

DISCIPLINE

After the terrible shootings which occurred at Columbine High School, many states, including Illinois began adopting “zero tolerance” policies. In short, these are policies directed at student behavior that punish particular conduct –often severely-- without regard to the fault of the student or any extenuating circumstances. Originally, federal legislation required states to adopt laws that required expulsion of students who possessed firearms or weapons in school. School districts across the nation rapidly expanded zero tolerance policies creating disciplinary rules to encompass not only firearms but all kinds of objects and items (toy guns, scissors, nail clippers). Zero tolerance was also applied to drugs and alcohol encompassing cough medicine, aspirin and other common items. Zero tolerance policies, though common in Illinois, have been held to violate the Illinois School Code as interpreted by Illinois courts. E.S. v. Community Consolidated School District 168, (02 CH 10967, Circuit Court, Cook County, Il. 2002). School districts, of course, have authority to discipline children through suspension and expulsion for “misconduct” and “gross disobedience” (105 ILCS 5/10-22.6) for periods of up to 2 years, but this power has important limitations. Expulsion and suspension cannot be imposed without the opportunity for a fair hearing and the courts have power to review the imposition of such discipline. Discipline itself must be fair.

Because these policies can have a devastating effect on a child and on the child’s educational progress, it is essential that advocates and educators alike understand the law and work to eliminate such illegal practices. Loss of school time, in particular, can greatly exacerbate the educational and emotional well-being of children experiencing homelessness and undercut the other efforts the school may be making to assist such children.

To suspend or expel a student in Illinois, school administrators must weigh five important factors:

- The egregiousness of the student’s conduct
- The history or record of the student’s past conduct
- The likelihood that such conduct will affect the delivery of educational services to other children
- The severity of the proposed punishment
- The interest of the child

Robinson v. Oak Park and River Forest High School, 213 Ill. App. 3d 77 (1st Dist. 1991).

Moreover, discipline cannot be applied more frequently or more harshly to distinct groups of children: racial or ethnic minorities, those with disabilities, those with particular religious beliefs, or those of particular gender identity or sexual orientation. As importantly, under the McKinney-Vento Act children experiencing homelessness cannot be discriminated against in the application of these practices either. (42 U.S.C. 11431(1) (homeless children must have “equal access” to all educational services); 42 U.S.C. 11431(2) and (3) (States must remove all practices that act as “barriers” to homeless children’s enrollment, attendance and success; and homeless children should not be separated from the mainstream school environment).¹

The problem below illustrates how schools should apply the “five-factor” test for discipline, taking into consideration, in particular, the fact that Louis is homeless.

Louis is nine years old and lives at the Cozy Corner transitional shelter with his mother and baby sister. The alley adjacent to the shelter is strewn with empty beer and wine bottles. On the way to school one morning, he picks up a miniature glass bottle because he is attracted to its deep blue color and the way it shines in the sunlight. He puts it in his pocket. At lunch, he emptied his pocket. A classmate sees the bottle, recognizes what it is and tells the teacher that Louis has a bottle of whiskey with him. Louis’ teacher confronts him and he surrenders the bottle. The school has a “zero tolerance” policy for possession of drugs and alcohol and related paraphernalia. Louis is immediately suspended and then expelled for three months. In the past year, three other Cozy Corner residents have also been expelled.

Consider:

Should Louis have been punished with suspension and expulsion?

What went wrong?

What should be done?

What could you do to prevent this from happening in your school district?

Should Louis have been punished with suspension and expulsion?

While there is certainly room for some subjective disagreement in matters of discipline, applying Illinois law to this situation (and common sense!), it is hard to argue that Louis’ conduct here was “egregious” in any respect. “Egregious” is defined as “flagrant” and “conspicuously offensive.” Technically, he may have “violated” a rule, though that is doubtful. Louis’ natural curiosity as a nine-year old drew him to this object. He did not seek out a liquor bottle, it was readily available in the environment of the shelter –perhaps a place where there is little else to peak a child’s interest. He didn’t drink any harmful substance or intend to do so. He didn’t brag about having a whiskey

bottle. In fact, he doesn't appear to know fully what it is. When asked for the bottle, he fully cooperated. Moreover, Louis has no prior disciplinary problems and nothing he did caused any disruption in education for even a single child.

The punishment imposed on Louis is very severe: loss of crucial educational services that might even result in failure to promote to fourth grade and loss of the companionship and community that school affords every child. This punishment may be particularly tough for Louis since, as a child experiencing homelessness, he may have already missed valuable school time and may have absolutely nothing constructive to do if he is required to stay "home" at the shelter during this period of expulsion. Likely, his period of homelessness is highly stressful and traumatic. To deprive Louis of the benefits of the school community and the presence of caring adults and classmates is particularly harsh. Other children will surely know that Louis was "kicked out" of school or characterize him as "bad," thus stigmatizing and isolating him. Finally, there seems to be no sense in which "the interest of the child" is served by this punishment. Whatever lesson the school may wish to have conveyed has certainly been accomplished by the teacher's actions in confronting Louis. Adding more punishment only harms the child.

In addition, the fact that three other children from the shelter have been expelled by this school suggests that Louis may be being treated unfairly and is victim of discrimination because he is homeless: Have non-homeless children been disciplined for such minor infractions? How many? Was similar punishment imposed? Is there a particular teacher or staff member who thinks that it is important to be especially tough on the homeless children since they are, in her view, "wild" and without good parental supervision? Is the school staff frustrated and feeling that their school is being overrun by "shelter kids"? If children at the shelter have disciplinary issues over doing their homework, is the shelter an appropriate place for homework to get done? Do the children have what they need (supplies, paper) to do their homework properly?

What went wrong?

Louis had no advocate for his interests in this disciplinary process. Because his parent does not understand school disciplinary law, she may have thought that she couldn't object. She may not have known to talk to a legal aid lawyer or find the district's McKinney liaison.

The school administrators here were not knowledgeable about the proper criteria for discipline and didn't seem to consider facts regarding his homelessness that should have been considered. They blindly followed a rule thinking that "zero tolerance" was necessary.

Perhaps the school or the staff is unintentionally discriminating against children experiencing homelessness. Perhaps they have little experience with such families and think of them as "sick" and often abusers of drugs and alcohol. They may feel it is particularly important to "nip" alcohol abuse "in the bud."

What should be done?

The McKinney liaison should be in constant communication with the local shelter staff and families and should be attuned to a particular crisis that may arise in the school community that affects one or more of the children. The McKinney liaison can link families to resources that can assist them like legal aid programs, and informative legal materials. The liaison can, and should, find ways to intervene appropriately in disciplinary situations to ensure that all the relevant facts regarding a homeless child are understood.

What could you do to prevent this from happening in your school district?

- Bring in skilled trainers who can teach both administrators and staff about the criteria for exercising discipline
- Create a formal process for the liaison to review any proposed discipline of children experiencing homelessness
- Review the overall numbers and categories of which children are subjected to discipline and ensure that staff reflect upon their subjective judgments
- Undertake a review of the disciplinary rules of the school or district to ensure that they conform with the law; add special provisions that highlight concerns about fair treatment of homeless families
- Engage in a regular process of educating staff on the true realities of homelessness and mitigate stereotypical views of homeless parents or children
- Meet with parents in shelters and other settings to educate them about their rights; generate materials about the disciplinary process and list the phone numbers of the district McKinney liaison, local legal aid lawyers or advocates who can assist parents or children.

DISCRIMINATION

There are several laws which afford students protection against discriminatory actions of schools or school districts, or peers in a school setting. These commonly include:

- the Fourteenth Amendment to the United States Constitution and its Illinois Constitutional counterpart which prohibit intentional discrimination based upon race and sex;
- Title VI of the federal Civil Rights Act and its implementing regulations (34 C.F.R. 100.3) which prohibit activities “with the effect of” discrimination based upon race, color and national origin or which “substantially impair the accomplishment of the objective of the program” based on race, color or national origin;
- Title IX which prohibits discrimination based upon sex and sexual harassment (peer-on-peer)
- §504 of the federal Rehabilitation Act which prohibits discrimination on the basis of disability.²

In addition:

- The McKinney-Vento Act prohibits segregation of homeless students in separate schools or separate settings and programs. (42 U.S.C. 11432(e)(3).
- McKinney also mandates “equal access” to school services and activities (42 U.S.C. 11431(1), and requires local districts to “ensure that homeless children and youths are not stigmatized or segregated on the basis of their status as homeless.” (42 U.S.C. 11432(g)(1)(J).
- In Cook County, Illinois, moreover, schools are prohibited from discriminating against students on the basis of their race, color, sex, age, religion, disability, national origin, ancestry, sexual orientation....gender (includes transgendered) and “housing status” including the status of lacking any permanent residence under the Cook County Human Rights Ordinance.
- Illinois “hate crime” statutes and concomitant civil remedies punish assault and battery, for example, motivated by the “race, color, creed,

² The rights of students with disabilities are complex and include the right to special services. This material does not address those rights.

religion, ancestry, gender, sexual orientation, physical or mental disability or national origin” of the victim. 720 ILCS 5/12-7.1

Finally, certain conduct targeted at homeless children and youth may give rise to legal claims that subject a school district to monetary damages and injunctive relief under the Illinois Education for Homeless Children Act: refusal to immediately enroll or to allow school selection, denial of needed transportation services to the school of origin, failure to follow the dispute resolution process, or to assist with obtaining records or immunizations.

Johnny, an African-American eight-grader, became homeless in October. His family doubled-up in housing with his aunt in another district. The school’s residency investigator and the administrator in charge of enrollment have been given written instructions on investigating residency issues but none of the material contains information about residency rules as they pertain to homeless children. The investigator reported Johnny as a “non-resident.” The vice principal dis-enrolls Johnny the same day. 90% of the children dis-enrolled this year were African American.

Consider:

Was Johnny discriminated against? On what basis?

What went wrong?

What should be done?

What could you do to prevent this from happening in your school district?

Was Johnny discriminated against? On what basis?

Based on these facts, there appears to be a system and practice in place that, intentionally or unintentionally, ignores the rights of homeless children. Ejecting homeless children who have a right to go to school in the district violates the McKinney-Vento Act, the Illinois Education for Homeless Children Act and probably the Cook County Human Rights Ordinance prohibition on discrimination based on “housing status.” Moreover, if, in this community, the overwhelming majority of homeless children are African-American, then the practice can be seen as predictably resulting in the exclusion primarily of African-American children, or, stated in terms of Title VI, creating a “disparate negative impact” on African-American children.

What went wrong?

No one at the school or district has clearly integrated the residency rules with the rights of homeless children or the right to be free of racial discrimination. If the Superintendent is

aware of the educational rights of homeless children, he or she has not reviewed the practices and policies to ensure that the investigator and vice principal are implementing these rights. No one is likely examining the *effects* of this practice, either.

What should be done?

If the residency investigator and vice principal received proper instructions, he or she would recognize the family as “homeless” and there would be no effort to dis-enroll that child or others similarly situated.

What could you do to prevent this from happening in your school district?

- Ensure that all the policies and practices of the school district take into consideration the effects of policies and practices on particular groups of children or families, including homeless families.
- Create a system for collecting information about the numbers of children affected by certain practices of the school (denial or delay of enrollment, dis-enrollment, suspensions, expulsions, denial of fee waiver applications, denial of transportation or tutoring services or preschool) and their race, housing status, gender, etc.
- Use the data to discern what practices may have a “disparate impact” towards any particular group.
- Bring a group of parents, teachers and administrators together to collaborate on creating fairer systemic practices.
- Consult with a knowledgeable lawyer to ensure that all suggested changes do not offend other provisions of anti-discrimination laws.

Tommie is gay. He ran away from home because his family does not approve of his sexual orientation. Tommie drops out of high school after other kids start calling him “fag,” and “nowhere man” and making numerous and repeated sexual comments to him. One boy threatened to “beat up” Tommie in the washroom “when no one is looking.” Tommie’s counselor had suggested to Tommie that he stay at the shelter until the problem “clears up.”

Consider?

Was Tommie discriminated against? On what basis?

What went wrong?

What should be done?

What could you do to prevent this from happening in your school district

Was Tommie discriminated against? On what basis?

Though the source of legal protections for students who are gay or “transgendered,” (i.e. biologically of one gender but either physically transforming to another gender or identifying as another gender) are complex and still in flux, rights to protection from harassment and physical violence for these students exist and are emerging with liability for schools who tolerate repeated, known acts of harassment. See Nabozny v. Podlesny

Most school districts have disciplinary codes that forbid students from engaging in threats of physical violence, intimidation or harassment of any kind towards any person. Many jurisdictions, including Illinois, have “hate crime” statutes and concomitant civil remedies that punish assault and battery, for example, motivated by the “race, color, creed, religion, ancestry, gender, sexual orientation, physical or mental disability or national origin” of the victim. 720 ILCS 5/12-7.1

Under the Illinois School Code, school districts in Illinois “shall provide instruction in violence prevention and conflict resolution education for grades 4 through 12.” (105 ILCS 5/27-23.4) “An atmosphere of safety” and one “conducive to learning” must prevail in schools and no student “[should be] subjected to violence, threats, harassment, intimidation, or otherwise confrontational or inappropriate behaviors that disrupt the educational atmosphere.” (105 ILCS 5/13A-1)

What went wrong?

No staff member at the school took action to ensure that Tommie was provided a safe, nurturing environment – a fundamental aspect of access to school. Perhaps staff members had never encountered a gay child before or felt that his apparent lifestyle was inappropriate. Staff members were unwilling to invoke the disciplinary code to protect Tommie and, instead, suggested that Tommie should solve the problem by staying home. Tommie has been stigmatized and isolated both as a homeless youth (“nowhere man”) and a gay student. Failure to provide him with protection has resulted in his leaving the mainstream school environment. It will now be much more difficult to re-engage Tommie in any high school program.

What should be done?

School staff should take responsibility to stop the harassment and threats towards Tommie and to ensure that Tommie feels secure in the environment of the school.

What could you do to prevent this from happening in your school district?

- Create programs to heighten the awareness of staff to anti-homeless, anti-gay and gender discrimination;

- Ensure that the school's violence prevention program encompasses issues of harassment of others who are "different" or in a minority in the school environment; teach tolerance in the classroom and to the staff
- Create a "safety plan" for any student who is becoming a potential victim
- Enforce disciplinary codes consistently and ensure that staff do not imply or state that victims of violence or intimidation should solve the problem by leaving school
- Adopt a comprehensive school policy prohibiting all forms of discrimination; identifying staff who will confidentially accept complaints and create a mechanism for swift but fair action
- Invite organizations that are supportive of gay and transgender youth (including gay/straight alliances) to have a visible presence in the school