The State of South Carolina

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OPINION NO. _____ June 20, 1989

SYLLABI:

A. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national attention." New Jersey v. T.L.O., 469 U. S. at 342, n. 9. Justice Powell.

B. Section 59-63-240 South Carolina Code of Laws provides that a school board may permanently expel any "incorrigible" pupil.

C. In light of increasing problems with violent behavior in South Carolina schools, it is clear that the legislature intended that boards apply the broadest possible meaning to the word "incorrigible" in determining if on premises weapons violations, drug dealing, a sexual assault or other serious violations constitute cause for permanent expulsion.

D. It is not necessary that the misbehavior be a continual pattern of activity. It is only necessary that the offense be a "serious" one which threatens the safety and good order of the school, its students and personnel.

E. Carrying a pistol, loaded or unloaded, or a knife or other lethal weapon, dealing drugs or a sexual assault upon the school premises is cause for permanent expulsion of the offending student.

F. In such cases, fundamentally fair proceedings must be provided the student in determining if the misconduct has occurred and the ultimate administrative decision lies with the local school board.

TO: The Honorable Candy Y. Waites
Member, House of Representatives

FROM: T. Travis Medlock
Attorney General

QUESTION: The meaning of the term "incorrigible" as used in Section 59-63-240 of the Code of Laws of South Carolina (1976 as amended).

APPLICABLE LAW: Sections 59-63-210, 59-63-240, Code of Laws of South Carolina (1976 as amended).

DISCUSSION AND CONCLUSION:

You have asked for our opinion as to the meaning of the term "incorrigible" as used in § 59-63-240 of the Code of Laws of South Carolina (1976 as amended). This provision governs the expulsion of students by the school district board and provides in pertinent part:

> [t]he board may expel for the remainder of the school year a pupil for any of the reasons listed in § 59-63-210.... The board may permanently expel any incorrigible pupil. (emphasis added).

It is our opinion that this term must be broadly construed to fulfill the legislative purpose of giving local school boards ample authority to maintain a safe environment in the schools.

We begin, in any interpretation of § 59-63-240, with the fundamental proposition that Article XI, § 3 of the South Carolina Constitution requires that the General Assembly provide "for the maintenance and support of a system of free public schools open to all children in the State ...." (emphasis added). Additionally, the United States Supreme Court has cautioned that a State, "[h]aving chosen to extend the right to an education to people ... may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred." Goss v. Lopez, 419 U.S. 565, 574 (1975). As one court has noted, permanent expulsion is a most serious penalty. See, Lee v. Macon County Board, 490 F.2d 458 (5th Cir. 1974). Against that background, we turn to an interpretation of § 59-63-240.

The word "incorrigible" possesses several meanings, depending upon the context in which it is used. It may refer to one who is incapable of reformation or to one who cannot be reformed. 42 C.J.S., Incorrigible. More broadly, however, the term also means

"unmanageable by parents or guardians." People ex rel. Thompson v. Purcell, 201 P. 881. This latter definition usually refers to being "unmanageable" not in an absolute sense, but to being incapable of correction in ones present situation. Mahaffey v. Mahaffey, 170 So. 288 (Miss. 1936). One court has characterized "incorrigibility" as a "continual pattern of disobedience of parental communications, viciousness and general bad conduct." In Re Shelton, 11 Pa. Dist. R. 155.

The case of Pervis v. LaMarque Ind. School Dist. 466 F.2d 1054 (5th Cir. 1972) is particularly instructive. There, the Court construed a statute authorizing the suspension of "incorrigible" students. By reading together with the statute under review another statutory definition, the Court determined that the suspension law was not unconstitutionally vague and included:

> any child within the compulsory school attendance age who is insubordinate, disorderly, vicious or immoral in conduct or who persistently violates the reasonable rules and regulations of the school he attends or who persistently misbehaves in such manner as to render himself incorrigible.

These definitions are thus helpful in determining the legislative intent underlying § 59-63-240. Other general statements by courts regarding student discipline are also useful in ascertaining legislative intent, which is foremost in any construction. Adams v. Clarendon Co. School Dist., 270 S.C. 266, 241 S.E.2d 897 (1978). For example, we note the following statement by the District Court in Pervis v. LaMarque Ind. School District, 328 F.Supp. 638 (1971) regarding the crucial decisions school administrators and school boards must make on a daily basis.

> Thus fleshed out, the word "incorrigible" is clearly a general guideline employed in a non-criminal statute empowering a school's administrators to remove from the scholastic environment persons whose serious or persistent misbehavior threatens to impair the educational efficiency of the institution. It is a settled principle of common law origin that school board members, superintendents and officials are impressed with the responsibility for front-line operation of the schools and to stand, to some extent in loco parentis ... As such they "may

> exercise such powers of control, restraint and correction over such pupils as may be reasonably necessary to enable the teachers to perform their duties and to effect the general purposes of education." .... As the District Court pointed out in Stevenson v. Wheeler County Board of Education, 306 F.Supp. 97, 101 (S. D. Ga. 1969), affd., 426 F.2d 1154: "[b]y accepting an education at public expense pupils at the elementary or high school level subject themselves to considerable discretion on the part of school authorities as to the manner in which they deport themselves."

The District Court in LaMarque went on to note that school administrators' authority must be broad "consistent with the realities of public education and with the requirements of the federal Constitution."

> Within the zone of reasonableness, an administrator must be given authority commensurate with his responsibility, or he cannot execute his assignment. At the level of the secondary school, the nature of the institution requires that such authority be tempered with considerable latitude and flexibility. It would be obviously inconsistent with this goal to require that the occasions for the exercise of a school board's disciplinary power be narrowly specified by the empowering statute in the manner of a criminal code. Legislative recognition of this fact is neither arbitrary or capricious.

328 F.Supp. at 642.

The Court's strong wording in LaMarque is consistent with the general law rule that admission to a school may be refused to a child who engages in licentious or immoral behavior. 79 C.J.S., Schools and School Districts, § 447, and with the legal principle that the state constitutional right of every child to attend public schools is subject to reasonable regulations by local authorities or by the Legislature. See, Washington v. Salisbury, 279 S.C. 306, 306 S.E.2d 600 (1983); Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988) ["the framers of the Constitution have left the legislature free to choose the means of funding the schools of this state to meet modern needs."] See also, Ingraham v. Wright, 430 U.S. 651 (1977).

As we previously noted in an opinion of this Office, dated November 25, 1985,

> [t]he power of school authorities to exclude children from school is very broad and is to be exercised for the best interests of pupils and of all the people .... So the fact that attendance of a child would impair the efficiency of a school or endanger ... other pupils may furnish grounds for the exclusion of such child.

In that same opinion, we noted that admission may be refused for immoral behavior even though such behavior was not manifested within the school itself on the grounds that a student's presence in school would be harmful to the best interests of the school. Indeed, we concluded in that opinion that a bill making any person 21 years or younger who is committed to the Department of Youth Services for the crimes of murder or certain other violent offenses ineligible to attend the public schools (except DYS) is constitutional and not violative of Article XI, §3.

In the last several years, courts have found it necessary to consider one important additional factor when interpreting the meaning of and adjudicating the validity of statutes and school policies concerning student discipline. That is the current sharp upswing of student violence and disorder which is part of a nationwide trend. 1/ The United States Supreme Court recently recognized the severity of this problem in New Jersey v. T. L. O., 469 U.S. 325 (1985) in determining the validity of searches in the public schools. In T. L. O., the Court recognized the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." Current conditions in the schools, observed the Court, more than ever require the maintenance of student discipline.

> Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems ... . Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of school children ....

1/ In South Carolina, recent SLED figures indicate that incidents of the 3 most common violent crimes among youths -- assaults, sexual attacks and robberies are increasing dramatically "amid signs that gang related crime is spreading." The Greenville News, Thursday, May 18, 1989, p. 3C.

469 U.S. at 339. The Court elaborated:

> The maintenance of discipline in the schools requires not only that students be restrained from assaulting one another, abusing drugs and alcohol and committing other crimes, but also that students conform themselves to the standards of conduct prescribed by school authorities.

469 U.S. at 342, n. 9. Justice Powell, in commenting further on the need for maintaining strong discipline in the schools, noted that

> [t]he primary duty of school officials and teachers ... is the education and training of young people. Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern.

469 U.S. at 350 - 351.

Other courts have similarly stressed today's crying need for the restoration of discipline and the removal of those who would disrupt the learning process. In Giles v. Marple Newtown School District Board, 367 A.2d 399 (Pa. 1976), for example, the Court upheld a ruling by the school board that a student be permanently expelled for having a large quantity of marijuana and drug paraphernalia on his person at school. The Court, in upholding the school board's action, emphasized that the board was

> charged ... with responsibility for the safety of all members of the school community. A majority of the Board undoubtedly concluded that the student who obtained the marijuana while visiting an older brother in Philadelphia could serve as a conduit for unlawful substances, thereby creating a possible hazard to the school at large.

And in Mitchell v. Board of Trustees of Oxford, 625 F.2d 660 (5th Cir. 1980), the Court of Appeals upheld a school rule requiring expulsion for bringing weapons to school against a constitutional attack that the rule permitted school officials no discretion in determining whether or not to expel, thereby violating due process.

To this argument, the Court responded that conditions in todays schools warranted stern responses by school officials. The Court stated that it was undeniable "that the School Board has the right, power and duty to make and enforce a rule against bringing weapons to school." 625 F.2d at 663. The Court, in dismissing the constitutional argument, observed:

> The School Board is under an obligation to educate the children of Oxford County. The Board is under an obligation to provide a safe environment for the children so they can learn. Unfortunately, violence in the schools is increasingly becoming a way of life. This School Board has responded to that problem by making a strict rule, and punishing violations with one of the most severe weapons in its arsenal of punishments. Because the rule and the punishment for violating the rule clearly are rationally related to the goal of providing a safe environment in which children can learn, it comports with substantive due process.

625 F.2d at 664 - 665.

Thus, in construing § 59-63-240, we must consider the fact that our state Constitution guarantees to all students a free education. We must also take into account that permanent expulsion from school is a severe punishment and that the federal Constitution requires that students not be expelled without constitutionally adequate procedures.

On the other hand, we must also consider the purpose which the legislature sought to accomplish in the enactment of § 59-63-240. This statute, like any other, must be construed in light of the evil which it seeks to remedy. Judson Mills v. South Carolina Unemployment Compensation Commission, 204 S.C. 37, 28 S.E.2d 535 (1944). The obvious purpose of the statute here is to insure that the primary objective of the public school -- the education of our children -- is carried out without threat of disorder or disruption from unmanageable students. The purpose of permanent expulsion is not so much the punishment of the incorrigible student, although that is part of it, but the protection of the majority of students who seek to receive a public school education. Particularly where a student poses a clear and present danger to students, such as when he or she brings weapons to school or deals drugs, the Legislature obviously envisioned that school administrators must have the flexibility to protect other students and teachers from harm. As noted, a school board "is under an obligation to provide a safe environment for the children so they can learn." Mitchell v. Board of Trustees of Oxford, supra.

Finally, we must also consider the fact that there is presently a nationwide trend of violence and misconduct in the public schools. As noted, South Carolina's schools are not immune from attack by those who wish to make the learning environment unsafe and undesirable for those who want to learn. Without safety and order, there cannot be the type of real educational advancement which progressive programs, such as the EIA, have sought to achieve for our State.

Accordingly, in construing § 59-63-240 we believe a court would balance these interests this way: so long as ample due process is given to a student who is to be permanently expelled, the statute permitting permanent expulsion would be interpreted as broadly as is permissible by its terms. In other words, if school administrators provide fundamentally fair procedures which show that a student is incorrigible, then they may apply the broadest possible meaning to the word "incorrigible" in determining that a particular student should be permanently expelled.

More specifically certain general criteria are clear from the case law. First and foremost, we believe, as other courts have held, that the current surge in violence in the schools requires that the broadest reasonable construction possible be given to the word "incorrigible" as used in § 59-63-240.

Secondly, in that regard, we believe that the language employed by the District Court (lower court) in Pervis v. LaMarque Ind. School Dist., 328 F.Supp. 638 (1971) best expresses the intent of the General Assembly in the enactment of § 59-63-240. The best guideline for interpretation of the word "incorrigible", as stated in the LaMarque case is that the word "is clearly a general guideline employed in a non-criminal statute empowering a school's administrators to remove from the scholastic environment persons whose serious or persistent misbehavior threatens to impair the educational efficiency of the institution." (emphasis added). This definition provides school boards with a sound working definition of the term.

Third, school boards, in employing this term as a guideline may certainly consider strongly the threat that a particular student poses to other students and to teachers. For example, where a student is found in violation of school rules by bringing weapons, including pistols, knives or other dangerous weapons, or dealing drugs on the school grounds, that is precisely the type of conduct or, in the words of LaMarque, the "serious ... misbehavior which threatens to impair the educational efficiency of the institution" which the Legislature sought to alleviate in § 59-63-240. While other definitions of the word "incorrigible" generally imply a previous pattern of misbehavior, see, In Re Shelton, supra, we do

not think that administrators are required to stand idly by when weapons are brought into the school. Again, § 59-63-240 must be interpreted in light of the evil sought to be remedied and it would disregard the intent of the Legislature to conclude otherwise. Thus, the definition of "incorrigible" is sufficiently broad to cover such reprehensible behavior.

Fourth, administrators can also consider a student's likelihood of disrupting school functions, particularly where previous behavior indicates such likelihood. Incorrigibility is not confined merely to violent acts but includes any type of "misbehavior which threatens to impair the educational efficiency of the institution." Pervis, supra, 328 F.Supp. at 642.

Finally, the decision regarding permanent expulsion based upon a finding of "incorrigibility" is primarily one which should be made by the school board, working hand in hand with the school principal and other administrators. This decision must be made on a case by case basis and within the sound discretion of the Board. Expulsion may be warranted by one set of facts, but not by another. However, courts have repeatedly held that "school disciplinary matters are best resolved in the local community and within the school system." Mitchell v. Bd. of Trustees of Oxford 625 F.2d at 664. Courts will not interfere with decisions regarding expulsion so long as the procedures are constitutionally adequate, and the evidence is supportive of the exercise of sound judgment by the administrators. Indeed, courts are more likely to intervene when an administrator does not maintain strong discipline in a school and another student is hurt or injured thereby. More and more frequently, courts are echoing the words of Justice Powell in the T. L. O. case, that a "school has the obligation to protect pupils from mistreatment by other children and also to protect teachers themselves from violence...." Supra.

Obviously, an opinion of this Office cannot anticipate every legal or factual issue that may arise in student disciplinary procedures involving permanent expulsion. We may only comment generally as to how § 59-63-240 may be construed by the courts. Day to day legal advice as to the standard of review by courts, whether procedures are constitutionally adequate and whether a particular set of facts justifies expulsion must be rendered by the school board's attorney who is in the best position to advise.

In conclusion, we believe the word "incorrigible" should be broadly construed to effectuate and maintain strong discipline in the public schools. The legislative intent was designed to insure that students be allowed to attend school in a safe environment and free from disruption by unmanageable students. This would particularly include those students who immediately threaten others by

bringing to the school dangerous weapons such as pistols or knives or dealing drugs. We believe that the definition of "incorrigibility" includes persons "whose serious or persistent misbehavior threatens to impair the educational efficiency of the institution." (emphasis added) The decision regarding "incorrigibility" in a specific instance rests in the sound discretion of the local school board based upon all the facts and circumstances.

With kindest regards, I remain

Very truly yours,

[redacted] Medlock
Attorney General

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