THE DISCRETION OF EDUCATORS & DISCIPLINARY REFORM: COURTS VERSUS THE REFORMERS

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One of the most important constraints on the reformers of school discipline is the lack of agreement on how to use the courts. Communication between policy reformers and the courts tends to be minimal, focusing on specific rights disputes instead of broad systemic education reform. For example, almost all policymakers agree that school discipline reform is necessary in public schools, but are uncertain on how the reform should be structured. There is a vast quantity of data that suggest that a suspicious attitude exists about the exercise of discretion by educators in discipline cases. One constant in each proposal for reform involves changes in the way educators determine disciplinary outcomes. The single biggest objective is to decrease referrals to law enforcement as a result of campus disruptions.

With this objective in mind, the judicial attitude on the discretion of educators goes in the opposite direction. To begin with, all litigation involving school discipline raises specific questions about limiting the authority of school officials to control the campus climate. However, despite extreme familiarity with these lawsuits, the rule of law that controls the approach that judges apply to the discretion of educators is quite different. It is not hard to understand why policymakers and the courts feel differently about the authority of school officials.

The judicial mantra on educational discretion is rooted in a series of opinions by the U.S. Supreme Court that establishes a “high degree of deference that courts must pay to the educator’s professional judgment.” This deference effectively lowers judicial review in school cases on the very issue currently under attack by policy reformers. According to the U.S. Supreme Court, “the determination of what [conduct] is inappropriate properly rests with the school board.” Across a range of cases, the Court has set forth the following principles:

- “Judicial interposition in the operation of the public school system of the nation raises problems requiring
care and restraint...By and large, public education in our nation is committed to the control of state and local authorities.

- "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values."
- "Striking the balance between schoolchildren's [rights] and the school's equally legitimate need to maintain an environment in which learning can take place requires some easing of the restrictions."
- "A school need not tolerate student speech that is inconsistent with its basic educational mission."
- "[A]lthough public school students retain Fourth Amendment rights under this Court's precedent, those rights are different...than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."
- "[S]tandards of conduct for schools are for school administrators to determine without second-guessing by courts."

This principle is well understood by lower court judges who typically apply it in the following fashion:

- "Whether it is the school curriculum, the hours of the school day, school discipline, the timing and content of examinations, the individuals hired to teach at the school, the extracurricular activities offered at the school or, as here, a dress code, these issues of public education are generally committed to the control of state and local authorities."
- "[The] broad authority to control the conduct of students granted to school officials permits a good deal of latitude in determining which policies will best serve educational and disciplinary goals."

Do you see what is happening? Courts tend to defer to the discretionary authority school authorities have in operating their schools. Judges persistently presume a level of good faith in educational decision making in maintaining a safe campus.

This deference is required until facts are established that tend to show that the educators are acting in bad faith. "Bad Faith" is code for the abuse of discretionary authority by school officials, that in the words of a court allows the second-guessing of a school policy.

- "Judicial interference with discretionary exercise of school board power is permissible where the action of the board was based on a misconception of law, ignorance through lack of inquiry into the facts necessary to form an intelligent judgment, or the result of arbitrary will or caprice."

THE INSUBORDINATION CASES

This demonstrated reluctance to use judicial power to reform school policies is worth a closer look in a spate of recent insubordination cases. The differences between the reformers and the courts are expressed in the decision by the educators to criminalize the misconduct of the students.


**M.M. v. State; 2016 WL 4524716 (Dist Ct Appeal of Florida 2016))**

**In re Terelle A.; 2016 WL 689004 (Ct of Special Appeals of Maryland 2016)**

In the case of K.S.D., a high school student arrived five to ten minutes late to his science class. The student erupted into a profanity laced tirade and was kicked out of class. The school's assistant principal responded to the incident and escorted the student back into class in order to retrieve his book bag. Again the student lashed out with profanity. He also threw his book bag across the classroom, hitting a wall. The school resource officer arrested and handcuffed the student.

It took roughly ten to fifteen minutes to regain control of classroom after the outburst. The student was charged with disorderly conduct in violation of North Carolina law. He was convicted by the court and sentenced to serve 20 hours community service, twelve months of supervised probation, and given a curfew from 4pm to 6am on school days. The student appealed the court's decision.

North Carolina law defines disorderly conduct as a public disturbance intentionally causing disruption or interference with teachers or students at school, or conduct that causes a disturbance of the peace order, or discipline at school. The conduct must be substantial for criminal sanctions to be imposed. The student essentially argued that the school officials overreacted. He argues that his conviction should be overturned due to lack of evidence that he caused a disorder. K.S.D. directed his profanity at teachers, thereby directly challenging their authority. He also caused class to be stopped during his outburst, and for ten to fifteen minutes after he had been arrested. According to the teachers, K.S.D. had destroyed the educational environment for his science class. Because of these facts, the court held that K.S.D.'s conviction for disorderly conduct was valid as his actions were serious enough to cause a substantial interference.

"Although [the teacher] was not required to step away from the classroom, the evidence shows that he had to stop teaching his class, call for an administrator, then explain to the assistant principal what had happened, thereby taking his attention away from the classroom for several minutes. Further, K.S.D.'s behavior required the attention of school officials, including the assistant principal, teachers, and the school resource officer. As a result of K.S.D.'s behavior, these officials stopped teaching and performing various administrative duties to attend to him. Finally, according to the assistant principal's testimony, "the educational environment is gone" after such extreme disrespect. Thus, we conclude that the evidence, viewed in the light most favorable to the State, was sufficient to establish that K.S.D.'s conduct substantially interfered with the operation of the school."

In the case of M.M., a middle school student misbehaved in class and was escorted to the school's administrative dean. While in the dean's office, M.M. began shouting profanities and pounding on the dean's desk. The dean suspended M.M. immediately and called his mother to pick him up from school. M.M. was escorted to a waiting room and instructed that he had to stay inside while his mother was on the way. Despite these instructions, M.M. left the waiting room. He was arrested by the school's resource officer for trespass. M.M. was convicted of trespass and appealed the ruling.

The court rejected M.M.'s argument that it was impossible to trespass in a
\textbf{LEGAL UPDATE}

school he was attending. The court held that Florida law allows property owners to limit access to certain parts of their property while allowing access to other areas.

- “We conclude that the only reasonable interpretation of [state law] is that "school property" means any part of the school's property. Accordingly, a person who does not have authorization, license, or invitation to enter or remain upon a restricted area of the school property may be found guilty of violating section 810.097(1).”

After M.M. was suspended, he had no further legitimate business at the school. He was confined to the waiting room and told that the rest of the school was off limits. Therefore, when M.M. left the waiting room, educators had discretion to deem him a trespasser under the law. Consequently, the school was within its rights to arrest M.M. for trespass. M.M.'s trespass conviction was affirmed by the court. One judge wrote a dissenting opinion in which he was unwilling to adhere to the deference principle:

- “[I]t seems absurd to me that a teacher or administrator can at any time create a trespass zone in order to turn simple disobedience into a crime—under the majority’s theory—by telling a student to stay in his or her chair, or to sit in a corner, or to stay in a particular line. Similarly, although absurd, I guess that an instruction to a student to go somewhere on campus is now a crime if not obeyed—given the remaining upon language of the statute.”

In the case of Terelle A., the court does not defer to school officials, finding the exercise of discretion to be the result of arbitrary will or caprice. A student cursed at an assistant principal in the hallway while students were changing classes. The student said: “[G]et the fuck out of my face, you ain't fucking nobody, you fucking soft, [the] only reason you talk shit is because the deputy’s here.” When the SRO was called to arrest the student, the student immediately apologized. Notwithstanding the apology, the SRO explained to Terelle that “the school has requested charges.” The student was adjudicated for violating a provision of the state education code that makes it a crime to “willfully disturb or otherwise willfully prevent the orderly conduct of the activities, administration, or classes of any institution of elementary, secondary, or higher education.” On appeal, the court reversed the conviction:

- “We conclude that there was no evidence that Terelle disturbed—much less significantly interfered, as required by [state law]—the school's activities. First, the Assistant Principal—the only eyewitness to testify—did not testify that any disturbance or prevention of the school's activities, administration, or classes occurred. And, second, the SRO's testimony that [the Assistant Principal] told him that Terelle had caused a "major disturbance" could not establish the fact of a disturbance both because [the SRO] did not witness the incident and because his account was directly contradicted by [the Assistant Principal’s] own testimony...Instead, [the Assistant Principal] testified that the incident with Terelle lasted only 30 seconds...No "rational trier of fact could have found the essential elements of [state law] beyond a reasonable doubt.”

\textbf{EDUCATIONAL DISCRETION - GOING FORWARD}

The gulf that separates the reformers on one hand, from the more deferential judiciary, is evident in this case above. The courts place few effective demands on school officials when it comes to discipline. Constitutional rights, of federal and state origin, represent nearly the complete basis for judicial intervention. Compromise is possible, but rarely occurs, except when improper procedure, motives, or both are implicated in school discipline.

Neither group fully understands the posture of the other. These differences are expressed in fundamental debates over the value of lawsuits, the role of legislation, and the choice of disciplinary reform going forward. To the courts, political accountability is the single most important element of education policy-making. The judicial preference is educator accountability -- to parents and the community. This preference effectively excludes many issues from judicial review until the process appears broken. When students and their parents raise issues that involve policy matters, judges often believe that they are being asked to interfere in politics. Judges do not understand why reformers do not understand this or why they insist that courts ought to usurp reform discussions by issuing a court order.

To the reformer, court intervention stands as a great and necessary source of limitation on public school officials in order to make the weight of the demands of parents and the community felt in the offices of educators. The reformers feel that the courts are abandoning their post for not participating in the discussion in a meaningful way. This gulf is deep and gives rise to many conflicts over how to go forward in school discipline reform.

One such conflict involves a novel form of deliberate indifference in which school officials ignore opportunities to more carefully mete out school discipline solely because the courts are not a viable option for parental and community opponents. The educator who is threatened with a lawsuit if she fails to act on a parental demand, has reason to know that the demand is an idle threat. The demise of “zero tolerance” school discipline can be tied to the image of the unresponsive educator who knows that a parent is bluffing until solidarity from a group of parents emerges to challenge their disciplinary authority.

Given this state of affairs, reformers have been developing other, more democratic, forms of influence over school policy development and implementation. The two most significant branches of this legislative reform involve the role of the school resource officer and the decriminalization of schools under emerging versions of restorative justice. These will be discussed in greater detail in later updates.

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