantial right and must be fair in all respects.¹⁴⁴ Once a teacher is tenured, a termination in the form of a dismissal during the school term or a failure to renew his contract for the following term, does not preclude the teacher from asserting his right to a statement of reasons and a hearing. No such rights are accorded to nontenured teachers by statute in Illinois,¹⁴⁵ though cautious employers may begin to compile a dossier on new teachers unlikely to be renewed in order to preserve the record. While the written reasons may not be served in all cases, they tend to materialize with an alacrity which is amazing by normal bureaucratic standards, in the face of the new teacher's allegation that the nonrenewal is for thought-crime or speech-crime. If the proper provocative action is taken by the teacher or counsel, some kind of written reasons will almost always issue, the statute notwithstanding.

On June 29, 1972, the United States Supreme Court decided four cases which dealt with the rights of nontenured teachers to receive

142. For a full discussion of this subject, see Kallin, *The Roth Decision: Does the Nontenured Teacher Have A Constitutional Right to A Hearing Before Non-renewal?*, 61 ILL. B. J. 464 (1973).

143. The rules are set out in two long sections of the Code: ILL. REV. STAT. ch. 122, §§ 24-11, 24-12 (1971). According to section 24-11

a tenured teacher is one who has been employed in any district as a full time teacher for a probationary period of two consecutive school terms. The board may extend the probationary period for one additional school term if the teacher did not have one school term of full-time teaching experience prior to the beginning of the probationary period. A nontenured teacher is one who has not met these requirements.

144. *Miller v. Bd. of Educ.*, 37 Ill. App. 2d 451, 186 N.E.2d 790 (1962).

145. ILL. REV. STAT. ch. 122, § 24-11 (1971).

a statement of reasons and a hearing. In *Board of Regents v. Roth*,¹⁴⁶ the Court faced the procedural issues squarely. "The only question presented to us at this stage in the case is whether the respondent had a constitutional right to a statement of reasons and a hearing on the university's decision not to rehire him for another year."¹⁴⁷ Justice Stewart, speaking for the majority, noted that under both Wisconsin law¹⁴⁸ and terms of his contract, Roth secured his interest in employment for one year and nothing more. Therefore, unless Roth could show that the Board's decision not to rehire him deprived him of "liberty" or "property" he was not entitled to a statement of reasons or a hearing under the due process clause of the fourteenth amendment. The nonrenewal did not constitute a deprivation of liberty:

The State, in declining to rehire the respondent, did not make any charge against him that might seriously damage his standing and associations in the community. . . .

Similarly, there is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. . . . Had it done so, this, again, would be a different case. . . .¹⁴⁹

Nor did it constitute a deprivation of property:

Property interests . . . are not created by the Constitution. . . .

[T]he respondent's "property" interest in employment at Wisconsin State University—Oshkosh was created and defined by the terms of his appointment. . . .

They supported absolutely no possible claim of entitlement to re-employment.¹⁵⁰

The Court rendered three other decisions on the same day as *Roth: Perry v. Sindermann*,¹⁵¹ *Orr v. Trinter*¹⁵² and *Shirck v. Thomas*.¹⁵³ *Sindermann* dealt with teachers' rights in a state (Texas) which does not provide a statutory tenure system. In *Orr*, the Court

146. 408 U.S. 564 (1972).

147. *Id.* at 569.

148. WIS. STAT. ANN. § 37.31 (1967). See WIS. STAT. ANN. § 37.31 (Supp. 1973).

149. 408 U.S. 564, 573-74 (1972).

150. *Id.* at 577-78.

151. 408 U.S. 593 (1972).

152. 444 F.2d 128 (6th Cir. 1971), *cert. denied*, 408 U.S. 943 (1972).

153. 447 F.2d 1025 (7th Cir. 1971), *vacated and remanded*, 408 U.S. 940 (1972).

denied certiorari from the Sixth Circuit's decision that a nontenured teacher need not be given reasons or a hearing upon non-retention. In *Shirck* the Court vacated and remanded for further consideration in light of *Roth*, the Seventh Circuit's decision that a nontenured teacher had a right to a bill of particulars and a hearing on non-retention.¹⁵⁴ While the Court's decisions may seem dispositive of the nontenured teachers' rights to a statement of reasons and a hearing, they raise some interesting questions for Illinois practitioners. Under the School Code,¹⁵⁵ first year probationary teachers need not be given reasons or a hearing upon nonrenewal. Second year probationary teachers, however, must be given a statement of reasons. Thus a second year probationary teacher may be able to successfully argue that the tendered reasons engage a favored right, in that they will "seriously damage his standing and associations in the community" or "impose on him a stigma," and thus do not satisfy the requirements for a hearing to afford him the opportunity to clear his name. A number of cases decided since *Roth* have taken this position.¹⁵⁶

In one local case, *Franz v. Board of Education*,¹⁵⁷ the court held that a nontenured teacher had stated a cause of action based on affidavits revealing that, after expending substantial efforts, the plaintiff could not find another teaching job. In *Hadjuk v. Vocational Technical and Adult Education District*,¹⁵⁸ the court stated that the school board would be compelled to provide a nontenured teacher with a hearing where it notified the teacher of reasons for his non-retention, which suggested immorality or irresponsibility or amounted to such a conclusive evaluation of the teacher's professional competence as to injure his good name. In *Hostrop v. Board of Junior College District*, the Seventh Circuit, Judge Castle speaking for the major-

154. For a more detailed treatment of *Roth*, see Note, *Constitutional Law—Procedural Due Process—The Rights of a Non-Tenured Teacher Upon Non-Renewal of His Contract at a State School*, 22 DEPAUL L. REV. 702 (1973), and *Kallin*, *supra*, note 3.

155. ILL. REV. STAT. ch. 122, § 24-11 (1971).

156. *Johnson v. Fraley*, 470 F.2d 179 (4th Cir. 1972) (a nontenured teacher stated a cause of action when he alleged that the nonrenewal placed a stigma upon him); *Wilderman v. Nelson*, 467 F.2d 1173 (8th Cir. 1972) (sufficient if employer's conduct was *likely* to impose a stigma).

157. Civil No. 72-151 (N.D. Ill., August 10, 1972).

158. 356 F. Supp. 33 (E.D. Wis. 1973).

ity, held that "[a] person is deprived of 'liberty' if the state damages his standing in the community by charging him with an unsavory character trait such as dishonesty or immorality."¹⁵⁹

Another question left unanswered by *Roth* is whether the school board, which predictably agreed with the administration's recommendation to terminate, is sufficiently impartial to provide a fair hearing.¹⁶⁰ The court declined to face this issue although it was raised by *amici curiae* briefs filed by both administrators and teachers.¹⁶¹

The Seventh Circuit had stepped where the high court did not tread and in two recent cases has held that nonrenewed educators did in fact have a right to a hearing before an impartial decision maker.¹⁶² A 1973 Second Circuit case, however, restated the oft-quoted dictum that due process does not invariably require the procedural safeguards accorded in a criminal proceeding. Because due process varies with the factual context of the case, absent a showing of actual, rather than potential, bias, the school board will be considered to be sufficiently impartial.¹⁶³

Illinois elementary and secondary teachers narrowly missed gaining a legislative resolution of this issue. Both houses of the General Assembly passed House Bill 311 which sought to amend sections 4-12 and 24-16 of the School Code to require that all teacher removal or dismissal hearings be held before a disinterested hearing officer appointed and paid for by the Superintendent of Public In-

159. 471 F.2d 488, 494 (7th Cir 1972), *cert. denied*, 411 U.S. 967 (1973).

160. *Roth v. Bd. of Regents*, 408 U.S. 564 (1972); *Shirck v. Thomas*, 447 F.2d 1025 (7th Cir. 1971), *vacated and remanded*, 408 U.S. 940 (1972) (teacher is entitled to reasons and a hearing). *Orr v. Trinter*, 444 F.2d 128 (6th Cir. 1971), *aff'd mem.*, 408 U.S. 943 (1972); *Jones v. Hopper*, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970); *Freeman v. Gould Special School Dist.*, 405 F.2d 1153 (8th Cir.), *cert. denied*, 396 U.S. 843 (1969); *Parker v. Bd. of Educ.*, 237 F. Supp. 222 (D. Md.), *aff'd per curiam*, 348 F.2d 464 (4th Cir. 1965) (entitled to neither reasons nor hearing).

161. See generally *Healy v. James*, 408 U.S. 169 (1972); *Finkin, Toward a Law of Academic Freedom*, 22 BUFF. L. REV. 575 (1973); *Pettigrew, Constitutional Tenure: Toward a Realization of Academic Freedom*, 22 CASE W. RES. L. REV. 475 (1971); *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1065 (1968).

162. *Hostrop v. Bd. of Junior College Dist.* 515, 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973); *Kennedy v. Sanchez*, 349 F. Supp. 863 (N.D. Ill. 1972) (3-judge court, *prob. juris. noted, sub nom.*, *Phillips v. Kennedy*, 411 U.S. 915 (1973)).

163. *Simard v. Bd. of Educ.*, 473 F.2d 988 (2d Cir. 1973).

struction, not the local board, as envisioned by the present law. This measure, like several other school bills which threatened to raise the price, and perhaps the quality, of Illinois education a bit higher, fell victim to Governor Daniel Walker's veto.

*B. Free Expression: The Teachers' Right to Criticize
and Keep Working*

The School Code provides that teachers may be removed for "cause."¹⁶⁴ A full discussion of what constitutes cause is beyond the scope of this article, but the school boards are accorded considerable latitude in their determinations. Courts are very hesitant to overturn a board's decision.¹⁶⁵

Until the past decade, courts have generally held that public employment is a privilege rather than a right, and that the first amendment rights of public employees must yield to accommodation when overriding interests of public policy are at stake.¹⁶⁶ Courts tended to weigh the public employer's interests much more heavily than the public employee's first amendment rights. This policy was thoroughly modified when the United States Supreme Court in *Keyishian v. Board of Regents*¹⁶⁷ flatly rejected the premise that public employment may be conditioned upon the surrender of constitutional rights. In *Pickering v. Board of Education*¹⁶⁸ which the Seventh Circuit considers to be the leading Supreme Court case on public employees' constitutional rights,¹⁶⁹ the Court stated that

[t]he problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and

164. ILL. REV. STAT. ch. 122, § 10-22.4 (1971).

To dismiss a teacher for incompetency, cruelty, immorality or other sufficient cause and . . . whenever, in its opinion, he is not qualified to teach, or whenever . . . the interests of the schools require it. . . .

Id.

165. *Last v. Bd. of Educ.*, 37 Ill. App. 2d 159, 185 N.E.2d 282 (1962); *Meredith v. Bd. of Educ.*, 7 Ill. App. 2d 477, 130 N.E.2d 5 (1955). School board decisions are not reviewable under the provisions of the Administrative Review Act. ILL. REV. STAT. ch. 110, §§ 264-79 (1971). Courts review school board decisions, even those allegedly in violation of constitutional rights grudgingly and narrowly.

166. *United Pub. Workers v. Mitchell*, 330 U.S. 75 (1947).

167. 385 U.S. 589 (1967).

168. 391 U.S. 563 (1968).

169. *See Donahue v. Staunton*, 471 F.2d 475, 480 (7th Cir. 1972).

the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.¹⁷⁰

Pickering held, and *Perry v. Sindermann*¹⁷¹ affirmed, that teachers could not be terminated for exercising their first amendment rights. The Court attempted to avoid formulating a *Tinker*-type test in *Pickering*: "Because of the enormous variety of fact situations . . . we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged."¹⁷² Nonetheless, the Court did brush a few broad strokes along which analysis of the controlling interests should run.¹⁷³ Interests to be weighted include: (1) maintaining discipline or harmony among co-workers, (2) need for confidentiality, (3) employee's position may be such that his false accusations may be hard to counter because of the employee's presumed greater access to the real facts, (4) statements which impede the employee's proper performance of an educator's daily duties, (5) statements so without foundation as to call into question an educator's competency to perform his job and (6) a close and personal working relationship calling for personal loyalty and confidence between employee and supervisor. Two key factual issues often entertained by the courts in these cases are, whether the issues upon which the teacher has spoken are of public concern and whether the teacher's statements were knowingly false or recklessly made. Applying the *New York Times Co. v. Sullivan*,¹⁷⁴ standard for defamation of public officials, the Court in *Pickering* held: "[I]n a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."¹⁷⁵

In *Clark v. Holmes*,¹⁷⁶ L. Verdelle Clark, a teacher at Northern Illinois University (NIU), sought damages against certain NIU officials who allegedly wished to penalize him for exercising his right

170. 391 U.S. at 568.

171. 408 U.S. 493 (1972).

172. 391 U.S. at 569.

173. *Id.* See also *Jepsen v. Bd. of Educ.*, 19 Ill. App. 2d 204, 153 N.E.2d 417 (1958) in which the court came closest to committing itself to a given definition of "cause."

174. 376 U.S. 254 (1964).

175. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 574 (1968).

176. 474 F.2d 928 (7th Cir. 1972), *cert. denied*, 411 U.S. 972 (1973).

to freedom of speech. Clark accepted a temporary position as associate professor at NIU to teach an introductory health course for the 1962-63 academic year. In a letter dated April 30, 1963, Clark was offered another temporary position for the 1963-64 academic year. The letter also warned Clark that he should remedy certain deficiencies in his professional conduct:

[H]e counseled an excessive number of students instead of referring them to NIU's professional counsellors; he overemphasized sex in his health survey course; he counselled students with his office door closed; and he belittled other staff members in his discussions with students.¹⁷⁷

The letter was in effect a statement of reasons on which his renewal was conditioned. Clark subsequently discussed these criticisms with the department head. He defended his conduct and stated that he had surveyed his students and found that they wanted sex education and mental health emphasized. He rejected disapproval of his critical remarks as hypocritical and declared that he would not stop, nor would he confine his discussions to his office. In early 1964, Clark was told that he would not be scheduled for any classes for the spring semester, 1963-64.

Clark filed suit in federal district court and at trial urged the court

to instruct the jury to the effect that a public school teacher has a First Amendment right to *teach and say anything he wishes* in classes and to students as long as he does not make statements knowing them to be false or with reckless disregard of their truth or falsity.¹⁷⁸

The instruction was refused and the Seventh Circuit affirmed, holding that the claim must fail for two reasons.

First, Clark construes too broadly the extent of his First Amendment right and thus slights the interest of the State in providing its educational services according to policies it deems proper. . . . Second, Clark ignores the factual differences between his case and a case like *Pickering*. His disputes with his superiors and colleagues about course content and counselling were not "matters of public concern" and involved Clark as a teacher rather than as an interested citizen. [Citations omitted]. Further, Clark has cited no sound authority for his proposition that he had a constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to the proper content of the required health course. . . .¹⁷⁹

Another Seventh Circuit case, *Donahue v. Staunton*,¹⁸⁰ though not

177. *Id.* at 930.

178. *Id.* (emphasis added).

179. *Id.* at 931.

180. 471 F.2d 475 (7th Cir. 1972).

dealing with teachers, balanced closely analogous interests. Joseph Donahue served as Catholic Chaplain at Manteno State Hospital from July, 1964, to December, 1969. He was dismissed by the hospital for making statements which the employer believed contained falsehoods and half-truths which were detrimental to the operation of the hospital and the well-being of the patients. The court found that the questions of mental health care were "matters of public concern" and that at the time of their issuance, Father Donahue's statements were reasonably believed to be true by him and were not knowingly false and recklessly made. Since the hospital could not prove that Donahue's vociferousness hindered him in the performance of his major role, his religious and spiritual duties toward the patients, society's interest in "uninhibited and robust debate" on matters of public concern outweighed those of the state as an employer.

The hospital had also argued that Father Donahue's accusations were so extensive and so critical as to impede the performance of his duties to address professional and lay groups to promote understanding of problems concerning patients and to interpret the hospital's problems and policies. The court did not disagree with this contention. Instead, it found that this was not such a critical responsibility of a chaplain so as to give the state a strong enough interest in interfering with his first amendment rights. The court felt this was especially so since Donahue had been rated on several factors periodically during his employment, but was not rated on this particular factor until May, 1969. To sustain a first amendment claim on the basis of *Clark* and *Donahue*, a teacher's statement must pertain to matters of public concern and must not be knowingly false or recklessly made. Even assuming the conditions are met, it is still theoretically possible for the state to dismiss or refuse to renew the employee, using the guidelines in *Pickering*, if the questioned statements impede the performance of his primary duties so as to give the state a strong enough interest in interfering with his first amendment rights. The court, however, looks askance at chilling preferred freedoms. Once the plaintiff has made a prima facie case, the state's burden looms large.

In *Hetrick v. Martin*,¹⁸¹ a state university failed to renew the contract of a nontenured teacher because her pedagogical style and

181. 480 F.2d 705 (6th Cir. 1973).

philosophy did not conform to the pattern prescribed by the school administration. Ms. Hetrick relied in part on *Healy v. James*,¹⁸² in which the Supreme Court reaffirmed academic freedom as a protected right of teachers. She argued that "teaching methods" should be included in the concept of academic freedom as a protected form of speech, that the first amendment protected her from termination for using teaching methods and adhering to a teaching philosophy well-recognized within the profession.

The Sixth Circuit disagreed:

We do not accept plaintiff's assertion that the school administration abridged her First Amendment rights when it refused to rehire her because it considered her teaching philosophy to be incompatible with the pedagogical aims of the University. Whatever may be the ultimate scope of the amorphous "academic freedom" . . . it does not encompass the right of a nontenured teacher to have her teaching style insulated from review by her superiors when they determine whether she has merited tenured status just because her methods and philosophy are considered acceptable somewhere within the teaching profession.¹⁸³

In *Clark*, the court similarly stated that

it is now clear that academic freedom, the preservation of the classroom as a "marketplace of ideas," is one of the safeguarded rights [citation omitted]. But we do not conceive academic freedom to be a license for uncontrolled expression at variance with established curricular contents and internally destructive of the proper functioning of the institution.¹⁸⁴

To summarize, the Supreme Court in *Healy* made it clear that academic freedom is one of the safeguarded rights. The Sixth Circuit in *Hetrick* and the Seventh Circuit in *Clark* have ruled that expression and subject matter emphasis at variance with established curricular content and teaching methods and philosophy which are incompatible with the pedagogical aims of the school are without the scope of academic freedom. Since teaching methods, deviation from established course content, and similar behavior patterns normally come to light during the first few years of employment, both *Hetrick* and *Clark* dealt with nontenured teachers. It appears, however, that should a tenured teacher radically change his teaching methods or substantially deviate from established course content he, too, might be subject to dismissal.

182. 408 U.S. 169 (1972).

183. 480 F.2d at 709.

184. *Clark v. Holmes*, 474 F.2d 928, 931 (1972), cert. denied, 411 U.S. 972 (1973).

In *Lafferty v. Carter*¹⁸⁵ a Wisconsin federal district court held that the protection afforded a teacher in exercising his right to freedom of expression reaches a suspension, even without loss of pay, as well as to a termination. In *Hajduk v. Vocational Technical and Adult Education District*,¹⁸⁶ the plaintiff contended that the reasons for his nonretention was his criticism of the school board. Ruling on a motion to dismiss by the defendant school board, the court held that "simply stating this contention in his pleadings, as plaintiff does, is sufficient to withstand a motion to dismiss."¹⁸⁷

In *Center School District v. Gieringer*¹⁸⁸ the court held that non-renewal of a nontenured teacher's contract for delivering a report to the teacher's union which disputed the board's financial inability to offer a greater salary increase abridged the teacher's rights of free speech and was impermissible. In some recent decisions, courts have expanded the rights of secondary school teachers to engage in "mild political" expression in the classroom.¹⁸⁹

Finally, though only in the brightest part of the penumbra of free expression, Susan Bravo's case was an important link in the teacher's rights chain. In *Bravo v. Board of Education of the City of Chicago*¹⁹⁰ the district court held that interrupting the pupil-teacher relationship by requiring mandatory maternity leave at the sixth month¹⁹¹ placed an unnecessary and unreasonable burden on the individual rights in play. The employer's interest in the orderly procedure must fall: such a purpose was of insufficient validity and

185. 310 F. Supp. 465 (W.D. Wis. 1970).

186. 356 F. Supp. 33 (E.D. Wis. 1973).

187. *Id.* at 35.

188. 477 F.2d 1164 (8th Cir. 1973), *cert. denied*, 42 U.S.L.W. 3195 (U.S. Oct. 9, 1973).

189. See Note, 86 HARV. L. REV. 1341 (1973). One form of private expression by a teacher which is *not* protected, at least by California courts, is mildly unorthodox sexual dallying, even though engaged in at a private swingers party which happened to be infiltrated by a police officer. The fourth amendment apparently having been temporarily suspended, she was charged with three felony counts and later pleaded guilty to a misdemeanor of outraging public decency. Three years later the state board revoked her teaching credentials, and the California Supreme Court affirmed. *Pettit v. State Bd. of Educ.*, — Cal. 3d —, 513 P.2d 889, 109 Cal. Rptr. 665 (1973).

190. 345 F. Supp. 155 (N.D. Ill. 1962).

191. RULES OF THE BOARD OF EDUCATION OF THE CITY OF CHICAGO § 4.37 (1972).

rationality to overcome the determination by the plaintiff and her students to continue the educational process. The Board did not contend that learning from a pregnant teacher would damage the students.

While it is a concededly optimistic view, the pregnancy phenomenon¹⁹² and its resolution by the *Bravo* court can be read to suggest a principle. Rules of administrative convenience or whim which encroach on the educational process, must fall. Court extension of this principle might be one small chisel to use on the mountain of administrative waste characteristic of large public school systems.

C. *Expansion of Rights from "Teachers" to "Educators": The Administrative Right to Criticize and Keep Working*

In *Hostrop v. Board of Junior College District*¹⁹³ the Seventh Circuit for the first time held that the rights of free expression and procedural due process given to teachers and other public employees extend to administrators and specifically to Prairie State College President Richard W. Hostrop. The court recognized that administrators act as direct agents of their schools and are thereby sufficiently different from teachers as to be subject to a different set of interests and a different test. Nonetheless, administrators are protected by the first and fourteenth amendments and school boards must accord them the same substantive and procedural rights accorded teachers.

In his role as College President, Hostrop had prepared a confidential memorandum requesting his administrative staff to consider certain proposed changes in the college's ethnic studies program. An unknown person made the memorandum public and certain mem-

192. The *Bravo* opinion is an excellent catalog of cases and sources on rights of teachers and students. For other courts which share similar views, see *William v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Buckley v. Coyle Pub. School Sys.*, 476 F.2d 92 (1973). *Contra*, *LaFleur v. Cleveland Bd. of Educ.*, 326 F. Supp. 1208 (N.D. Ohio 1971). Pregnant students have a right to remain in school almost to term, according to a legal opinion of OSPI. See OSPI, FORMAL OPINION No. 4, 1972. If the student chooses, she may claim special education or home instruction, but the decision is the student's and her doctor's, not the school administrator's. Should the courts share the opinion of OSPI, which seems likely after *Bravo*, the traditional rule of excluding pregnant students may fall victim to the Constitution.

193. 471 F.2d 488 (7th Cir. 1972), *cert. denied*, 411 U.S. 967 (1973).

bers of the Board questioned Hostrop's right to make such a proposal. The Board later met and terminated Hostrop's contract without a hearing. The College Board found language in *Pickering*¹⁹⁴ to differentiate between teachers and administrators arguing that

personal loyalty and confidence are necessary for the proper functioning of the working relationship between Dr. Hostrop and themselves, and that since the circulation of the ethnic studies memorandum could have arguably affected this loyalty and confidence, Hostrop can be discharged.¹⁹⁵

The district court agreed with the Board and dismissed Hostrop's complaint.¹⁹⁶ The Seventh Circuit disagreed with the interpretation of *Pickering* offered by the board and the district court and reversed saying

Pickering should not be read to authorize the discharge of a college president merely because he expresses an opinion that could be interpreted as a sign of disloyalty or an undermining of the confidence placed in him. Instead, *Pickering* holds that an employee's speech may be regulated only if a public entity can show that its functions are being substantially impeded by the employee's statements.¹⁹⁷

Absent actual proof of such an impairment, it was improper to dismiss the complaint on first amendment grounds.¹⁹⁸

Turning to the issue of the no-hearing discharge the court next found a denial of procedural due process. Relying on *Board of Regents v. Roth*,¹⁹⁹ the appellate court held that the plaintiff had made a credible showing of deprivation of "liberty" and "property" as defined in *Roth*.²⁰⁰ The finding of deprivation of "liberty" was based on the Board's attack on Hostrop's veracity in its reasons for his discharge. Deprivation of "property" was found in the two remaining years in Hostrop's employment contract. Following *Roth*, the court balanced the Board's interest in maintaining efficiency through the

194. *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

195. 471 F.2d at 492.

196. *Hostrop v. Bd. of Junior College Dist.*, 337 F. Supp. 977 (N.D. Ill. 1972).

197. 471 F.2d at 492.

198. In a footnote the court stated that the district court thought the issue of whether the memorandum was distributed publicly or privately was important because of its view that the first amendment does not protect private communications. This point was not argued on appeal, but the court noted that past decisions have extended the first amendment to protect private statements made by public employees. 471 F.2d at 493 n.13.

199. 408 U.S. 564 (1972).

200. See text accompanying notes 149 and 150, *supra*.

prompt removal of its chief administrator against Hostrop's interest in protecting his first amendment rights and future employment prospects. The Constitution was on the plaintiff's side. The court reversed and ordered a hearing before an impartial tribunal.

In *Washington v. Board of Education*²⁰¹ the plaintiff was terminated as the acting principal of an elementary school. The alleged reason for the termination was his exercise of his first amendment rights on two occasions in a fashion deemed critical by the Board. Washington sued, and the district court dismissed on December 14, 1972, following its decision in *Hostrop*.²⁰² Seven days later *Hostrop* was reversed. The district court refused a motion to modify the judgment in light of a change in the law, and *Washington's* appeal is pending, with oral argument having been set for December 3, 1973. In its brief, the defendant Board admits the expansion of first amendment rights to administrators but denies the basis for terminating Washington. It seems likely the Seventh Circuit will follow its *Hostrop* ruling, thus continuing the extension of constitutional rights to all educators.²⁰³

The law of administrator's rights and, to a lesser extent, teacher's rights is developing in the curious and somewhat anomalous direction whereby the employee can be terminated if he or she cannot maintain a close working relationship with and consistently represent the interests of the employer-board, *unless* the cause for the degeneration in the relationship is criticism related to public issues and protected by the first amendment. Strange as it sounds, educators who foresee difficulty with their employers might be advised to engage in a little or a lot of public criticism of their employers in order to be able to charge that the termination is in retaliation for conduct protected by the first amendment. This also preserves the considerable threat of a federal lawsuit as the time for renewal or termination nears.

201. Civil No. 72-2219 (N.D. Ill., *dismissed*, Dec. 14, 1972).

202. 337 F. Supp. 977 (N.D. Ill. 1972).

203. Coincidentally, a third case very nearly presented itself at the same time when Timuel Black, a respected but vocal administrator in the Chicago City College system, was terminated over differences with Chancellor Oscar Shabat. Black found his remedy in the public and political arena and regained his employ much more quickly and cheaply than either Hostrop or Washington. *Chicago Sun-Times*, July 9, 1973 at 7; and July 28, 1973 at 17.

IV. DEVELOPMENTS IN SPECIAL EDUCATION

In the field of special education, the General Assembly, during the past few years, has created a statutory scheme which is unparalleled in the nation. Articles 14, 14A and 14B of the School Code secure to all exceptional children in Illinois free public educational services appropriate to the needs of each.²⁰⁴ With these statutes in effect, there now exist the laws needed to realize the goal expressed in the Illinois Constitution: ". . . the educational development of all persons to the limits of their capacities."²⁰⁵

Briefly, every public school district must either:

1. Provide specialized services and facilities for all statutory categories of exceptional children; or
2. Provide some categories of facilities and services and join with other districts in a special educational cooperative district to gain access to complimentary services; or if it can do neither 1 or 2, then
3. Send its exceptional children to public or private special education facilities where the exceptional students can secure the educational services appropriate for their needs.²⁰⁶

The district and the state presently share the tuition bill up to \$2,000 (30 percent paid by the district and 70 percent paid by the state) and 1973 amendments to provide for full state payment were vetoed.²⁰⁷ The Superintendent of Public Instruction is empowered to establish elaborate regulations for the identification, classification and placement of exceptional children and for registration, inspection, recognition and approval of public and private schools providing special education services pursuant to section 14-7.02.²⁰⁸ These Regula-

204. ILL. REV. STAT. ch. 122, §§ 14-1.01 to 14-14.01, 14A-1 to 14A-8, 14B-1 to 14B-8 (1971). Article 14 deals with services for children traditionally defined as "handicapped"; physically (§ 14-1.02); emotionally disturbed or maladjusted (§ 14-1.03); learning disabled (§ 14-1.03a); educable mentally handicapped (§ 14-1.04); trainable mentally handicapped (§ 14-1.05); speech defective (§ 14-1.06); and multiply handicapped (§ 14-1.07). Article 14A provides for identification of and special services to gifted children (§§ 14A-1 *et seq.*). Article 14B provides for special education to children of normal intelligence suffering educational handicaps, for example, because of a different language or inadequate preschool or primary training (§§ 14B-1 *et seq.*).

205. ILL. CONST. art. X, § 1.

206. ILL. REV. STAT. ch. 122, §§ 14-4.01, 14-5.01, 14-6.01 (1971).

207. Both houses of the General Assembly have passed House Bill 805 raising the 9-month tuition reimbursement to \$3,000. Like other financing bills, Governor Daniel Walker vetoed it, also.

208. ILL. REV. STAT. ch. 122, § 14-8.01 (1971).

tions were completed and became effective July 1, 1973.²⁰⁹ Like all of the regulations promulgated by the Office of the Superintendent of Public Instruction (OSPI), these are printed and should be available free of charge from the OSPI. Unfortunately, the regulations are too often out of stock or out of print and simply gaining access to a complete set of current regulations is a formidable obstacle to the practitioner. Law libraries do not own and probably could not maintain current sets, and school boards or special education co-op districts and schools often do not have or cannot find their copies. The OSPI could perform a significant service by codifying all of its regulations in one form and make subscriptions available at a minimal cost to interested persons.

The difficulty of access to the regulations is only one of several obstacles facing the smooth and universal application of the laws. The degree to which the law is obeyed and the degree and quality of services available varies immensely throughout the state, often varying within the same county, particularly Cook County, and varying even among the different categories of students receiving special education services in the same district.

The spotty quality of specialized services provides a partial explanation for the use of the term "goal" in article X of the Constitution. Appropriate special education services are several years away, but the legal tools are well aged. It will be necessary to find the money and, to a lesser extent, the know-how to put the law into state-wide effect.

The 1973 OSPI Regulations for special education require that each school district, independently or in cooperation with other school districts, provide a comprehensive program of special education for children between the ages of three and twenty-one who reside in the school district. This requirement is essentially the same as that of the Illinois School Code.²¹⁰

Assignment to a special education program is undoubtedly a welcome benefit to most of the children so classified. Nevertheless, such an assignment tends to stigmatize a child and determine the course of his or her future education in a disturbingly permanent

209. See note 211, *infra*.

210. See ILL. REV. STAT. ch. 122, §§ 14-4.01, 14-1.02 to 14-1.07, 14A-1 to 14A-2, 14B-1 to 14B-2 (1971); and note 211, *infra*.

manner. Thus, while a perceptive assignment to an appropriate special education program can be immensely beneficial to the exceptional child, an insensitive, ill-motivated or premature assignment to special education can be disastrous. An improper classification always creates a self-fulfilling prophecy. The student begins to react to education in the manner expected, that is, as a person with a learning difficulty. Hopefully, such a misclassification would be detected as soon as possible, nevertheless, the interests involved are so critical as to require that considerable attention be given to the problem of misclassification.

The Special Education Rules²¹¹ set out fairly detailed procedures for the identification of exceptional children, placement and programming for them, and review of those decisions on their behalf.²¹² Children identified as candidates for special education programs are given a complete case study evaluation which includes a social development study, a medical history, vision and hearing tests and an educational and psychological evaluation.²¹³ A child whose primary language is not English is to be evaluated in his primary language.²¹⁴ Should the child's evaluation indicate visual, hearing, speech or other physical or mental impairment, a learning disability, an education maladjustment, or a behavioral disorder, the child is eligible for special education.²¹⁵

A parent has the right to request a review of the educational placement of his or her child.²¹⁶ This review is intended to substantiate the requirement for special education and is to be accomplished at a meeting of the parents, their representatives, authors of the placement decision, special education administrators and local school

211. STATE OF ILLINOIS, OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, RULES AND REGULATIONS TO GOVERN ADMINISTRATION AND OPERATION OF SPECIAL EDUCATION (1973) [hereinafter referred to as SPECIAL EDUCATION RULES]. The SPECIAL EDUCATION RULES define the responsibility for special education, provide for its establishment and administration, outline the nature of special education instructional programs and supportive services, provide general procedures for the identification and evaluation of exceptional children and for a review of educational placement. SPECIAL EDUC. RULES art. II, §§ 2.01 to 2.04 (1973).

212. *Id.* arts. X-XI.

213. *Id.* §§ 9.03(1)(a) and (b).

214. *Id.* § 9.05.

215. *Id.* §§ 9.09(1)-(9).

216. *Id.* § 11.01.

district personnel.²¹⁷

To assist them in their review, parents may retain, at their own expense, appropriate professional workers. Both the parents and their consultants are allowed access to information upon which the placement decision was based. Two types of information, however, are kept secret from the parents and their experts:

1. Personal observations of school personnel or case workers having no bearing on the placement, and
2. Test instruments and raw data which will only be released to professional workers of like discipline.²¹⁸

Detailed hearing procedures have been provided by the OSPI lawyers, including a provision for the preservation of a transcribed record.²¹⁹ There is no provision, however, for providing expert consultation, at state expense, for indigent parents. If the parents are unsatisfied with the placement review, they have five days from receipt of the local board's decision to request state level review with personnel of the OSPI.²²⁰ The time for appeal may be extended 30 days.²²¹ Any system of classification has certain dangers and classification in the field of education is routinely and justifiably criticized as unreliable. Tests used in the classification process are never free of some cultural bias. As a result, children of certain cultural groups run the risk of being classified into special educational groupings with a frequency greater than would be expected by a distribution resulting from a culturally unbiased evaluation.

The stigma attached to a special education classification, the consequent denial of "normal" educational experiences and the potential damage which can result from the all too frequent and possibly long-term misclassifications are all eloquent arguments for a system of strict procedural safeguards and checks in the classification process.

The power of the state to classify students into ability groupings (often called "tracks") and special education categories and the machinery for so doing are the subjects of substantial bodies of lit-

217. *Id.* § 11.04.

218. *Id.* §§ 11.06(1) and (2).

219. *Id.* §§ 11.07-11.11.

220. *Id.* § 11.12.

221. *Id.* § 11.13.

erature in both the legal and educational disciplines and are generally beyond the scope of this article. A leading case which catalogs the arguments and issues is *Mills v. Board of Education* where the District Court for the District of Columbia held that the city's "tracking" system was constitutionally defective because it handily directed the black students—the majority of the D.C. school population—into the lowest tracks.²²²

It appears that courts are increasingly receptive to due process challenges to state actions categorizing citizens where the classification has effects which are, in the citizens' view, punitive or at least pejorative and stigmatizing. For example, in *Wisconsin v. Constantineau*,²²³ the statute which authorized the labeling, without notice or hearing, of a citizen as unfit to be served liquor was declared unconstitutional. It is likely that many elements of the public school systems' categorizing machinery are vulnerable to this kind of attack absent the school systems' attempt to provide some due process and review.

While the procedures set out in the Rules at first appear to guarantee adequate due process in a proceeding which should be professional, non-adversary and objectively keyed to the student's best interests, there remain some questionable areas. While parents can theoretically protest with the help of experts (although the cost of experts may exclude low-income parents from this procedure) and seek review of their child's assignment to a special education program, they are not made privy to the hard information at the basis of the decision. The Rules provide:

Prior to the conference, the parents may request a professional worker of their choice and at their expense (including legal counsel) to meet with the appropriate school personnel to discuss the reasons for the placement. The information on which the placement decision was made shall be made available for examination by the parents or their representatives, with the following exceptions:

- 1—Personal observations which in the opinion of the superintendent of the local school district, would have no direct bearing on placement shall not be available for examination nor shall they be introduced at the review conference.

222. *Mills v. Bd. of Educ.*, 348 F. Supp. 866 (D.D.C. 1972).

223. 400 U.S. 433 (1973).

2—Test instruments and raw data shall be reviewed only by a professional worker of like discipline.²²⁴

Thus, the school withholds such data as the superintendent dictates. There is no remedy. Additionally, there is the added burden of hiring an “expert”—perhaps a private psychologist to counter the school psychologist. In fact, the information is sometimes withheld from the experts, and there is no way to police the board.²²⁵ Such confrontations are relatively rare since the experts charge about \$150 or more for these services, and parents with that kind of money and sophistication will likely have made private school arrangements if dissatisfied with their child’s public special education.

Rare is the parent who will or is able to confront the formidable “staffing” scenario at which some special education assignments are made. Most people are frightened by, and remain mincingly respectful to, teachers, principals and school psychologists. The conversation may be heavily jargonized with rhetoric about Johnny’s unique needs and the unseen test results. The unarmed parent and child stand little chance.

The parents’ experience, instincts and opinions are generally not consulted in the classification process,²²⁶ and their full participation in the hearing is precluded without the expenditure of considerable

224. SPECIAL EDUC. RULES § 11.06.

225. The subject of access to records, particularly those used in evaluating students, normal, handicapped, disturbed or whatever is one about which school administrators are sensitive to the point of paranoia. While all student records are routinely shipped to the police, juvenile court, immigration authorities, welfare departments and the Department of Justice, they are never released to parents, or, absent a hard subpoena fight, to students’ attorneys. See ILL. REV. STAT. ch. 122, § 34-18(3) (Supp. 1973); CHICAGO BOARD OF EDUCATION POLICY: DISSEMINATION OF INFORMATION FROM SCHOOL RECORDS INCLUDING CHILD STUDY [Psychological and Psychiatric] RECORDS AND MEDICAL RECORDS, January, 1971.

On the difficulty of viewing any records, even public financial ones, see *Research Study—The Chicago Board of Education and Public Access to Information*, 68 NW. U.L. REV. 363 (1973) wherein it is concluded that the willingness of the Chicago Board to release information generally changes according to its assessment of the requester’s politics and motives.

226. Nowhere in the SPECIAL EDUCATION RULES is there a *requirement* for parental consultation during the classification process prior to the hearing. It is this observer’s experience that, in cases where there is any hint of antagonism during the classification process, the often useful and accurate input of the parents is foregone and reliance is placed on professional mystique. The phenomenon is particularly found in cases where the parents are not from a social or educational level the educator perceives to be lower than his own.

fees for an expert. The upshot of the procedure described in the Rules is a hearing which can easily be perverted so that only the appearance and not the substance of due process is preserved.

Not addressed by the Rules is the obverse situation where a parent actively seeks testing, classification and special educational placement for his or her child, and the school refuses to so act. The only remedy in the face of steadfast opposition or inertia is for the parents to make such pests of themselves as to evoke action. An alternative legalistic approach would be to make a written request for testing evaluation, and, if warranted, placement within a reasonable time. If no action ensues, the parents should attempt an administrative appeal on the theory that the inaction or nonresponse is a decision in "controversies arising under the school law" and thus reviewable by the Superintendent of the Educational Service Region and the State Superintendent.²²⁷ Numerous empirical tests of this approach have produced no reaction whatsoever by the Superintendent of the Educational Service Region and OSPI.

While mandamus is theoretically available, parents would be far better advised to spend the money on private testing, evaluation and placement in an appropriate private school, and then, with the *fait accompli*, request a tuition reimbursement under section 14-7.02. Lawyers, like all other expert consultants, are expensive. This last tactic has been successfully employed by some parents, particularly in the Chicago Public School District where the very weight of the bureaucracy and strained resources make all processes and services slow.

It is unclear at present on whom the burden of finding an appropriate private school legally falls. While myriad consultation and referral resources are theoretically available to parents, and finding the proper programs should be a joint effort with primarily professional input, some school districts take the position that the tender of the \$2000 offer and a list of private schools absolves the public school of further duty to secure placement in an appropriate program.²²⁸ The Chicago Board does this from time to time, particularly to students it has handily categorized "to be a distinct detrimental influence to the conduct of the school, or to be unable to profit

227. ILL. REV. STAT. ch. 122, §§ 3-10, 2-3.8 (1971).

228. *Id.* § 14-7.02.

from further experience in the school."²²⁹

Embryonic attempts to challenge this procedure and to impress a duty upon public schools to *find* the proper program have been fruitless to date. Letters demanding review of these actions at the Educational Service Region and OSPI level as a "controversy arising under the School Code" remain unanswered.

According to the present scheme, two economic considerations obstruct the local district's decision to provide for a student's education in a specialized private school: first, the district would lose one capita in its average daily attendance report and thus one share of its proportional state aid; second, it would have to pay out its 30 percent share of the private school tuition—almost always the \$2,000 maximum.²³⁰ Additionally, the local board must provide the entire nine month fee of \$2000 at the beginning of the school year and then seek the \$1400 reimbursement from the state. At present, these reimbursement payments are running about sixteen months behind.

In 1973 the General Assembly provided for greater subsidy of special education services in the public schools and concurrently sought to amend the private tuition reimbursement law to allow the state to pay the entire \$2000 with no local contribution required.²³¹ The latter attempt failed, but is again on the agenda for the 1974 session. Should it pass and should the laws of basic economics operate, the local district will be more willing to place exceptional students in private schools. Hopefully, this would be true in the case of a student presenting both a behavior problem and possible emotional disorder or other exceptional characteristics. Heretofore, the local board's usual action would be to suspend or expel the student, despite the broad invitation of the suspension-expulsion statute to explore special educational alternatives.²³² Section 14-7.02 presents the potential for far more imaginative approaches to securing and preserving the exceptional Illinois child's right to appropriate education than have yet been tried.

The administration of the tuition reimbursement program is presently an administrative quagmire, the drainage of which has been

229. CHICAGO BD. OF EDUC. RULES § 6.8 (1972).

230. ILL. REV. STAT. ch. 122, § 14-7.02 (Supp. 1972).

231. *Id.* and §§ 14-7.03, 14-13.01 (Supp. 1973).

232. ILL. REV. STAT. ch. 122, § 10-22.6(d) (Supp. 1972) which is set out at n.121, *supra*.

hampered by the need to use successive sets of draft regulations. With the promulgation of the final Regulations on July 1, 1973, some movement toward efficiency will undoubtedly occur. The tuition reimbursement program, now in its fifth year, remains fraught with wrangles and beset by problems, notwithstanding its benefits. There are, however, some fantastic success stories.

Red tape aside, the most serious problem with the section 14-7.02 tuition reimbursement program is the \$2000 limit. It is effectively impossible to run a high quality, private, special education program within the current rules for that amount. The General Assembly this year passed a bill providing a more realistic but still inadequate \$3000 figure. This bill fell victim to a money-saving veto.²³³

On this point a potentially far-reaching class action suit has been filed and is now pending in the Cook County Circuit Court.²³⁴ The plaintiffs are seeking to require full payment of the tuition for the most appropriate special education program without regard to amount. One named plaintiff, a tragically multiply-handicapped boy, attends an extremely specialized residential school of national repute, the price of which is probably \$800 per month or more.²³⁵ The plaintiffs are asking the court to go further than it is probably able to, but the suit is illustrative of a potentially large number of yet untried strategies to secure the educational rights of exceptional children.

Nationally, exceptional students and their parents are just crossing the threshold of the special schoolhouse. Notwithstanding *Rodriguez*, the army of previously unserved or underserved children with special educational needs is beginning to fight and win the battle for recognition and equal educational services. The legislation and litigation in this area will doubtlessly increase.²³⁶ There is a nascent

233. The current costs include not only the huge labor item (certified special education teachers must be paid) but also expensive record keeping and coordination with the public school, and the irrationally expensive proposition of finding a schoolhouse which complies with all state and local building, zoning, fire, licensing, health and political rules. See also H.B. 305, 78th ILL. GEN. ASSEMBLY (1973).

234. *Elliot v. Bd. of Educ.*, No. 73 Ch. 6104 (Cook Cty. filed Oct. 1973).

235. It is interesting to note here the irony of the shipment by the State of Illinois from 1963 to 1972 of state wards (almost all classified "emotionally disturbed") to Texas residential institutions at rates of up to \$710 per month. Some of the children received no schooling whatever. See P. KEENAN, *AN ILLINOIS TRAGEDY: AN ANALYSIS OF THE PLACEMENT OF ILLINOIS WARDS IN THE STATE OF TEXAS* (DePaul University 1973).

236. To date there are no published Illinois court opinions concerning special education and the laws controlling it. There is a small cluster of cases, usually

but viable and growing militancy among parents of exceptional children which has already been noted by the lawmakers. The American dream of universal free public education for all children, even those who "couldn't benefit from education" during darker ages, may finally be realized. It is an idea whose time has come.²³⁷

V. CURRENT MOVES IN THE MONEY GAME AND THE RETREAT
OF EQUAL PROTECTION: A GLANCE

Probably the most critical and regressive development in 1972-73 school law in Illinois or anywhere else in the country was the Nixon Court's 5-4 opinion in *San Antonio Independent School District v. Rodriguez*,²³⁸ which declared that education is not a constitutional right,²³⁹ thus placing the court's stamp of approval on public education financing schemes which permit and perpetuate gross differences in resources and quality. Equal protection is not deemed violated when, as a result of economically dictated racist geography, black, brown and poor white children consistently happen to attend the poorest, lowest quality schools and thus continue to reap the burden of grinding cyclical poverty. Such is the state of the law of the land. The most eloquent criticism came from within the court:

The majority's decision represents an abrupt departure from the mainstream of recent state and federal court decisions concerning the unconstitutionality of state educational financing schemes dependent upon taxable local wealth. More unfortunately, though, the majority's holding can only be seen as a retreat from our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens. The Court does this despite the absence of any substantial justification for

filed by legal aid foundations or clinics wending their way through other trial courts. See, e.g., *Pa. Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279 (1972); *Harrison v. State*, 350 F. Supp. 846 (E.D. Mich., S.D., Oct. 30, 1972).

237. For further information: The OSPI actively solicits inquiries about the Illinois Special Education Programs. For information write Mr. Fred G. Rozum, Assistant Superintendent for Special Educational Programs, OSPI, 525 S. Spring Street, Springfield, Ill. 62706. There are numerous parent and professional groups interested in programs for exceptional students which have joined in the Coordinating Council for the Handicapped Children and the Mental Health Coalition, both at 407 S. Dearborn, Chicago, Ill. 60604. In 1970, the Council published a directory, *Services for Exceptional Children* (\$1.25), listing many special education facilities. All of the Illinois universities with graduate schools of education can provide some information; particularly current in special education is the graduate school at Northeastern Illinois University.

238. 411 U.S. 1 (1973).

239. *Id.* at 75.

a scheme which arbitrarily channels educational resources in accordance with the fortuity of the amount of taxable wealth within each district.

In my judgment, the right of every American to an equal start in life so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record. Nor can I accept the notion that it is sufficient to remit these appellees to the vagaries of the political process which, contrary to the majority's suggestion, has proven singularly unsuited to the task of providing a remedy for this discrimination. I, for one, am unsatisfied with the hope of an ultimate "political" solution sometime in the indefinite future while, in the meantime, countless children unjustifiably receive inferior educations that "may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, 347 U.S. 483, 494 (1954).²⁴⁰

The *Rodriguez* decision abruptly disarmed a phalanx of cases, including *Serrano v. Priest*²⁴¹ where the California Supreme Court held that that state's educational financing system, based on local property taxes which remained at the collection point, was a violation of equal protection. Such an arrangement guaranteed that the rich children attended the best schools while the poor children attended the worst. Within the space of a year and a half, similar suits had been filed in most of the other forty-eight²⁴² states with corresponding systems of school financing.

In *Serrano* the California court held that the right to an education is a fundamental interest and therefore, state laws which allowed discrimination were subject to the "close scrutiny" test of equal protection: "[T]he state bears the burden of establishing not only that it has a *compelling* interest which justifies the law but that the distinctions drawn by the law are *necessary* to further its purpose."²⁴³ The court found that the wealth of the school districts, as measured by their assessed valuations, was the major determinant of educational expenditures and thus ascertained

that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an educa-

240. *Id.* at 70-72 (Marshall, J. dissenting).

241. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

242. See, e.g., *Van Duzart v. Hatfield*, 34 F. Supp. 870 (D. Minn. 1971); *Milliken v. Green*, 203 N.W.2d 457 (Mich. 1973); *Robinson v. Cahill*, 118 N.J. Super. 223, 287 A.2d 187 (1972).

243. 5 Cal. 3d at 597, 487 P.2d at 1249, 96 Cal. Rptr. at 609 (emphasis by the court).

tion in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing. We have concluded, therefore, that such a system cannot withstand constitutional challenge and must fall before the equal protection clause.²⁴⁴

With a seemingly clear principle, sound theory and compelling equities upon which to base their hope and confidence, a group of Mexican-American children from a poor Texas district filed a three-judge district court action attacking the defective quality of their education. Texas public schools are financed from combined state and local tax receipt coffers. The state antes a basic minimum per capita and the local school district produces the balance from *ad valorem* property taxes—a system akin to that of California, Illinois and most other states.

The district court accordingly struck down the Texas scheme²⁴⁵ and the rich districts appealed. Writing for the majority, Justice Powell, a former attorney for a well-financed school board, concluded that the Texas system did not operate to the peculiar advantage of any suspect class and that education is not among the rights explicitly or implicitly protected by the federal Constitution.²⁴⁶ The opinion, and particularly the dissent by Justice Marshall, is required reading for all practitioners in the field of education law. An even battle has suddenly become unbalanced.

The Illinois variant of the question was presented by Niles Mayor Nicholas Blase and Chicago School Board Member Gerald Sbarbaro,²⁴⁷ who, departing from the straight equal protection theory, based their demands on the phrase in the education article of the new constitution: "The state has the primary responsibility for financing the system of public education."²⁴⁸

Illinois' present system of school financing employs a widely used "equalization formula" which has been used in one form or another since the 1930's. The formula has three components: first, the state is to establish a foundation to determine the minimal cost for

244. *Id.* at 589, 487 P.2d at 1244, 96 Cal. Rptr. at 604.

245. *Rodriguez v. San Antonio Indep. School Dist.*, 337 F. Supp. 280 (W.D. Tex. 1971).

246. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 18 (1973).

247. *Blase v. State*, — Ill. 2d —, 302 N.E.2d 46 (1973).

248. ILL. CONST. art. X, § 1.

producing an educational program and then this amount is multiplied by the number of pupils in a particular district; second, each school district, in order to be eligible for state assistance, must set a tax rate on its property owners which is multiplied by the assessed valuation of the district; and third, the amount resulting from Step 2 is subtracted from Step 1 and the state pays the difference.²⁴⁹ The Supreme Court of Illinois found the vehicle for preserving the system's *status quo* by interpreting the quoted section of the Constitution as only a "goal," not a requirement. To support its opinion, the court dug deep into the records of the 1970 Constitutional Convention and dredged up a quote from the proposing delegate (now

249. The Illinois School financing scheme is set out in ILL. REV. STAT. ch. 122, §§ 17-1 *et seq.* (1971). The following example will illustrate the formula and the problem it generates:

FORMULA USED IN TWO DISTRICTS
WHICH DIFFER ONLY IN ASSESSED VALUATION

Step 1	District I	District II
	(Poor)	(Rich)
State Foundation Level	\$ 600	\$ 600
Number of Pupils	× 200	× 200
	\$ 120,000	\$ 120,000
<u>Step 2</u>		
Assessed Valuation	\$10,000,000	\$20,000,000
Rate of District Tax	× .0090	× .0090
	\$ 90,000	\$ 180,000
<u>Step 3</u>		
Result from Step 1	\$ 120,000	\$ 120,000
Result from Step 2	less 90,000	less 180,000
	30,000	—
State Aid	30,000	—
Annual per student expenditure	\$ 600	\$ 300

Thus even with state aid, the children in the poor district will get a significantly cheaper education, that is, the \$600 state minimum. To achieve parity of expenditure per capita, District I would have to tax itself twice the rate of District II. To achieve parity of quality, District I might have to tax itself thrice the rate, since it is a safe assumption that equal educational quality will carry a higher price tag in the poor district, with its older school buildings, greater social problems, higher incidence of teacher turnover and handicapped children, higher costs for security, etc.

It is a widespread and probably correct observation that, given the present size of the educational money pie (with its 5 per cent federal, 40 per cent state, and 55 per cent local ingredients) and assuming no differential for higher metropolitan area costs, any of the equalizing plans suggested, including the 51 per cent idea advanced by Blase and Sbarbaro, would result in a net loss of revenue for every district in Cook County.

senator) Dawn Clark Netsch to the effect that her language which did appear in article X was "not a legally obligatory command to the state legislature."²⁵⁰ The plaintiffs did not regard the loss as total but argued that the suits had served as a catalyst in the General Assembly's decision to increase the state contribution from about 30 percent to 40 percent this year. The state contribution may be 50 percent within four years.²⁵¹

School financing is the subject of an enormous literature and a tumultuous, sometimes irrational, debate. Rivers of ink, mountains of paper and a torrent of words have produced few answers. Secular subsidization of the Catholic school system, the traditional pressure relief valve, seems constitutionally impossible.²⁵² The often proposed idea of a voucher system remains untried in Illinois.²⁵³ Private, alternative and free schools are equally caught in the cost bind. Despite dispensing with a building and its maintenance costs, Chicago's innovative Metro High incurs about the same per student costs as conventional schools, though there may be a significant quality difference. Little more can be said within the scope of this Survey. Perhaps *Rodriguez*, as *Plessy v. Ferguson*²⁵⁴ before it, will not be the final word on the right of all young citizens to equal educational dollars.

VI. THE GREENING OF ILLINOIS SCHOOLS: POSSIBILITIES AND PROMISES

A consistent theme in the Illinois education culture is embodied in the pretention and hope of continued improvement directed toward that elusive commodity, excellence. The constitution itself calls for an efficient system of high quality schools and services so that all

250. SIXTH ILLINOIS CONSTITUTIONAL CONVENTION, 5 RECORD OF PROCEEDINGS 4502 (1972).

251. See Chicago Sun-Times, Sept. 26, 1973, at 62.

252. The General Assembly's most recent attempt to keep the Catholic and other religious affiliated schools open consisted of a \$30 million appropriation for secular textbooks and auxiliary services (P.A. 77-1894); and a plan to reimburse low income families who sent children to parochial schools (P.A. 77-1890). On October 1, 1973, the Illinois Parochial Plan was declared unconstitutional. *Klinger v. Howlett*, No. 45419 (Ill. Sup. Ct., Oct. 1, 1973). Enrollment in the schools operated by the Archdiocese of Chicago is down 31 per cent from 1965 levels.

253. See, e.g., Friedman, *The Voucher Idea—Selling School Like Groceries*, N.Y. Times, Sept. 23, 1973, § 6 (Magazine), at 24.

254. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

persons can develop to the limits of their capacity.²⁵⁵ The theme runs ubiquitously through the public relations literature published by Illinois schools and government.²⁵⁶ The speeches of the present state superintendent, Dr. Michael Bakalis, reflect consistent repetition of the quest for improvement—progress—in the state schools.

Not surprisingly, the subject of improving the quality of education in Illinois schools has surfaced in the regulations. For about two years the OSPI has been issuing re-drafts of the Program for the Education, Recognition and Supervision of Illinois Schools and on July 1, 1973, enacted the final form.²⁵⁷ The program calls for regular evaluation of all Illinois schools and school districts to measure the extent to which they conform to the program's various standards. Depending on the degree of such conformity, the schools will be awarded one of several levels of recognition status.²⁵⁸ If the status is less than full recognition, the inspection team and assistant superintendent for recognition and approval will offer suggestions or requirements concerning the steps necessary to achieve full recognition and approval. If a subsequent inspection does not reveal compliance with the suggestions and standards, non-recognized status, whether probationary or final, could be assigned. If OSPI proceeds to use its power, this latter step could have extremely dire financial consequences; state funds could be cut off. An analogous recognition and approval program is planned for application to all private schools.

The theory is an excellent one, entirely consistent with and conducive to realizing the constitutional goal of "high quality free public schools." The practice, as is often the case with innovative governmental programs administered by largely patronage bureaucracies, falls far short. There are, for example, only token appropriations to execute this state-wide program. The standards themselves, despite a good faith attempt, are either arbitrary and irrational or

255. ILL. CONST. art. X, § 1.

256. See, e.g., STATE OF ILLINOIS, OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, ACTION GOALS FOR THE SEVENTIES: AN AGENDA FOR ILLINOIS EDUCATION 60 (1972). See also STATE OF ILLINOIS, OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, THE ILLINOIS PROGRAM FOR EVALUATION, SUPERVISION, AND RECOGNITION OF SCHOOLS, Circular Series A. No. 160, at iii (1973).

257. STATE OF ILLINOIS, OFFICE OF THE SUPERINTENDENT OF PUBLIC INSTRUCTION, THE ILLINOIS PROGRAM FOR EVALUATION, SUPERVISION, AND RECOGNITION OF SCHOOLS, Circular Series A. No. 160 (1973).

258. *Id.* at 4, 5.

overly broad. Inquiries to the OSPI have failed to produce a single school or district where the process of inspection, criticism, compliance and full recognition has been completed. The quality of Illinois schools and thus, education, has yet to significantly improve as the constitution dictated that it must.

Nevertheless, the idea is established and the OSPI program is still embryonic. If the OSPI can move more quickly, find a few dollars and qualified people to pursue the inspections and exercise its as yet untested but theoretically considerable muscle, the process might work. All persons concerned about students and their education must support the program which shifts the emphasis from taxes, teacher contracts, new construction and disciplinary actions to the quality of the product, which is the *raison d'etre* for public schools. And to date the consciousness and sensitivity about the quality of education on the part of some school board members is inching up to the troglodytic level.

Board members, administrators, teachers, parents, students and practitioners should be aware of and educated about these standards and the considerable OSPI rule-making and enforcement powers. Schools should prepare for and welcome OSPI field inspection teams. Practitioners will then be called upon to find, interpret and avoid or challenge various standards and, no doubt, to perform the lawyer's best trick-gain more time within which to comply. The OSPI, perhaps in the spirit of encouraging a voluntary, cooperative team effort, has been quite lenient in granting such delays.

The process of improving the quality of education through legal dictates alone is probably fated to fail, but the ready availability of a legal structure may allow the Illinois educational establishment to capitalize fully on the efforts of persons determined to view schools from the consumer perspective. Illinois lawyers, amateurs in the field of education, but professionals at shaking down new law, could, by representing students' interests, imbue the process with a certain degree of integrity and a resultant reduction in mutilated spirits.