

STUDENT RIGHTS AND DISCIPLINE

Oregon School Law Conference

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1. School Rules

School districts must adopt “reasonable written rules regarding pupil conduct, discipline and rights and procedures pertaining thereto. Such rules must comply with the minimum standards promulgated by the State Board of Education.” ORS 339.240(2).

The State Board of Education requires districts to adopt “written rules of pupil conduct and discipline,” including standards of freedom of expression, search and seizure, and dress and grooming. OAR 581-021-0050(1).

School rules must have “some reasonable connection with the operation of the public schools.” *Neuhaus v. Federico*, 12 Or App. 314, 319 (1973).

2. Student Freedom of Expression – On Campus & At School Activities

While students do not lose their constitutional right to freedom of expression while in school, their right to expression is not as broad as those of the public. School Districts may restrict the following types of speech:

- a. **Material and Substantial Disruption:** This is the basic test from the *Tinker* case. Student expression may be restricted to prevent a material and substantial disruption of the school environment.
- b. **Plainly offensive speech:** Student expression that is lewd, vulgar, and indecent may be restricted.
- c. **School-sponsored speech:** Schools may restrict school-sponsored speech as long as restriction is reasonably related to legitimate educational concerns. But note that Oregon law grants student journalists extensive free speech rights.
- d. **Promotion of illegal drug use:** Schools may restrict expression that promotes illegal drug use (e.g. can discipline student for banner that reads “Bong Hits 4 Jesus”)
- e. **True threats:** A true threat is not protected expression under the First Amendment.

3. Student Freedom of Expression – Off-campus

- a. Examples of off-campus expression include comments on web sites or writings not circulated at school
- b. True threats – Schools can take action in response to true threats whether made on or off-campus as true threats are not protected speech.
- c. If the expression is not a true threat, the *Tinker* substantial disruption test applies to determine if a school can discipline a student for expression occurring off-campus. Thus, to discipline a student for off-campus expression, the school must be able to demonstrate that the off-campus speech caused a substantial and material disruption of the school environment or created that school officials can forecast with reasonable certainty that the speech created a foreseeable risk of a substantial and material disruption of the school environment.
- d. While courts typically apply the *Tinker* substantial disruption, courts have not been consistent in determining when a school has shown enough of a “substantial disruption” to support imposing discipline
- e. Examples:

The **Third Circuit Court of Appeals** issued two *en banc* decisions finding school districts to have violated students’ First amendment rights by disciplining them for off-campus online speech where the school cannot show the students’ actions would materially and substantially disrupt the work and discipline of the school. *J.S. v. Blue Mountain.*, and *Layshock v. Hermitage Sch. Dist.* (June, 2011). Panels of Third Circuit judges had issued conflicting opinions in these two cases.

• In *Blue Mountain*, administrators suspended two eighth graders for 10 days after the students used home computers in March 2007 to create a MySpace page that described their principal as a sex addict and pedophile. The profile did not identify the principal by name, but included his photograph from the school district’s website and listed his interests as “being a tight ass,” “f***ing in my office,” and “hitting on students and their parents.” According to the 3rd Circuit, Blue Mountain school computers block access to MySpace, so students could have only viewed the profile from off-campus locations. The District argued that the profile disrupted school because two teachers had to quiet their classes as students discussed the profile, and a guidance counselor had to proctor a test so that an administrator could attend meetings between the principal and a suspended student. In addition, the school said that students decorated the lockers of J.S. and K.L. to welcome them back to school following their suspensions, prompting students to congregate in the hallway. The district court acknowledged that J.S. had created the profile at home, and determined that the profile itself did not substantially and materially disrupt school. However, the district court ruled that “because the lewd and vulgar off-campus speech had an effect on-campus,” the school district did not violate J.S.’s First Amendment rights by disciplining her. In affirming the district court on

appeal, the 3rd Circuit opinion in *Blue Mountain* relied on *Tinker v. Des Moines Indep. Cnty. Sch. Dist.*, 393 U.S. 503 (1969), in which the U.S. Supreme Court established that student expression may not be suppressed unless school officials conclude that the conduct “would materially and substantially disrupt the work and discipline of the school.” The majority in *Blue Mountain* said that, although the profile did not substantially disrupt school activity, the suspensions could be upheld because “the profile presented a reasonable possibility of a future disruption” if the principal did not punish its creators.

- In *Layshock*, a senior used his grandmother’s home computer in to create a fake MySpace profile of his school's principal. As with the profile at issue in *Blue Mountain*, the student also included a photograph of the principal from the school district’s website in his mocking profile. The profile said the principal was a “big steroid freak” and a “big whore” who smoked a “big blunt.” The District suspended the student for 10 days and prohibited him from participating in all extracurricular activities, including the graduation ceremony, for the rest of the school year. The parents filed suit and prevailed in district court, and the district appealed. On appeal, the school district did not dispute the district court's finding that the student’s conduct failed to satisfy the *Tinker* standard by creating “a substantial disruption of the school environment.” Instead, the school district argued that the student’s use of the principal’s photograph from the school’s website created a “sufficient nexus” between the profile and the school to permit the district to regulate the student’s off-campus conduct. The district claimed that the profile was vulgar, lewd, and offensive, and therefore not entitled to First Amendment protection when it entered the school community. The school district had not been able to immediately block student access to MySpace on school computers after Layshock created the profile because its technology coordinator was on vacation when the profile was discovered. The 3rd Circuit panel affirmed that Layshock’s suspension had violated his First Amendment rights, stating that Layshock's use of a photograph on the school district website did not constitute “entering the school.” “It would be an unseemly and dangerous precedent to allow the state in the guise of school authorities to reach into a child's home and control his/her actions there to the same extent that they can control that child when he/she participates in school sponsored activities,” Judge Theodore McKee wrote for the panel.

- In the Fourth Circuit, a three-judge panel held that a school district that disciplined a student for off-campus internet activity did not violate the student’s First Amendment free speech rights, nor her procedural due process rights. The panel relied upon *Tinker* to find that the district had authority under the substantial disruption standard because it was reasonably foreseeable that the speech would reach the school. Kara Kowalski created a MySpace page chat group, using her home computer, and named it S.A.S.H. (Students Against Sluts Herpes) and invited about 100 individuals, some of them her fellow students at the high school, to post comments. Several members of SASH posted false and derogatory comments about a student, S.N., that were vulgar and offensive; in addition, one member posted a photo of S.N., altered to make it appear that she had herpes. Kowalski did not post anything regarding S.N., but commented approvingly about many of the derogatory postings. S.N. and her parents reported to the high school officials, asking that they close down the site and punish those students

responsible. Kowalski and other students were interviewed and given an opportunity to present their side of the story. Kowalski was ultimately given a 10-day school suspension and a 90-day social suspension from cheerleading and participation in “Charm Review.” She was found in violation of the school’s bullying policy. Her parents petitioned the school board and had the length of the suspensions cut in half. Although acknowledging the Third Circuit’s recently en banc decisions, the 4th Circuit judges said that the school’s pedagogical interests in teaching “habits and manners of civility” was sufficiently strong to justify the actions of school officials. Sufficient notice was provided through the bullying policy to satisfy due process (advance notice of rules). *Kowalski v. Berkeley County Sch.*, No. 1098 (4th Cir. July 2011).

- In the 8th Circuit, a panel of judges ruled that a school district that suspended a student for off-campus instant message communications with a classmate did not violate the student’s free speech rights because the speech constituted unprotected true threats, and because the “speech” reasonably might lead school authorities to forecast substantial disruption of or material interference with school activities. The student, D.J.M., send an instant message (IM) on his home computer to a classmate on her home computer, saying he was going to get a gun and kill certain students. When the classmate contacted school authorities, they involved law enforcement and D.J.M. was suspended for the rest of the year and referred by the juvenile court of a hospital for psychiatric treatment. The 8th Circuit found that this was a true threat because it was “a statement that a reasonable recipient would have interpreted as a serious expression of an intent to harm or cause injury to another,” and the writer or speaker of the threat had intended to communicate because the statement was made to the object of the purported threat or to a third party. *D.J.M. v. Hannibal Public Sch. Dist.*, No. 10-1428 (8th Cir. Aug. 1, 2011).

- In the fall of 2012, the 8th Circuit also ruled that a federal district court erred in granting two students a preliminary injunction barring a school district from suspending the students for posts to an online blog. The three-judge panel of the 8th Circuit concluded that regardless of whether the speech occurred on-campus or off- campus, the speech should be analyzed under the *Tinker* substantial disruption standard. The court found that the students had failed to show the likelihood of success on the merits of their claim and also failed to show that imposing the suspensions would irreparably harm the students. The students were twin brothers who created a website that contained a blog, which they claimed they set up on their personal computer on their own time, but this was contested by the district. The posts contained a variety of offensive and racist comments as well as sexually explicit and degrading comments about named female classmates. The student body learned about the blog and the boys were suspended for 180 days but allowed to enroll in another school during that period. The court found that the brothers would not suffer irreparable harm in the absence of an injunction because the boys earned academic credit and stayed on track for graduation while attending the alternative school, and any harm from not being able to try out for the band during their suspension was speculative. The court also found that the disruption did not stem solely from a third student’s post, and thus declined to find the discipline a violation of the Communications Decency Act, which states that “[n]o provider or user of an interactive computer service shall be treated

as the publisher or speaker of any information provided by another information content provider.” *S.J.W. v. Lee’s Summit R-7 Sch. Dist.*, No. 12-1727 (W.D. Mo. Oct. 17, 2012)

f. Off-campus writing brought to school will be governed by on-campus rules. *Boim v. Fulton County School District* (11th Cir. 2007). Student’s First Amendment lawsuit dismissed; no violation of right to expression when she was suspended for bringing to campus a notebook with her story in which a student dreams of shooting her sixth-period math teacher. While the student did not show the story to anyone else, she brought the notebook to school and passed it to another student before it was confiscated by a teacher. Court held, “Regardless of the literary merit of Rachel’s narrative, the entry could reasonably be construed as a threat of physical violence, and by taking it to school and failing to control the notebook, Rachel ‘increased the likelihood to the point of certainty’ it would be seen by others,” and therefore her “action ‘clearly caused and was reasonably likely to further cause a material and substantial disruption to the ‘maintenance of order and decorum’ within” the school. *See also, Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 698 (5th Cir. 2004)(student’s forgotten drawing at home not a true threat; not communicated to anyone but brother accidentally brought notebook to school).

4. First Amendment Rights – Student Dress

a. First amendment rights only protect dress that constitutes “expression,” which requires that the student must intend to convey a message by wearing the clothing, and the message must be likely to be understood by observers. Thus, a student wearing saggy pants was not engaged in constitutionally protected expression because his stated reason for wearing the clothes – identification with black culture—was not objectively recognized by those who observed the conduct. *Bivens ex rel. Green v. Albuquerque Public Schools*, 899 F. Supp. 556 (D.N.M. 1995). Student had no right to wear clothes that she thought “looked nice on her” or that she “felt good in,” in violation of the dress code. *Blau v. Fort Thomas Public School District*, 401 F3d 381 (6th Cir., 2005).

b. However, even clothing/dress that communicates a particular message is subject to these restrictions:

1. Any dress reasonably likely to cause a substantial disruption or disturbance (take into account the standards of the community, age of students, any problems previously encountered). Example: a dress code prohibiting clothing that identified any professional sports team or college team violated the First Amendment rights of elementary and middle school students, but not high school students, because of the problems experienced at the high school level with gang affiliations. *Jeglin v. San Jacinto Unified School District*, 827 F. Supp. 1459 (C.D. Cal. 1993). Example: students in a Tennessee high school who wore T-shirts depicting the Confederate flag were subject to discipline under a dress code that prohibits clothing that “causes disruption to the educational process”; the school reasonably believed that disruption might result because of racial tensions during recent school years that required the stationing of law

enforcement officers at the school. *D.B. v. Lafon*, No. 06-5982 (6th Cir. Feb. 21, 2007). There have been recent controversies over the wearing of rosary beads as they have become symbols of gang affiliation.

2. Any dress that is “vulgar,” regardless of its potential for disruption. Although courts have left it up to school districts to define what is “vulgar,” local community standards have influence. Generally, dress that is too revealing or sexual is included.

3. Any dress that interferes with the school’s educational mission. Clothing that interferes with the school’s ability to teach its curriculum is not protected by the First Amendment. Thus, mottos and ad messages regarding drugs and alcohol can be prohibited as contrary to school curriculum. A school’s prohibition of a T-shirt displaying images of drugs and alcohol has been approved because it was not political speech; however, a school district violated a student’s free speech rights when it disciplined him for wearing a T-shirt critical of President Bush (referring to him as “Chicken-Hawk-in-Chief” and featuring drug and alcohol related images and text that alluded to his alleged past drug and alcohol abuse) . The Second Circuit Court of Appeals found that the student’s “speech” was governed by *Tinker*, rather than *Fraser* or *Hazelwood*, because his speech was neither school-sponsored nor lewd, vulgar, indecent, or plainly offensive. Disciplinary action was therefore ordered stricken from school records of middle school student. *Guiles v. Marineau*, 461 F.3d 320 (2d Cir., Aug. 30, 2006).

4. Any dress that poses health and safety risks. This includes special restrictions in classes such as home economics or auto shop, requirements that shoes and socks be worn.

5. Participation in extracurricular activities or performances can be conditioned on special rules regarding dress and grooming (no facial hair, special dress for concerts, etc.)

6. Schools may adopt school uniforms and require students to wear only standard clothing items.

5. First Amendment Rights – Freedom of Religious Expression

--The First Amendment protects individual religious freedom, but prohibits “establishment” of religion by the school as an arm of the government.

--Individual religious expression at school is limited only by the student’s obligation to engage in educational activities determined by the teacher and the school. Examples: praying in class, Bible reading during free reading time, individual prayers before games must be permitted if they do not interfere with instruction.

--Schools must take action to avoid student coercion in matters of religious expression. Examples: group prayer before the game led by coach.

--Students' right to distribute material at school to fellow students, staff must not be limited based on religious content, but can be limited to appropriate time, place and manner.

--Students have the right to conduct religious gatherings during time when other non-curricular-related activities are allowed. Examples: Rally 'Round the Flagpole observances, student religious clubs. Such clubs must be provided with equal access to the school newspaper, intercom, bulletin boards, etc. Equal Access Act, 20 U.S.C. section 4071 et. seq.; *Board of Educ. of Westside Comm. Schools v. Mergens*, 496 U.S. at 226 (1990). In addition, the Supreme Court has held that the First Amendment requires schools to allow equal access to their facilities. *Good News Club v. Milford Cent. Sch.*, 533 US 98 (2001).

--Oregon courts turned back the challenge by a mother of an atheist student, claiming that a Portland elementary school allowed Boy Scouts to make recruiting presentations to students at school during school hours, and this violated the boy's state constitutional rights and ORS 659.850 because the Boy Scouts limit membership to those who profess belief in a god. The court found that the school policy regarding organizations' access to schools was neutral with regard to religion. *Powell v. Bunn (Powell I)*, 185 Or App 334 (2002). The Supreme Court, ruling only on the basis of ORS 659.850, found that the District did not violate the statute because it merely allowed a community group to provide nondiscriminatory information (which did not mention the Scout's requirement that all members profess a belief in a theistic God) to parents and students, who may then voluntarily decide whether to be involved in such activities. (*Powell II*) 341 Or 306 (2006).

--The Fourth Circuit previously ruled that the school district's denial of a request by a religious group (CEF) to distribute flyers promoting the group's after-school "Good News Club" constituted impermissible viewpoint discrimination. A revised policy was also found unconstitutional, although it placed no restrictions on the content of materials distributed in class but limited distribution to the District itself, other state and federal agencies, PTAs, licensed day care providers on-campus, and non-profit youth sports leagues. Such "unfettered discretion" to deny access to the forum for any reason fails to provide sufficient safeguards to prevent viewpoint discrimination. *Child Evangelism Fellowship of Maryland v. Montgomery County Public Schools*, 457 F.3d 376 (4th Cir. 2006).

--School-sponsored prayers are prohibited at graduation ceremonies, before sports events, etc. due to the Establishment Clause. A formal prayer as part of high school graduation exercises violated Article I, sections 2 and 5 of the Oregon Constitution. *Kay v. David Douglas Sch. Dist. No. 40*, 79 Or. App. 384, 393 (1986), rev'd on other grounds, 303 Or 574 (1987). Enforcement of these prohibitions does not violate students' freedom of speech, according to the Ninth Circuit Court of Appeals. *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1095 (9th Cir. 2000), see also *Lassonde v. Pleasanton Unified School Dist.*, 320 F.3d 979, 985 (9th Cir. 2003). Schools must allow speakers to make personal references to religion, but proselytizing statements are prohibited.

--The Third Circuit held that a school lawfully prohibited mother of kindergarten student from reading Bible passages during student's show and tell. The student was allowed to include references to church on a poster about himself, but reading Bible passages to the class would violate the Establishment Clause. The court noted that Some classroom discussion of religion or religious practices may be consistent with appropriate curricular standards, but classroom speech promoting religion or specific religious messages presents special problems for educators. The court also noted that the age of the students was relevant to the analysis: "The age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise." *Busch v. Marple Newton School District* (3rd Circuit, June 1, 2009).

-- In *Nakashima v. Board of Education*, 344 Or. 497, 185 P.3d 429 (2008), the Oregon Supreme Court clarified the standard that is to be used in determining whether a public school program is "fair in form but discriminatory in operation" so that it violates Oregon's anti-discrimination statutes. At issue was an attempt by Portland Adventist Academy (PAA) to get the Oregon School Activities Association to alter the schedule of the 2A State High School Boys' Basketball Tournament so that its basketball team would not be required to compete on their Sabbath. The Supreme Court remanded the case to the Oregon State Board of Education for it to determine whether the challenged scheduling policy that adversely impacts PAA is "reasonably necessary" to the successful administration of the Tournament.

-- Students who cannot attend class on a particular day because of religious beliefs must be excused from attendance and allowed to make up any missed assignments or examinations and the day cannot be counted as an unexcused absence. OAR 581-021-0046(1), (5), (7).

6. Fourth Amendment Rights

--The general rule under U.S. Constitution: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) requires that the search need not be supported by "probable cause," (which is the standard for obtaining a search warrant), but rather that it be reasonable under the circumstances at its inception, and any further extension of the search was reasonable, based upon evidence initially discovered.

--Oregon Constitution: Oregon Supreme Court held in 2011 that when school officials have a reasonable suspicion, based on specific and articulable facts, that an individual student possess illegal drugs on school grounds, they may respond to the immediate risk of harm created by the student's possession of the drugs by the searching the student without first obtaining a warrant.

- Cannot rely on generalizations about suspected drug use or on information that is not specific or current
- Court left open question of whether a present threat to student safety is necessary to justify a search on reasonable suspicion
- Court reversed Oregon Court of Appeals which had held probable cause would be required

State ex rel Juvenile Dept. of Clackamas County v. M.A.D. (June, 2010).

Requirements for a Legal Search under *T.L.O.* and progeny :

In order to legally search a student and/or his personal effects (including clothing, backpack, etc.), such a search must be **reasonable**.

- 1. The search must be justified in its inception = there are reasonable grounds to suspect that the search will turn up evidence of a violation of the law or school rules.**
- 2. The search must be reasonable in scope to the circumstances = the manner in which the search is conducted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.**
- 3. For a search to be reasonable, there must be individualized suspicion of wrongdoing; that is, the school employee must have a reasonable basis to believe that the specific student in question violated a law or school rule.**
- 4. Potential Oregon requirement: For search to be reasonable, search must be in response to immediate risk of harm posed by student (e.g. weapon, drug possession)**

Situations in Which a Search Need Not Be Reasonable

- 1. The student consents to the search.** If the student agrees to the search, or offers to be searched, it is not necessary to show that there was a reasonable basis for the search. However, the search could not go beyond the scope of the consent given without having a reasonable basis. The consent must be clear and unequivocal, and cannot be given under duress.
- 2. The search is a general search of areas under the school's control rather than of students.** Schools are allowed to conduct searches of property under their control. However, if those general sweeps are going to result in search of students or their possessions, then the search must be reasonable as described above.
- 3. The search is minimally intrusive.** Schools may search all students, without reasonable individualized suspicion, when the search is not invasive in nature. The most common example is the use of metal detectors at school entrances.
- 4. Exigent or emergency circumstances exist.** A school employee may not need to have individualized suspicion when the immediate safety of the school and/or students is at risk.
- 5. An object is in plain view.**

Examples and Issues:

--*Safford v. Redding* -- On an 8-1 vote, the U.S. Supreme Court decided that officials of an Arizona middle school exceeded the Fourth Amendment when - acting on an unspecific tip of

unknown reliability - they forced 13-year-old student to stretch out her underwear so an assistant principal could check for contraband over-the-counter pills. The Court ruled the school district failed to meet both prongs of the *T.L.O.* standard: The tipster's information - that Redding possessed nonprescription painkillers while at school - was of unknown vintage, making it unreasonable to assume she was carrying them on the day of the search. And the school's stated rationale - attempting to prevent dangerous overdoses by drug abuses - did not justify looking in a place where a harmful quantity of pills could not realistically be concealed.

--School property used by students (such as a locker) may be searched at any time without any individualized suspicion, as long as students are informed in advance. Ideally, when they receive a lock or combination, students sign a statement acknowledging that they are aware that their property (such as a book bag or backpack or purse) left in a locker can be searched at any time.

--Private vehicles brought onto the campus by a student can be searched at any time if the student's application for a parking permit includes an acknowledgement that the vehicle may be opened if there is a reasonable basis for believing that it might contain contraband. Fourth Amendment did not prohibit police from using a drug detection dog to sniff the exterior of students' unoccupied cars without reasonable individualized suspicion of the presence of drugs. The ensuing search of the vehicle after the dog alerted to it was governed by the reasonableness test rather than a probable cause test because the search was initiated and conducted solely by school officials, while police supported these efforts at the request of school officials. *Myers v. Indiana*, 830 N.E. 2d 1154 (2005) (U.S. Supreme Court declined review).

--Use of drug dogs: random canine sniffing of lockers, book bags, backpacks, hallways, buses, and parking lots is allowed. A dog sniff of a student is a search if it involves close physical proximity.

--A police officer employed by the local police department or by the school may search a student under the *T.L.O.* standard if done at the request of and in conjunction with school officials. The exclusionary rule does not prohibit the use of information gathered unconstitutionally in school disciplinary proceedings. *T.M.M. v. Lake Oswego School Dist.*, 198 Or App 572, 578 (2005) (student claimed violation of right to counsel and privilege against self-incrimination when school officials questioned him). However, information gathered unlawfully during a school investigation that is turned over the law enforcement authorities and used in a juvenile court delinquency proceeding is subject to exclusion. *See State ex rel Juv. Dept. v. Finch*, 144 Or App 42 (1996).

--Mandatory random drug testing as a condition of participation in student athletics has been found constitutional in *Vernonia v. Acton*, 115 S.Ct. 2386 (1995), where there was a substantial problem with drug use among athletes and where less invasive measures had not proven successful in reducing drug use among students. This case holding has been extended to students participating in other extracurricular activities, as well, even in the absence of evidence of a particular drug problem in school or of particular danger to students participating. *Bd. Of Educ. v. Earls*, 536 US 822 (2002). *But see Weber v. Oakridge School District 76*, 184 Or App

415 (2002) (under Oregon constitution, required drug testing for student athletes did constitute a “search” but a warrant was not required because the search was “administrative.”)

--Use of evidence of drug violation at an extracurricular event: The Oregon federal district court refused to grant an injunction to force the District to allow a senior to participate in graduation exercises after she was expelled for use of marijuana in a motel during an overnight stay in conjunction with a softball tournament. The court found that the tournament was a school-sponsored event, even though held during spring break, and found no basis for the student’s contention that the high school treated boys more leniently than girls in dealing with drug and alcohol violations. *Bailey Jackson v. Rainier School District* (June, 2011).

7. Searches by police or DHS of students relating to child abuse allegations:

The 9th Circuit Court of Appeals ruled that a police officer cannot interview a student at school regarding child abuse without a warrant, probable cause, exigent circumstances or parental consent. Similarly, the court suggested that a DHS caseworker must have a court order prior to interviewing a student at school, unless the parent consents to the interview. *Greene v Camreta*, (9th Cir. Dec. 10, 2009). The U.S. Supreme Court accepted review of this case, but vacated the decision because the case was moot, since the student was by then in Florida and about to turn 18. This left unanswered the question of whether Greene’s 4th Amendment rights to be free of unreasonable search and seizure were violated.

In this case, a caseworker was notified of allegations regarding the sexual abuse of two children by their father. He was assigned to assess the girls’ safety. Upon learning that the father was being released from custody, he became concerned for the girls’ safety. He interviewed one of the girls at her elementary school, and a law enforcement officer was present for the interview. The mother sued the caseworker and the law enforcement officer alleging a Fourth Amendment violation because the in-school interview was conducted without a warrant, parental consent, probable cause, or exigent circumstances. The mother’s claims against the school district and school counselor were dismissed.

The 9th Circuit Court of Appeals held that the seizure was unlawful because it was not based on probable cause. The interview constituted a seizure, which must be reasonable to be lawful. Reasonableness depends on the evidence supporting the government’s desire to seize someone. Generally, the government must show enough evidence to create probable cause. The court held that a caseworker’s belief that the girls’ safety was in danger did not constitute probable cause.

The school-setting exception to the probable cause requirement does not apply when a caseworker and police officer seize a student in the school setting. In the school setting, if a teacher or school official seizes a student to maintain discipline on school grounds, then the justification for the seizure can be something less than probable cause. The lower standard did not apply in this case because the students were not seized by teachers or school officials to maintain discipline on school grounds.

8. Police interviews of minor students at school

The U.S. Supreme Court held in 2011 that police who questioned a minor student at school about a string of robberies not involving the school were required to give the student a Miranda warning before they could use the results of the boy's confession. An assistant principal was in attendance and encouraged the student to "do the right thing." *J.D.B. v. North Carolina* (June, 2011).

9. Relevant Oregon Statutes & Rules on Student Discipline

ORS 339.240 Rules of student conduct, discipline and rights; duties of state board and district school boards.

(1) The State Board of Education in accordance with ORS chapter 183 shall adopt rules setting minimum standards for pupil conduct and discipline and for rights and procedures pertaining thereto that are consistent with orderly operation of the educational processes and with fair hearing requirements. The rules shall be distributed by the Superintendent of Public Instruction to all school districts.

(2) Every district school board shall adopt and attempt to give the widest possible distribution of copies of reasonable written rules regarding pupil conduct, discipline and rights and procedures pertaining thereto. Such rules must comply with minimum standards adopted by the State Board of Education under subsection (1) of this section.

(3) Every district school board shall enforce consistently and fairly its written rules regarding pupil conduct, discipline and rights. This subsection does not apply to a pupil who is eligible for special education as a child with disabilities under ORS 343.035.

ORS 339.250 Duty of student to comply with rules; discipline, suspension, expulsion, removal and counseling; written information on alternative programs required.

(1) Public school students shall comply with rules for the government of such schools, pursue the prescribed course of study, use the prescribed textbooks and submit to the teachers' authority.

(2) Pursuant to the written policies of a district school board, an individual who is a teacher, administrator, school employee or school volunteer may use reasonable physical force upon a student when and to the extent the individual reasonably believes it necessary to maintain order in the school or classroom or at a school activity or event, whether or not it is held on school property. The district school board shall adopt written policies to implement this subsection and shall inform such individuals of the existence and content of these policies.

(3) The district school board may authorize the discipline, suspension or expulsion of any refractory student and may suspend or expel any student who assaults or menaces a school employee or another student. The age of a student and the past pattern of behavior of a student shall be considered prior to a suspension or expulsion of a student. As used in this subsection "menace" means by word or conduct the student intentionally attempts to place a school employee or another student in fear of imminent serious physical injury.

(4)(a) Willful disobedience, willful damage or injury to school property, use of threats, intimidation, harassment or coercion against any fellow student or school employee, open defiance of a teacher's authority or use or display of profane or obscene language is sufficient cause for discipline, suspension or expulsion from school.

(b) District school boards shall develop policies on managing students who threaten violence or harm in public schools. The policies adopted by a school district shall include staff reporting methods and shall require an administrator to consider:

(A) Immediately removing from the classroom setting any student who has threatened to injure another person or to severely damage school property.

(B) Placing the student in a setting where the behavior will receive immediate attention, including, but not limited to, the office of the school principal, vice principal, assistant principal or counselor or a school psychologist licensed by the Teacher Standards and Practices Commission or the office of any licensed mental health professional.

(C) Requiring the student to be evaluated by a licensed mental health professional before allowing the student to return to the classroom setting.

(c) The administrator shall notify the parent or legal guardian of the student's behavior and the school's response.

(d) District school boards may enter into contracts with licensed mental health professionals to perform the evaluations required under paragraph (b) of this subsection.

(e) District school boards shall allocate any funds necessary for school districts to implement the policies adopted under paragraph (b) of this subsection.

(5) Expulsion of a student shall not extend beyond one calendar year and suspension shall not extend beyond 10 school days.

(6)(a) Notwithstanding subsection (5) of this section, a school district shall have a policy that requires the expulsion from school for a period of not less than one year of any student who is determined to have:

(A) Brought a weapon to a school, to school property under the jurisdiction of the district or to an activity under the jurisdiction of the school district;

(B) Possessed, concealed or used a weapon in a school or on school property or at an activity under the jurisdiction of the district; or

(C) Brought to or possessed, concealed or used a weapon at an interscholastic activity administered by a voluntary organization approved by the State Board of Education under ORS 339.430.

(b) The policy shall allow an exception for courses, programs and activities approved by the school district that are conducted on school property, including but not limited to hunter safety courses, Reserve Officer Training Corps programs, weapons-related sports or weapons-related vocational courses. In addition, the State Board of Education may adopt by rule additional exceptions to be included in school district policies.

(c) The policy shall allow a superintendent to modify the expulsion requirement for a student on a case-by-case basis.

(d) The policy shall require a referral to the appropriate law enforcement agency of any student who is expelled under this subsection.

(e) For purposes of this subsection, "weapon" includes a:

(A) "Firearm" as defined in 18 U.S.C. 921;

- (B) “Dangerous weapon” as defined in ORS 161.015; or
- (C) “Deadly weapon” as defined in ORS 161.015.

(7) The Department of Education shall collect data on any expulsions required pursuant to subsection (6) of this section including:

- (a) The name of each school;
- (b) The number of students expelled from each school; and
- (c) The types of weapons involved.

(8) Notwithstanding ORS 336.010, a school district may require a student to attend school during nonschool hours as an alternative to suspension.

(9) Unless a student is under expulsion for an offense that constitutes a violation of a school district policy adopted pursuant to subsection (6) of this section, a school district board shall consider and propose to the student prior to expulsion or leaving school, and document to the parent, legal guardian or person in parental relationship, alternative programs of instruction or instruction combined with counseling for the student that are appropriate and accessible to the student in the following circumstances:

- (a) When a student is expelled pursuant to subsection (4) of this section;
- (b) Following a second or subsequent occurrence within any three-year period of a severe disciplinary problem with a student;
- (c) When it has been determined that a student’s attendance pattern is so erratic that the student is not benefiting from the educational program; or
- (d) When a parent or legal guardian applies for a student’s exemption from compulsory attendance on a semiannual basis as provided in ORS 339.030 (2).

(10) A school district board may consider and propose to a student who is under expulsion or to a student prior to expulsion for an offense that constitutes a violation of a school district policy adopted pursuant to subsection (6) of this section, and document to the parent, legal guardian or person in parental relationship, alternative programs of instruction or instruction combined with counseling for the student that are appropriate and accessible to the student.

(11) Information on alternative programs provided under subsections (9) and (10) of this section shall be in writing. The information need not be given to the student and the parent, guardian or person in parental relationship more often than once every six months unless the information has changed because of the availability of new programs.

(12)(a) The authority to discipline a student does not authorize the infliction of corporal punishment. Every resolution, bylaw, rule, ordinance or other act of a district school board, a public charter school or the Department of Education that permits or authorizes the infliction of corporal punishment upon a student is void and unenforceable.

(b) As used in this subsection, “corporal punishment” means the willful infliction of, or willfully causing the infliction of, physical pain on a student.

(c) As used in this subsection, “corporal punishment” does not mean:

(A) The use of physical force authorized by ORS 161.205 for the reasons specified therein; or

(B) Physical pain or discomfort resulting from or caused by participation in athletic competition or other such recreational activity, voluntarily engaged in by a student.

ORS 161.015 General definitions. [Expulsion statute references these definitions of weapon]

(1) “Dangerous weapon” means any weapon, device, instrument, material or substance which under the circumstances in which it is used, attempted to be used or threatened to be used, is readily capable of causing death or serious physical injury.

(2) “Deadly weapon” means any instrument, article or substance specifically designed for and presently capable of causing death or serious physical injury.

ORS 339.252 Child with disability continues to be entitled to free appropriate public education if removed for disciplinary reasons; due process procedures.

(1) As used in this section, “child with a disability” has the meaning given that term in ORS 343.035.

(2) A child with a disability continues to be entitled to a free appropriate public education if the child has been removed for disciplinary reasons from the child’s current educational placement for more than 10 school days in a school year.

(3) A disciplinary removal is considered a change in educational placement and the school district shall follow special education due process procedures under ORS 343.155 (5) if:

(a) The removal is for more than 10 consecutive school days; or

(b) The child is removed for more than 10 cumulative school days in a school year, and those removals constitute a pattern based on the length and total time of removals and the proximity of the removals to one another.

(4) A child with a disability shall not be removed for disciplinary reasons under subsection (3) of this section for misconduct that is a manifestation of the child’s disability, except as provided under ORS 343.177.

(5) Notwithstanding ORS 339.250 (9) and (10), a school district shall provide a free appropriate public education in an alternative setting to a child with disabilities even if the basis for expulsion was a weapon violation pursuant to ORS 339.250 (6).

(6) School personnel may consider any unique circumstances on a case-by-case basis when determining whether to order a change in placement for a child with a disability who violates a code of student conduct.

ORS 339.315 Report required if person has possession of unlawful firearm or destructive device; immunity; law enforcement investigation required.

(1)(a) Any employee of a public school district, an education service district or a private school who has reasonable cause to believe that a person, while in a school, is or within the previous 120 days has been in possession of a firearm or destructive device in violation of ORS 166.250, 166.370 or 166.382 shall report the person’s conduct immediately to a school administrator,

school director, the administrator's or director's designee or law enforcement agency within the county. A school administrator, school director or the administrator's or director's designee, who has reasonable cause to believe that the person, while in a school, is or within the previous 120 days has been in possession of a firearm or destructive device in violation of ORS 166.250, 166.370 or 166.382, shall promptly report the person's conduct to a law enforcement agency within the county. If the school administrator, school director or employee has reasonable cause to believe that a person has been in possession of a firearm or destructive device as described in this paragraph more than 120 days previously, the school administrator, school director or employee may report the person's conduct to a law enforcement agency within the county.

(b) Anyone participating in the making of a report under paragraph (a) of this subsection who has reasonable grounds for making the report is immune from any liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making or content of the report. Any participant has the same immunity with respect to participating in any judicial proceeding resulting from the report.

(c) Except as required by ORS 135.805 to 135.873 and 419C.270 (5) or (6), the identity of a person participating in good faith in the making of a report under paragraph (a) of this subsection who has reasonable grounds for making the report is confidential and may not be disclosed by law enforcement agencies, the district attorney or any public or private school administrator, school director or employee.

(2) When a law enforcement agency receives a report under subsection (1) of this section, the law enforcement agency shall promptly conduct an investigation to determine whether there is probable cause to believe that the person, while in a school, did possess a firearm or destructive device in violation of ORS 166.250, 166.370 or 166.382.

(3) As used in this section, "school" means:

(a) A public or private institution of learning providing instruction at levels kindergarten through grade 12, or their equivalents, or any part thereof;

(b) The grounds adjacent to the institution; and

(c) Any site or premises that at the time is being used exclusively for a student program or activity that is sponsored or sanctioned by the institution, a public school district, an education service district or a voluntary organization approved by the State Board of Education under ORS 339.430 and that is posted as such.

(4) For purposes of subsection (3)(c) of this section, a site or premises is posted as such when the sponsoring or sanctioning entity has posted a notice identifying the sponsoring or sanctioning entity and stating, in substance, that the program or activity is a school function and that the possession of firearms or dangerous weapons in or on the site or premises is prohibited under ORS 166.370.

Oregon Legislature Amended ORS 339.317 through ORS 339.323 (SB 1092). Changes became effective January 1, 2009. Key elements:

1. Notice that a student has been charged with a violence-related offense is triggered within 15 days of his/her first appearance before the juvenile court to respond to the petition, or within 5 days of appearing in adult court for a Measure 11 charge (see ORS 137.707 for a list of these crimes).

2. The juvenile or adult court notice goes first to the superintendent or his/her designee, or in the case of a private school or public charter school, to the principal.

3. The administrator receiving the notice is required to notify key personnel within 48 hours. Personnel who the administrator deems are in the “need to know” category are any staff or contractors working in the school who would be needed to ensure that the safety and security of the school, students and staff are maintained or who would be in charge of arranging appropriate counseling and education for the youth in question.

4. Noticed personnel must maintain this information in confidentiality and may discuss it only with the student, his/her parent/guardian, the school administrator, other noticed school employees, law enforcement personnel, and the youth’s probation officer or juvenile court counselor. Disclosure of the information will not be subject to discipline unless the disclosure was “made in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another.”

5. If a youth transfers to an Oregon school from outside the state, the school administrator must contact the youth’s former school to determine whether there is any information about the student suggesting that his/her previous activity “is likely to place at risk the safety of school employees, school subcontractors, or other students” or that may indicate a need for counseling or determinations about educational placement.

6. If a student transfers into a school from inside the state, the sending school is required to send notice to the receiving school or district.

7. The conduct that triggers these notice requirements:

A. Harm or threatened harm to another person, including criminal homicide, felony assault, or any attempt to cause serious physical injury to another person.

B. Sexual assault of an animal or animal abuse in any degree.

C. Sex offenses, except third-degree (“statutory”) rape.

D. A crime involving a weapon or threatened use of a weapon.

E. Possession or manufacture of a destructive device, or possession of a hoax destructive device.

F. An offense for which MANUFACTURE or DELIVERY (but not possession/use) of alcohol or a controlled substance is an element of the crime.

8. A school may not use the noticed information to discipline a student unless the information had previously been obtained independently by the school or if the conduct took place during a school function or on school property.

9. The elements of notice must include: the name and date of birth of the student, the name(s) and address(es) of parents or guardians, the alleged basis for the juvenile court’s jurisdiction (or adult court’s jurisdiction in Measure 11 crimes), and the alleged act for which the student is being charged.

10. Once a student’s case is adjudicated or dismissed, the court will send notice to the district, private school or public charter school to inform of the disposition of the case. Records are to be expunged once a student is exonerated, graduates from high school, or is age 21. Records must be kept separate from the student’s educational record, in compliance with federal student privacy law.

ORS 339.327 Notification required if person possesses threatening list or when threats of violence or harm made; immunity.

(1) A superintendent of a school district or a superintendent's designee who has reasonable cause to believe that a person, while in a school, is or has been in possession of a list that threatens harm to other persons, shall notify:

(a) The parent or guardian of any student whose name appears on the list as a target of the harm; and

(b) Any teacher or school employee whose name appears on the list as a target of the harm.

(2) A superintendent or superintendent's designee who has reasonable cause to believe that a student, while in a school, has made threats of violence or harm to another student shall notify the parent or guardian of the threatened student.

(3) The superintendent or superintendent's designee shall attempt to notify the persons specified in subsections (1) and (2) of this section by telephone or in person promptly but not later than 12 hours after discovering the list or learning of the threat. The superintendent or superintendent's designee shall follow up the notice with a written notification sent within 24 hours after discovering the list or learning of the threat.

(4) Any school district or person participating in good faith in making the notification required by this section is immune from any liability, civil or criminal, that might otherwise be incurred or imposed with respect to the making or content of the notification.

(5) As used in this section, "school" has the meaning given that term in ORS 339.315.

OAR 581-021-0065 Suspension

(1) Students may be suspended when such suspension contains within its procedures the elements of prior notice (OAR 581-021-0075), specification of charges, and an opportunity for the student to present his or her view of the alleged misconduct. The suspending official shall notify the student's parent or guardian of the suspension, the conditions for reinstatement, and appeal procedures, where applicable. These procedures may be postponed in emergency situations relating to health and safety.

(2) Emergency situations shall be limited to those instances where there is a serious risk that substantial harm will occur if suspension does not take place immediately.

(3) School district boards shall provide students suspended under emergency conditions with the rights outlined in section (1) of this rule as soon as the emergency condition has passed.

(4) In all suspensions ordered by the executive officer of the school district or designated representative, the district school board shall have the right of final review if the action is not taken by the school board itself.

(5) School district boards shall limit suspension to a specific maximum number of days. That maximum shall not exceed ten school days.

(6) School district boards or designated representatives shall specify the methods and conditions, if any, under which the student's school work can be made up. Students shall be allowed to make up school work upon their return from the suspension if that work reflects achievement over a greater period of time than the length of the suspension. For example, the students shall be allowed to make up final, mid-term, and unit examinations, without an academic penalty, but it is within the districts' discretion as to whether the students may be allowed to make up daily assignments, laboratory experiments, class discussions or presentations.

(7) In special circumstances a suspension may be continued until some specific pending action occurs, such as a physical or mental examination, or incarceration by court action.

OAR 581-021-0070 Expulsion

(1) A school district board may expel, or delegate authority to a hearings officer to expel, a student provided the student is not expelled without a hearing unless the student's parent(s) or guardian, or the student, if 18 years of age, waives the right to a hearing. Waiver may take place by the parent or the student, if 18 years of age, notifying the school district in writing of waiver of the right to a hearing. Waiver may also take place by the parent, or the student, if age 18 or over, failing to appear after notice, at the place and time set for the hearing:

(a) If the school board acts to expel, the hearing may be conducted by a hearings officer designated by the board. In cases where the hearings officer is conducting the expulsion hearing for the board, the hearings officer shall provide to the board the findings as to the facts, the recommended decision and whether or not the student is guilty of the conduct alleged. This material shall be made available at the same time to the parent or guardian, and to the student, if age 18 or over;

(b) If the authority to expel a student is delegated to a hearings officer, the parent, or student, if age 18 or over, shall have the right upon appeal to a board review of the decision. If the decision is appealed to the board for review, the board shall be provided findings as to the facts and the decision of the hearings officer. This material shall be made available at the same time to the parent or guardian, and to the student, if age 18 or over. When appealed, the board will affirm, modify, or rescind the decision of the hearings officer.

(2) Student expulsion hearings shall be conducted pursuant to ORS 332.061.

(3) Expulsion hearing policies or rules shall contain provisions for the following:

(a) Notice to the student and to the parent or guardian shall be given by personal service or certified mail of the charge or charges and the specific facts that support the charge or charges. The notice shall include the statement of intent to consider the charges as reason for expulsion. Where notice is given by personal service, the person serving the notice shall file a return of service. Where notice is given by certified mail to a parent of a suspended student the notice shall be placed in the mail at least five days before the date of the hearing;

(b) Where the student or the student's parent cannot understand the spoken English language, an interpreter shall be provided by the district;

(c) The student may be represented by counsel or other persons;

(d) The student shall be permitted to introduce evidence by testimony, writings, or other exhibits;

(e) The student shall be permitted to be present and hear the evidence presented by the district;

(f) Strict rules of evidence shall not apply to the proceedings. However, this provision shall not limit the hearing officer's control of the hearing;

(g) The hearing officer or the student may make a record of the hearing.

OAR 581-021-0071 District Information for Parents and Students Regarding the Availability of Alternative Education Programs

(1) The following definitions apply to this rule:

(a) "Erratic attendance" means the student is frequently absent to the degree that he/she is not benefiting from the educational program;

(b) "Notification" means written notice, by personal service or certified mail, to the parent or guardian and student as required by ORS 339.250(6).

(2) District school boards shall adopt policies and procedures for notification to students and parents, or guardians of the availability of appropriate and accessible alternative programs. This notification shall be provided in the following situations:

(a) Upon the occurrence of a second or any subsequent occurrence of a severe disciplinary problem within a three-year period;

(b) When the district finds a student's attendance pattern to be so erratic that the student is not benefiting from the educational program;

(c) When the district is considering expulsion as a disciplinary alternative;

(d) When a student is expelled pursuant to subsection (3) of ORS 339.250; and

(e) When an emancipated minor, parent, or legal guardian applies for a student's exemption from compulsory attendance on a semiannual basis as provided in ORS 339.030(5).

(3) The notification must include but is not limited to the following:

(a) Student action which is the basis for consideration of alternative education;

(b) Listing of alternative programs available to this student for which the district would provide financial support in accordance with ORS 339.620 except that when notice is given in accordance with subsection (2)(e) of this rule the district shall not be obligated to provide financial support;

(c) The program recommended for the student based on student's learning styles and needs;

(d) Procedures for enrolling the student in the recommended program; and

(e) When the parent or guardian's language is other than English, the district must provide notification in manner that the parent or guardian can understand.

(4) The district shall inform all parents or guardians of the law regarding alternative education and educational services available to students by such means as a statement in the student/parent handbook, notice in the newspaper, or an individual letter to a parent.

(5) District school boards shall adopt a procedure for parents or guardians to request establishment of alternative programs within the district.

(6) District school boards shall not approve the enrollment of a pupil in a private alternative program unless the private alternative program meets all requirements of OAR 581-021-0045.