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This month

Expelling students

Parents' vs. children's rights

New concept in health care

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The cover of this month's belated issue shows a phenomenon of this spring's elections—seventeen-year-olds registering to vote.

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The author is an attorney in New York. This article is adapted from a speech given at Duke University in November.

CHILDREN'S RIGHTS:

children aren't chattels

by Helen L. Buttenweiser

WHAT A PARADOX it is that in our society, child-oriented in so many ways, children are often in effect merely chattels before the law. Our society has always believed that the family is necessarily the best protection for children, and therefore should be inviolable. As a result, we have often not recognized that children are people, human beings, who are separate and separable from the adults responsible for their care and nurture. Consequently, in any conflict between parental rights and children's rights, it is parental rights that usually prevail.

Let me list the children's rights that I am talking about:

1. The right to food, shelter, and clothing.
2. The right to love, protection, and guidance.
3. The right to an atmosphere that will promote emotional growth.
4. The right to be educated.

. . . . All simple and basic enough, but the way we assure them makes me wonder whether Oliver Twist is still bucking the system.

First, consider a "welfare" family—a strange phrase meaning a family whose wage earner, if any, cannot support them. First, the appropriate governmental body determines what the family needs for the barest living; this sum is then reduced to a ridiculous percentage, and this reduced sum, or less, is given to some adult deemed head of the family for the use and support of the whole family.

But suppose Daddy drinks—or even worse, refuses to work, if work is available. Result—no welfare payments. We recognize that the sins of the father shall be visited upon his children, but do we accept the fact that such a biblical ethic results in starving children?

In all the years I have been working with children and reading about welfare payments and family allowances, I have never seen one line about protecting the children of the families under discussion. Do we realize that in emphasizing these puritanical values, we are destroying the very young people about whom we shall later wring our hands when they fail to acquire the emotional maturity that living in our world requires.

SEVERAL YEARS AGO I wrote a **brief amicus curiae** for a case in the Supreme Court of the United States. The subject of the action was the constitutionality of what was euphemistically entitled "the man in the house rule." This rule required the welfare department in the county in question to terminate a form of public support called Aid to Dependent Children if the social worker assigned to the case determined that the children's mother was having sexual relations on a more or less regular basis with a man. The rule was ostensibly based on the presumption—irrational, as so many presumptions are—that if a man has sexual relations with a woman, he must be supporting her children. In truth, the rule was based on the mistaken notion that illegitimate births can be prevented by punishing extramarital sex relations if indulged in by the poor—the well-off are presumed to know about birth control.

This case involved a widow with several children. The undisputed facts revealed that the man who visited her Saturday nights, when he was not otherwise occupied, was

married and had nine children. Although he clearly could not even support his own children, the man-in-the-house rule deprived the widow's children of money for necessary food.

While the man-in-the-house rule was eventually declared unconstitutional, the measly ways used by the state and county departments of welfare to get around the decision and other mandated procedures leaves no doubt that our culture still requires the deprivation of children as the price of punishing the parent. Our cultural concern with the family as an entity leads us again and again to abuse children's rights where they conflict with parental rights.

WE DO SEEM to be making some progress, but it is painfully slow. Nevertheless, the direction of such progress is worth examining. In New York, a child-abuse case in the 1870s was brought by the Society for the Prevention of Cruelty to Animals because the Society for the Prevention of Cruelty to Children did not exist. Then, a man seen beating his horse would be promptly reported to the SPCA, but a parent seen beating his child would have been assumed to be within his rights to bring up his child as he saw fit.

In New York in the 1920s and 1930s a small child begging from late theater crowds was a common sight. Often he used the story that Daddy would beat him if he came home without money earned from shoe-shining, and it had been stolen from him. The money, of course, belonged to Daddy.

The theater, which tends to reflect current mores, no longer produces plays about the beautiful young daughter who is forced by a cruel relative to marry the villain, thus preventing him from foreclosing the mortgage on the family homestead, but this change took place after the turn of the century.

Going to work at an unconscionably early age to support the rest of the family instead of remaining in school is now forbidden by statutes in most parts of our country, but in the past such sacrifices were the rule and not exceptional.

Not too many generations ago indenturing small children was accepted practice. In those days New York laws provided that the earnings of a minor were the property of the father.

While the concept of a child as inviolable property of the parent is rapidly being modified universally, the related and generally useful concept of the inviolability of the family unit fails where the rights of all members of that unit are not equally protected.

The Supreme Court of the United States has given constitutional status to the parent's right to bring up a child as he sees fit. This constitutional status, protecting the family unit against invasion of privacy, would be totally acceptable except that provision has not been made for those situations in which there is a conflict of interest between parent and child.

There is, of course, no question that in this country at least, a totally unfit parent can be deprived of the custody of his child. However, because decisions in our highest courts have tended to emphasize the rights of parents and have not generally weighed the rights of a fit parent against the rights of a child, we are faced with a phenomenon that cries out for examination.

Most, if not all, of the states have statutes protecting neglected children or children subject to child abuse. But our bias in favor of parental rights and our lack of statutory and case law authority for implementing children's rights tend to tip all except extreme cases of neglect and abuse in favor of the parent.

The most dramatic of the situations in which a child needs protection from his parents is the one who suffers from what is euphemistically called "the battered-child syndrome." For those not acquainted with the more sordid aspects of our community life, this phrase is used to describe children who are brought to hospitals or doctor's offices with severe injuries —burns, breaks, bruises beyond belief—for which the explanation is either patently untrue or so suspect that, given similar discrepancies, no businessman would go forward with a business deal that had to be based on an accurate assessment of the facts. How does the matter proceed from there?

Here are the possibilities:

(1) The injuries are so severe and the culpability of the parent so apparent that the child is removed from the home and criminal prosecution of the parent is initiated. Or,

(2) the injury is so serious and the culpability of the parent so apparent that the child is, in fact, removed from the home, but is later returned to the parents on the assumption that the parent has improved sufficiently so as to warrant "taking a chance" (who takes it?) that the cruel behavior will not recur. Or

(3) the court or agency providing protective service, having investigated the circumstances surrounding the injury to the child, is convinced that it is the parent who has injured the child but believes that the parent can be helped to overcome his or her inability to control this injury-producing behavior. Since there is a presumption that the parents are the persons best fitted to care for the child and the risk that injury will recur is not great enough to overcome the presumption, this child is also returned to his home. Sometimes the parent is able to control his damaging behavior and the child does have the family life to which he is entitled, but sometimes the results are devastating. Or

(4) the court—or the local "protective" services agency called in to avoid a court experience if possible—investigates but cannot be sure that the parent has caused the injury. Since the parent has an inherent "right" to the child, which can be terminated only if the parent has been found to have for-

feited that right, this child is returned to his home. The authorities recognize that they are taking a chance that the child will be injured again, but in emphasizing the parents' rights and ignoring the child's rights, the community has not given the authorities the ability to protect the child under these circumstances. Many times this taking a chance results in the child's living through, or not living through, a similar experience.

IN EACH OF THE ABOVE CATEGORIES the rights of a child to a home free from fear of injury and insulated from the rejection that cruelty embodies are never considered. There is always a presumption that a parent, uncontrolled or rejecting though he may be, is better than a stranger, warm and loving though he may be. The only question considered is how far the parents' rights can be curtailed.

Take another situation in which a child's welfare is a major consideration but his rights are not considered. Every community has hundreds of children whose parent(s) are unable to care for them and who turn to the public welfare department for relief from the burden they are unable to shoulder. New York City has thousands of such children under care in private and public institutions and foster homes.

Of course, it is essential to protect the rights of parents who, although they are unable to care for their children themselves, do in fact maintain a parental relationship with their children. However, there are literally thousands of children who are condemned to living a childhood in limbo because the parental rights of parents unable or unwilling to exercise their parental obligations are safeguarded by community pressure, while children's rights are nonexistent. True, we do talk about the child's "best interests," but only when the parent's behavior is so inadequate as to constitute a forfeiture of their rights do the courts consider whether the child is getting the kind of home to which all children should be entitled.

Consider, for example, the situation in which the parent having sole custody of a child is a narcotics addict and the child is placed in a foster home as soon after birth as hospital treatment for withdrawal symptoms are complete. Often the placement is with a warm, loving, stable couple who adore the baby and wish to adopt him. Nevertheless, community standards require that efforts be made to rehabilitate the mother—not just to make her a happy and useful member of society, but to restore her to a status where she can exercise her rights to be a parent. Let us assume that the mother does make diligent efforts towards recovery so that she can care for her child. Let us assume further that the rehabilitation is remarkably successful and results in her application to have her child restored to her when he is 3½ years old. What about his right to the only home he has ever known, in which he has blossomed, prospered, and become deeply attached to good foster parents?

I know of two cases embodying just this problem. In one case, the foster parents have appealed to the public press to add the pressure of public opinion in favor of their rights as opposed to the rights of the natural parents; and in the other case the evidence has been adduced in open court.

In the first case, the mother kept the child in her custody for the first year and a half, boarding the child five days a week and allegedly taking her home on weekends. She then decided that the burden was too great and placed the child for public care and voluntarily hospitalized herself for mental care. She remained hospitalized for a year and a half, although during the latter part of her hospital stay she was employed in the community as a secretary and lived in the hospital. After a year and a half she was released from the hospital and stayed in the community for the next 2½ years.

During the period she was in the community she was unable to decide whether she would resume the care of the child or surrender her for adoption. While she was in this ambivalent state, she was encouraged, and agreed, not to resume seeing her child until she reached a firm decision.

After 2½ years of failure to resolve the problem, the agency brought a proceeding to free the child for adoption, but the court, having found that the mother was still mentally ill and had been during this whole period, held that she did not have the mental capacity that would permit the agency to fulfill the requirements of the statute authorizing termination of parental rights. Meanwhile, as soon as the proceeding began, the mother again hospitalized herself and remained hospitalized for a year.

Now she has been in the community for a year and, under the aegis of an eager-beaver attorney, seeks her "constitutional property rights" in the child (quoting the attorney).

The court before which the the case has been tried has stated openly that (1) the mother being in the community must be **presumed** to be recovered and therefore must be presumed to be a fit mother, and (2) a fit mother cannot be denied the right to the return of her own child, and (3) the highest court in the state has stated in its decision in a recent, much-publicized adoption case that there can be no weighing of the relative advantages to the child of the foster home and the child's own home but that a fit parent must always be allowed to have her child back. Now we are faced with a situation in which the seven-year-old child, frightened by her few contacts with a mother who has always had trouble in relating to people and desperately afraid of losing her adored foster family, is being returned to a mother whose ability to maintain herself in the community has been restored by new

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PEOPLE












by Rep. Willis P. Whichard
of Durham County. Adapted from an address before a meeting of county health board members held at the Institute.

COMMENT

The Role of the Local Board of Health

Health care is no longer, if ever it was, the exclusive preserve of the health-related professions and administrators. The quality and availability of health care is one of the foremost public issues today and for the foreseeable future, because the public is involved in a revolution of rising expectations. The public believes that professionals have the technical knowledge and the ability to solve many of their health problems; they believe that modern research can and will produce the solution to many more; and they are demanding that systems of distribution of health-related services be improved to make the benefits of the new knowledge and techniques generally available to those who need them. In short, the public now regards availability of the best medical care as a fundamental human right, not just a commodity to be bargained at a given rate of exchange.

Too often people seem to think doctors and nurses can put scrambled eggs back into the shell: they cannot. Many people also believe that politicians could solve all human problems if only they would. The whole of human experience and our basic religious tenets run counter to any such prospects. We are all concerned with the art of the possible, not with perfection.

The fundamental questions, then, are what is possible, and how do we achieve it? There, to my mind, we discover the role of the local board of health. The first major function of the local health board is to assess the health needs of the public in its particular area. It involves not only viewing the existing scene and combating present problems, but also assessing and planning for future health needs.

Why must we assess the needs of the future? The Cheshire Cat in **Alice in Wonderland** suggests the reason. Alice asks, "Which way shall I go?" And the cat replies, "Where are you trying to get to?" Alice says, "It really doesn't matter"; so the cat says, "Well, in that case, it really doesn't matter which way you go." To that Alice replies, "Well, as long as I get some place." And the cat responds, "Well, you're sure to do that if you keep going long enough."

Since, as a local board of health member, you cannot know in advance how long is long or how much is enough, you must attempt to assess future needs so that you know not only which way to go, but where to begin and, most important, what will be the expected results of your intervention on behalf of the public's health needs. Thus, it is essential that you assess and plan ahead.

The local boards of health also have an essentially public relations role. Having assessed future health needs and problems, to the extent possible, you have a duty to inform the public of your assessments and your proposals for dealing with the problems you anticipate. This is essentially a political effort. It involves bringing the problems to the public's attention, creating a demand for the necessary equipment and services needed to resolve the problems, and possibly creating a willingness to pay for such equipment and services, through either taxes or service charges or both. It may also include attempts to generate willingness to pay for research into basic medical or sociological problems.

A third aspect of your role is simply that of delivering the services once you have assessed the need for them and convinced the public that they are essential. The issues "Why assess?" and "How to deliver" exist in tandem. If you deliver in shotgun style without assessment, then, as the wise cat said, you are sure to get some place if you go long enough. But if you assess and educate and then fail to deliver, you will face the justifiable wrath of a frustrated public.

I recently came across the following quotation concerning health services in the United States:

At the present time many persons do not

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Expulsion and Suspension of Public School Students

part one: substantive due process

by Robert E. Phay and Anthony B. Lamb

This first of two articles on the expulsion and suspension of public school students will review recent litigation in the area of student substantive rights and what the courts have said are permissible and impermissible reasons for expelling a student.[1] The second article, which will appear in a subsequent issue of *Popular Government*, will review recent litigation concerning the procedural rights of students before they may be expelled for violating school rules. Both of these articles were written in conjunction with research for *The 1972 Yearbook of School Law*, which will be published this summer by the National Organization on Legal Problems in Education (NOLPE).

Most recent litigation concerned with the expulsion or long-term suspension of public school students[2] for misconduct has centered on the 1969 Supreme Court decision of *Tinker v. Des Moines Independent Community School District*.[3] In this decision, which declared unconstitutional a school regulation banning the wearing of armbands to protest the Vietnam War, the Court said that to wear an armband for the purpose of expressing an opinion is symbolic speech protected by the First Amendment, that an "undifferentiated fear or apprehension of disturbance is not enough to overcome the right of freedom of expression," and that the burden of proof is on the school authorities to show facts that "might reasonably have led [the] school authorities to forecast substantial disruption of or material interference with school activities." Since *Tinker*, cases in which challenges are made to the constitutionality of school regulations have usually focused on these three aspects of the *Tinker* decision: Is the student's activity protected by the Constitution, is the fear or apprehension of a particular disruption sufficient to outweigh the right involved, and has the school board met its burden of proof on the issue? The following discussion of student conduct cases should be read with these focal points of *Tinker* in mind.

Demonstrations, Armbands, and Buttons

A school regulation completely prohibiting boycotts, sit-ins, stand-ins, and walkouts was found unconstitutional by a federal district court in Texas on the basis that a student's free-speech rights are not limited to passive, muted, symbolic protests.[4] The forms of protest banned in this case were found to be protected expression unless they were likely to create or did create substantial school disruption. Since it was apparent that not all the prohibited activities are disruptive per se, the court held that a complete ban on all such activities was too broad and therefore unconstitutional. It said that any disruptive behavior in the nature of these activities could be prohibited, but the manner of the prohibition must strike at the particular evil rather than prohibit all such activities.

The Fifth Circuit Court of Appeals also applied *Tinker* to a case in Texas. It ruled that a school's expectation of disruption was inadequate to justify banning the wearing of black armbands.[5] The court required as a minimum:

1. For a more extensive review of the literature dealing with the expulsion of students, see R. Phay, SUSPENSION AND EXPULSION OF PUBLIC SCHOOL STUDENTS, (NOLPE, Topeka, Kans. 1971). This article updates that publication.

2. The Fourteenth Amendment and its due process clause apply only against the state and its agencies, and thus private schools are exempt from its application unless sufficient "state action" can be established. *See e.g.*, Bright v. Isenbarger, 314 F. Supp. 1382 (N.D. Ind. 1970).

3. 393 U.S. 503 (1969).

4. Dunn v. Tyler Independent School Dist., 327 F. Supp. 528 (E.D. Tex. 1971).

5. Butts v. Dallas Independent School Dist., 436 F.2d 728 (5th Cir. 1970).

> a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or severe.

The school district had attempted to bar the armbands under a statute originally passed to prevent disruptions caused by fraternities. The court made a distinction between black armbands as a mature symbol of mourning and other symbols that might be incendiary words or disruptive in themselves.

In an Ohio case, the Sixth Circuit Court found sufficient facts to justify a limitation on speech, upholding the suspension of a student for wearing an antiwar button to school in contravention of a rule banning all buttons.[6] To justify the rule, the school principal testified that the school had recently been integrated and that an explosive racial atmosphere existed that had been aggravated when students wore buttons with racially inflammatory messages. Since disruptions precipitated by the wearing of buttons had already taken place, the court considered the regulation banning all buttons justified because permitting some buttons to be worn and prohibiting others would have created problems of substance and appearance of fairness, and thus would have deprived the school officials of their needed position of neutrality.

In a Colorado case the disruption problems became apparent before the school banned the symbols. A group of Mexican-American students requested permission to wear long hair and black berets as a symbol of their Mexican heritage.[7] The principal at first agreed to the practice and also allowed the celebration of Mexican Independence Day. Later in the semester the berets became a symbol of disruption. As a group the students who wore them chanted in the halls and attempted to undermine student discipline. When the principal forbade the students to wear the berets any longer, several students resisted and were suspended. In upholding their suspension, a federal district court distinguished that case from *Tinker* on the basis that actual disruptions had occurred.

In California a high school student alleged that the principal's refusal to allow him to hold a rally at lunch time in the student eating area was an infringement of the First Amendment guarantee of freedom of speech. A state appellate court found no infringement. Noting that there had been disruptions when similar rallies had been permitted in the past and that the school provided a weekly forum where all students could speak freely, the court said that it was not the purpose of the school to provide a captive audience for student speakers.[8]

6. Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971).
7. Hernandez v. School Dist. No. 1, 315 F. Supp. 289 (D. Colo. 1970).
8. Lipkis v. Caveny, 19 Cal. App.3d 383, 96 Cal. Rptr. 779 (1971).

Mr. Phay is an Institute of Government faculty member whose field is school law. Mr. Lamb is a 1972 graduate of the UNC Law School and was a research assistant at the Institute.

In another armband case, a North Carolina federal district court denied plaintiff's request for an injunction against a regulation prohibiting the wearing of any armbands to school.[9] The case involved a school located next to the Fort Bragg military installation. Three groups of students wearing different-colored armbands to symbolize the divergent factions in the school had been involved in recruiting noncommitted students and there had been marching and chanting in the halls, belligerent and disrespectful attitudes toward teachers, and threats of violence. The court agreed with the school that permitting armbands to be worn under these circumstances would further polarize the groups in an already tense situation. In view of the disruptions that had already occurred (the police had had to be called to quiet one class) and the fact that one-third of the students were children of military personnel, the court distinguished the fact situation in this case from that in *Tinker* and concluded that more than an undifferentiated fear or apprehension of disturbance existed.

In Tennessee, where a student was suspended for wearing the Confederate flag as an arm patch, a federal district court found that

> A public school principal is responsible for maintaining such discipline and order within the school as will permit the educational processes to be carried out. His plenary authority in this regard is not dependent upon the adoption of a written code of student conduct in each school, although the latter may be the desirable practice.[10]

Accordingly, the court said that the principal could ban the display of the Confederate flag at the recently integrated school without a written rule. The principal offered evidence that the flag had been the school flag until disruptions in protest caused the school to change symbols. The court felt these actual disruptions removed the symbol from the protection of *Tinker*.

The Seventh Circuit Court dismissed a suit seeking to enjoin Southern High School in Muncie, Indiana, from using the Confederate flag as the school flag, nicknaming the school teams "The Rebels," using "Dixie" as the school song, and calling the glee club the "Southern Aires."[11] The court said it could not find an infringement on the constitutional rights of black students who said that they had been denied access to campus activities. The court ruled that the students had failed to link their exclusion to the use of these symbols, although it agreed that the symbols

9. Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971).
10. Melton v. Young, 328 F. Supp. 88 (E.D. Tenn. 1971).
11. Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1971).

were no doubt offensive to the blacks and suggested that good policy would recommend their removal.

On the other hand, a federal district court in Louisiana said that Confederate emblems must be removed from a school that was under court order to desegregate. The court said the Confederate symbols had become symbols of resistance to desegregation and the failure to remove them was a failure to eliminate the dual system. The court added, however, that this order would not prevent individual students from wearing the symbols to school.[12]

Distribution of Literature

Distributing leaflets or underground newspapers is an area of student conduct that has at times resulted in suspensions or expulsions. Since such distribution falls within the First Amendment area of free speech, the question posed is similar to that in *Tinker*: Under what circumstances and in what manner can the school restrict the distribution of literature in the interest of maintaining school operations?

The Second Circuit Court held unconstitutional a school regulation that prohibited the distribution of underground newspapers without prior approval by school authorities.[13] Its decision focused on the lack of criteria for administrators to follow in determining whether to permit distribution and the absence of a procedure for reviewing an adverse decision. In another Second Circuit case, the court granted injunctive relief to two students who had been prevented from distributing an underground newspaper on school grounds. A board policy was being challenged that prohibited the distribution of material "which by its contents will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorders, or will constitute an invasion of the rights of others." While the court found the regulation itself to be sufficiently definite,[14] it found the procedure for applying for prior approval to be vague. The regulation, it said, neither delimited the period in which the decision would be made nor indicated to whom and how the material should be submitted for approval. Finally, the court ruled that the term "distribution" was unconstitutionally vague since it did not distinguish between an exchange between two students and a substantial distribution.

The First Circuit Court of Appeals declared unconstitutional a school regulation prohibiting the advertisement or promotion of any nonschool organization on school grounds without prior approval.[15] The court found the regulation to be vague and overbroad as applied to the distribution of a pamphlet asking for a student bill of rights. The court recognized that the regulation had been passed for a purpose different from the one to which it was applied and pointed out that as a regulation against pamphlets it failed to minimize adequately the effects of prior restraint.

A North Carolina federal district court found no First Amendment rights had been involved when a school board barred the *sale* of newspapers on the school ground under a general "no solicitation" rule.[16] The court reasoned that regulating the sale of items or solicitation of funds on the school ground was within the school board's power. The court pointed out that the school board had not prohibited the free distribution of the paper, only its sale. The student appealed the decision to the Fourth Circuit Court, which refused to review the constitutionality of the regulation since the student was no longer in the school. Instead, it vacated the district court judgment and dismissed the case as moot.

Dress Codes

Student dress continues to be a litigated area of student conduct. In New Hampshire a federal district court applied First Circuit Court rulings in holding that dress in schools was a matter of personal liberty.[17] It recognized that the school had a duty to exclude persons who were unsanitary or obscenely or scantily clad, but if it could not show that blue jeans inhibited or tended to inhibit the educational process, the school could not constitutionally prohibit students from wearing them.

In Texas, however, a federal district court upheld a "dress code" regulation forbidding girls to wear pants suits to school.[18] The court found that wearing pants suits is not an expression within the meaning of *Tinker*, and said that it would not become involved in what is basically a state issue.

Prohibiting Long Hair on Males

The Fourth Circuit Court of Appeals, which has jurisdiction over North Carolina, recently ruled in *Massie v. Henry*[19] that the right of students "to wear their hair as they wish is an aspect of the right to be secure in one's person guaranteed by the due process clause, with overlapping equal protection clause considerations. . . ." In so ruling the court overturned a federal court decision that had upheld a hair regulation used in the schools of Haywood County, North Carolina.

The court said in *Massie* that the school administrators had the burden of proving the necessity of a regulation that infringed on the students' rights and that they had not met that burden. The school board had claimed that the needs for discipline and safety were sufficient justifications for the rule. It introduced evidence to show that students with long hair had evoked considerable "jest, disgust, and amusement,"

12. Smith v. Tammany Parish School Bd., 316 F. Supp. 1174 (E.D. La 1970).
13. Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).
14. Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2nd Cir. 1971).
15. Riseman v. School Comm., 439 F.2d 148 (1st Cir. 1971).
16. Cloak v. Cody, 326 F. Supp. 391 (M.D.N.C. 1971), *dismissed as moot*, 449 F.2d 781 (4th Cir. 1971).
17. Bannister v. Paradis, 316 F. Supp. 185 (D.N.H. 1970).
18. Press v. Pasadena Independent School Dist. 326 F. Supp. 550 (S.D. Tex. 1971)
19. Massie v. Henry, 455 F.2d 779 (4th Cir. 1972).

making it hard to restore and keep order. The court found this evidence insufficient and observed that "faculty leadership in promoting and enforcing an attitude of tolerance rather than one of suppression or derision would obviate the relatively minor disruptions which have occurred." The court dismissed the alleged safety problems by suggesting that they could easily be dealt with by requiring students to wear "hairbands, hairnets, or protective caps." Judge Boreman dissented on the basis that such matters are best left to the discretion of local authorities.

The Fourth Circuit has now joined the First,[20] Seventh,[21] and Eighth[22] circuits in ruling for students in hair cases while the Fifth,[23] Sixth,[24] Ninth,[25] and Tenth[26] circuits have ruled for the school boards. Since the Supreme Court has denied certiorari in cases supporting each side, it is unlikely that the *Massie* case will be overruled.

● *General Survey of Hair Cases.* During the last year and a half over fifty cases have dealt with the legality of school regulations prohibiting long hair on male students.[27] The court decisions can be divided into three groups: (1) wearing long hair to school is constitutionally protected, (2) it is not protected, and (3) the constitutional question is not ruled on. The area has been further confused by the United States Supreme Court's refusal to grant certiorari in either cases upholding the hair regulations[28] or cases striking down regulations.[29] Indeed, Justice Douglas supported the students in an opinion dissenting from the denial of certiorari in one case[30] while Justice Black supported school board hair regulations in an opinion denying an injunction in another.[31] To add to the confusion, the Fifth Circuit Court upheld a decision supporting students' right to wear long hair[32] shortly after handing down an opinion supporting the school board.[33]

Challenges against school regulation of student hair length usually have been based on one or more of four constitutional grounds: Such a regulation is (1) a violation of due process, (2) a violation of equal protection of the laws, (3) an infringement of freedom of speech, (4) an abridgment of a fundamental freedom under the Ninth Amendment. Determining whether a constitutional violation exists involves balancing the state's interests against those of the student.

● *Pro Student.* In those decisions that found a denial of substantive due process and upheld the student's right to wear long hair, the court usually based its decision on the premise that the right is an important interest that may be abridged only by showing a compelling state interest. In most cases in which students were successful, the school board could not adequately justify the rule.[34]

While not advanced so frequently, the equal protection argument has been sustained at least twice. In one case, the Seventh Circuit Court held that excluding long-haired male students from classes where female students were involved in substantially the same activities was a denial of equal protection.[35] In the other, a federal district court in Vermont held that excluding only long-haired students from the tennis team, on which long hair was not reasonably related to the conduct of the athletic program, was a denial of equal protection.[36]

While we have found no court that has held long hair to be protected by the First Amendment alone, some have held that it is protected in the "penumbra" of the First and Ninth Amendments.[37] At least one court has recognized the choice of hair length as protected by the Ninth Amendment alone.[38]

In balancing the interests of the state against those of the student, some courts have struck down the hair regulation because it was not established that long hair caused disruptions or health or safety problems in the schools.[39] The "disruption" test stems from *Tinker*, in which the Supreme Court recognized that school regulations, restricting what would otherwise be an exercise of constitutional rights, could be upheld if it was shown that "the students' activities would materially and substantially disrupt the work and discipline of the school."[40] The crucial determination, of course, is what constitutes a "material and substantial" disruption.

Some courts found that *mere fear* of disruption was not adequate to remove, under the disruption doctrine of *Tinker*, the constitutional protection of long hair.[41] One court said that the hostile reaction of other students was not the kind of disruption *Tinker* was concerned with and did not suffice to

20. Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970).
21. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). Crews v. Cloncs, 432 F.2d 1259 (7th Cir 1970).
22. Bishop v. Colaw, 450 F.2d 1069 (8th Cir. 1971).
23. Wood v. Alamo Heights Independent School Dist., 433 F.2d 355 (5th Cir. 1970). Stevenson v Board of Educ., 426 F.2d 1154 (5th Cir. 1970).
24. Jackson v. Dorrier, 424 F.2d 213 (6th Cir.), *cert. denied*, 400 U.S. 850 (1970).
25. King v. Saddleback Jr. College Dist., 445 F.2d 932 (9th Cir. 1971).
26. Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).
27. The cases that have upheld and overturned school board regulations regulating long hair on males since July 1, 1970, are cited in the chapter on pupils in the 1972 YEARBOOK OF SCHOOL LAW.
28. Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969), *cert. denied*, 398 U.S. 937 (1970). Livingston v Swanquist, — F.2d — (7th Cir. 1971), *cert. denied*, 30 L.Ed. 2d 367 (1971).
29. Jackson v. Dorrier, 424 F.24 213, (6th Cir.), *cert denied*, 400 U.S. 850 (1970). Olff v. East Side Union High School, 445 F.2d 932 (9th Cir. 1971), *cert denied*, 30 L.Ed. 2d. 756 (1972).
30. Olff v. East Side Union High School, 445 F.2d 932 (9th Cir. 1971), *cert. denied*, 30 L.Ed. 2d 736 (1972).
31. Karr v. Schmidt, 401 U.S. 1201 (1971).
32. Dawson v. Hillsborough County School Bd., 322 F. Supp. 286 (M.D. Fla. 1971), *aff'd*, 445 F.2d 308 (5th Cir. 1971).
33. Wood v. Alamo Independent School Dist., 433 F.2d 355 (5th Cir. 1970). *See also* Davis v. Firment, 408 F.2d 1085 (5th Cir. 1969), *aff'g per curiam*, 269 F. Supp. 524 (E.D. La. 1967); Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir.), *cert. denied*, 393 U.S. 856 (1968)
34. *See, e.g.*, Butts v. Dallas Independent School Dist., 436 F.2d 728 (5th Cir 1971) and Dawson v. Hillsborough County School Bd., 322 F. Supp. 286 (M.D. Fla), *aff'd*, 445 F.2d 308 (5th Cir. 1971).
35. Crews v. Cloncs, 432 F.2d 1259 (7th Cir. 1970).
36. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).
37. *See, e.g.*, Richards v. Thurston, 304 F. Supp. 449, 455 (D. Mass. 1969), *aff'd*, 424 F.2d 1281 (1st Cir. 1970).
38. Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970).
39. *See, e.g.*, Dawson v. Hillsborough County School Bd., 322 F. Supp 286 (M.D. Fla. 1971).
40. Tinker v. Des Moines Independent Community School Dist. 393 U.S. 503 (1969).
41. *See, e.g.*, Butts v. Dallas Independent School Dist., 436 F.2d 728 (5th Cir. 1971); Lambert v. Marushi, 322 F. Supp. 326 (S.D. W.Va. 1971).

justify a hair regulation.[42] Many more cases were decided in favor of the students simply because the school board failed to prove to the court's satisfaction that a "substantial disruption of or material interference with school activities"[43] would indeed occur. One court simply concluded that the school had failed to show that the regulation of hair length was related to the educational process.[44] A federal district court in Florida awarded a student $100 in damages plus costs in a case striking down a school regulation prohibiting long hair on males.[45]

● *Pro School Board.* Although school boards occasionally have succeeded in claiming that the right to wear long hair is not constitutionally protected, most recent cases holding for the defendant school board have based their decisions on a finding that the regulation was not arbitrary and did promote a valid school policy. In federal court decisions upholding regulations against long hair, many courts were unwilling to interfere with the administration of the schools. The Tenth Circuit Court found that the states have a compelling interest in educating their children and that the states, acting through their school authorities, should determine what, if any, regulation is necessary in managing their schools.[46] Indeed, Justice Black, in an opinion denying a student's request for an injunction, said that the "Federal judiciary can perform no greater service to the Nation than to leave the states unhampered in the performance of their purely local affairs."[47] A federal district court in Mississippi held

> School authorities are the judges of the existence of circumstances which require the adoption of regulations such as the [hair regulation] in this action. If their decision is within the range where reasonable minds may differ their decision will govern.[48]

School boards often used the disruption doctine of *Tinker* to overcome any contended right to wear long hair. The schools introduced evidence of what they considered to be "substantial disruption and material interference" with school activities. Some cited the behavior problems and poor academic performance of those with long hair.[49] In other cases, shop and laboratory teachers testified that boys with long hair presented a health and safety problem.[50] In many of these cases the students aided the courts in avoiding the precedent of *Tinker* by testifying that they wore their hair long as a matter of taste and not to express an idea.[51]

● *Issue Avoided.* Several courts have avoided the issue of whether the right to wear long hair is constitutionally protected by deciding the case on another issue. A federal district court in Ohio found that due process had been denied where a student had been suspended under a hair regulation that was beyond the authority of the principal.[52] In a similar case, a California federal district court issued a restraining order until a state court could determine whether state officials had authority to adopt a hair regulation.[53]

The Fifth Circuit Court held that a haircut "blocked" in the back did not violate a school rule that required hair to be trimmed and well cut and prohibited "Beatle haircuts, long sideburns, ducktails. . . ."[54] A federal district court in Pennsylvania, held that the plaintiff's "labial hirsute accrescence" was an imperceptible natural growth and therefore did not violate the grooming code.[55] In a Georgia case, on the other hand, a federal district court rejected the plaintiff's argument that he had never shaved and was too young to begin and upheld a clean-shaven policy and the student's suspension.[56] Finally, a federal district court in Connecticut held a dress code requiring students to be "neatly dressed" and not to wear clothes or hair styles of "extreme style or fashion" was unconstitutionally vague.[57]

From the large number of hair cases, it is clear that many schools continue to expel and suspend male students for wearing long hair. In North Carolina, however, the law is clear: Students have a constitutionally protected right to wear long hair and they cannot be expelled for this reason.

Extracurricular Activities: Restrictions Because of Long Hair

Court decisions on the validity of hair regulations for participants in extracurricular activities also have gone both ways. There is little consistency in the opinions.

A federal district court in Arkansas upheld a regulation excluding males with long hair from participation in the school band program. The court found that the regulation did not interfere with a constitutionally protected right[58] and was reasonably related to the need for uniformity in a marching band. On the other hand, an Ohio federal district court found a regulation excluding long-haired males from membership in the school band unconstitutional.[59] Noting that girl band members with long hair did

42. Turley v. Adel Community School Dist., 322 F. Sup. 402 (S.D. Iowa 1971).
43. *See, e.g.*, Richards v. Thurston, 424 F.2d 1281 (1st Cir. 1970) and Martin v. Davison, 322 F. Supp. 318 (W.D. Pa. 1971).
44. Berryman v. Hein, 329 F. Supp. 616 (D. Idaho, 1971).
45. Pyle v. Blews, — F. Supp. — (M.D. Fla. 1971).
46. Freeman v. Flake, 448 F.2d 258 (10th Cir. 1971).
47. Karr v. Schmidt, 401 U.S. 1201 (1970).
48. Pound v. Holladay, 322 F. Supp. 1000, 1005 (N.D. Miss 1971).
49. Brownlee v. Board of Educ., 311 F. Supp. 1360 (S.D. Tenn 1970).
50. Gfell v. Rickelman, 441 F.2d 444 (6th Cir. 1971).
51. Gere v. Stanley, 320 F. Supp. 852 (M.D. Penn. 1970).
52. Cardova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970).
53. Alexander v. Thompson, 313 F. Supp. 1389 (C.D. Calif. 1970).
54. Griffin v. Tatum, 425 F.2d 201 (5th Cir. 1970).
55. Lovelace v. Leechburg Area School Dist., 310 F. Supp. 579 (W.D. Pa. 1970).
56. Stevenson v. Board of Educ., 306 F. Supp. 97 (S.D. Ga. 1969), *aff'd*, 426 F.2d 1154 (5th Cir.), *cert. denied*, 400 U.S. 957 (1970).
57. Crossen v. Fatsi, 309 F. Supp. 114 (D. Conn. 1970). *Contra*, Parker v. Fry, 323 F. Supp. 728 (E.D. Ark. 1970).
58. Corley v. Daunhauer, 312 F. Supp. 811 (E.D. Ark. 1970).
59. Cordova v. Chonko, 315 F. Supp. 953 (N.D. Ohio 1970).

not interfere with the band's uniformity, the court found the regulation arbitrary.

In California, a federal district court heard evidence from athletic coaches that a hair regulation for members of the school track team improved performance, aided discipline, and contributed to team morale. Citing this evidence as a reasonable basis for the regulation the court upheld its constitutionality.[60] In Vermont, however, a federal district court heard similar arguments and was unpersuaded. Accordingly it struck down the school hair regulation challenged by members of the school's tennis team as an unjustified infringement on personal liberty.[61]

Extracurricular Activities: Other Cases

The Tenth Circuit Court affirmed a federal district court's dismissal of a suit alleging that a high school principal had violated a student's civil rights by refusing to permit him to be a candidate for an office in the student government.[62] The court reasoned that the principal had determined that the student had not displayed "good citizenship" as defined in the qualifications for office in the students' constitution. Since the principal's actions were based solely on the standards set by the student constitution and by-laws and not on state law, the court found no deprivation of rights under color of state law and consequently no federal court jurisdiction.

A New York superior court enjoined a principal from barring a student from graduation exercises as part of her punishment for striking a school official.[63] The court found that the principal's statutory powers to suspend extended only to activities at which attendance was required and held that his "inherent" powers to suspend a student depended on a showing that the student's presence was a threat to the orderliness of the graduation ceremony.

Flag Salute

A Florida federal district court struck down a school board regulation requiring those who dissented for religious and political reasons to stand quietly during the pledge of allegiance.[64] The court reasoned that refusal to stand was as much expression as the black armband in *Tinker*. Therefore, absent a showing that it substantially interfered with the school activity, refusing to stand could not be prohibited. A Maryland statute that exempted only those with religious objections from standing during the pledge of allegiance was held to be unconstitutional by the state court of appeals.[65]

60. Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Calif. 1970).
61. Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970).
62. Palacios v. Foltz, 441 F.2d 1966 (10th Cir. 1971).
63. Ladson v. Board of Educ., 67 Misc. 2d 173, 323 N.Y.S.2d 545 (Sup. Ct. 1971).
64. Banks v. Board of Pub. Instruction, 314 F. Supp. 285 (S.D. Fla. 1970), 401 U.S. 988 (1971). Upon remand, a single district judge entered an order adopting as his findings of fact and conclusions of law that portion of the original opinion concerning the First Amendment challenge to the Dade County school board regulations. On appeal to the Fifth Circuit, the order was affirmed, 450 F.2d 1103 (1971).
65. State v. Lundquist, 262 Md. 534, 278 A.2d 263 (1971).

Solicitation of Funds

The Second Circuit upheld a rule that forbade soliciting funds from pupils at school.[66] The court found that the rule focused upon a demonstrable harm rather than an undifferentiated fear. What the school was trying to prevent was disruption caused by the general solicitation for many funds and not solicitation for a particular fund. Accordingly, disciplining students for passing out leaflets that solicited funds for the defense of certain "radical" defendants did not infringe on their freedom of speech. A federal district court decision in North Carolina prohibiting the sale of newspapers on school grounds is in accord.[67]

Pregnant Students

An area of growing concern for school administrators is the problem of pregnant high school students, particularly those that are not married. The North Carolina Department of Public Instruction reports that 26 per cent of the white and 32 per cent of the non-white child-bearing age females are teenagers, statistics that are about the same nationwide. Furthermore, the National Alliance Concerned with School Age Parents reports that "Pregnancy is the major known cause of school dropouts among girls." Since administrators often suspend or expel pregnant students from their regular classes, courts are reviewing these cases with the standards similar to those used in reviewing discipline cases. In Massachusetts for example, an unmarried pregnant student was prohibited from attending regular classes, but was provided with individual tutoring.[68] She was permitted, however, to attend all other school functions, to use school facilities, and to graduate with her class. When she sought judicial relief, a federal district court ordered her readmitted to classes on the grounds that the school had not shown that classroom attendance would endanger her physical or mental health, cause a disruption, or pose a threat to others, or was justified by any other valid educational reason. The court noted that married pregnant high school students were not similarly restricted.

The Attorney General of Illinois issued a written opinion last month in which he states that Illinois school officials do not have the authority to automatically exclude pregnant students from classes. He cited the Massachusetts case noted above and concluded that recent developments in the area of student rights have created a heavy burden of proof for those wishing to justify such authority.

In an interview with the *Charlotte Observer*, A. A. Vanore, Jr., an Assistant North Carolina Attorney General who works in the area of schools, reached the same conclusion. He said that his interpretation of

66. Katz v. McAuley, 438 F.2d 1058 (2nd Cir. 1971).
67. Cloak v. Cody, 326 F. Supp. 391 (M.D.N.C.), *rev'd on other grounds*, 449 F.2d 781 (4th Cir. 1971).
68. Ordway v. Hargraves, 323 F. Supp. 1155 (D. Mass. 1971).

current law is that North Carolina schools may not penalize students solely because they are pregnant or married or both. He thought, however, that schools could tell pregnant students that they must drop out at a certain stage in their pregnancy for health reasons, but that the students could not be denied readmission after their child is born. It seems clear that school boards with policies prohibiting attendance by pregnant students or unwed mothers should review their policies to see that they conform with the law.

Conclusion

The evolution of student rights and the judicial protection of these rights will be regarded by many at best as a mixed blessing and at worst as a serious interference with internal school discipline and affairs. It should be remembered, however, that the schools must have and do have plenary authority to regulate conduct calculated to cause disorder and interfere with educational functions. The primary concern of the courts is that students be treated fairly and accorded minimum standards of due process of law.

In light of the changing nature of due process in this area, the need to understand students, and the importance of avoiding disruption of school operations, we recommend that schools do these things:

1. Adopt a grievance procedure for students and faculty.

2. Adopt written regulations on student conduct. These regulations should specify the potential penalty for a violation. They should be worked out in consultation with principals, who should have a checklist of things to do before they take action. When completed, the regulations should be made public and widely distributed.*

3. Adopt written procedures for handling discipline cases.*

4. Develop an emergency plan to deal with school disorders.

The concluding article on the expulsion of public school students will appear in the next issue of *Popular Government*. It will review the recent litigation in which courts have ruled on the procedural rights of students before they can be expelled for violating school rules.

*A proposed code governing serious misconduct by public school students and outlining procedures for hearing alleged violations of the code has been published by the Institute of Government at the University of North Carolina at Chapel Hill. A copy can be purchased for $3.00 from the Institute. (North Carolina residents should add 3% sales tax.)

Children's Rights *(Continued from page 3)*

knowledge in the drug-therapy field, but whose motherly instincts have not been restored—all because the best interests of the child are not an element to be considered if the mother has a decent home and can maintain herself in the community.

The other case concerns a child who was placed at birth because her drug-addicted parents were unable to care for her. Since community pressures required that the parents be rehabilitated (they were eventually), and since the rights of the parents required that the child be kept in contact with her parents as soon as the rehabilitation started, she is now, at age nine, torn between foster parents she loves and parents who have now been completely rehabilitated. That is a poor position in which the community has placed this child.

IMPLEMENTING THE CONCEPT that children are people whose rights are entitled to enforcement is not so difficult as it seems. There are few, if any, statutes that specifically prevent considering children's rights, and even pronouncements made by our courts in interpreting statutes do not exclude balancing children's rights against adult's rights. On the contrary, our law books are full of pious statements that the primary consideration, in the many cases involving children's rights, is the **best interests** of the child. A basic tenet of our law is that when a child's rights are concerned, the courts have the right and an obligation to act as **parens patriae**—the wise and thoughtful parent substitute—when the real parents fail in their obligations.

Regardless of whether statutory changes will be needed to protect children's rights, clearly the change really needed is in the community's attitude. If the community determined that children's rights were to be considered on a par with adults' rights, many of the present problems would resolve themselves without having to reverse a single court opinion or curtail a single statutory right now belonging to adults.

The persons who wield power over children—parents, social agencies, courts—are really only carrying out the mandates of the public in making their interpretations and decisions. Public opinion requires that an inadequate parent whose child is being cared for in a "temporary" home be given opportunity after opportunity to rehabilitate himself while the child pays the price. It is public opinion that requires our courts to determine first whether a parent has forfeited his or her rights to be a parent before considering the interests of the child.

As soon as the courts, legislatures, and other public officials dealing with children feel that public opinion favors protecting children with less emphasis on parental rights, the decisions, practices, and even legislation will reflect this opinion. Then we may even be able to start considering protection for children whose families are affluent enough to hide their shortcomings from public scrutiny.

new man on the health team – the physician's assistant in North Carolina

by David G. Warren and Ernest E. Ratliff

the health care crisis

Long waits in the emergency room, delays of sometimes a month before an appointment with a physician, roadside signs near small towns saying "Doctor Wanted," pleas from private medical schools for state and federal financial assistance, demands from eastern North Carolina for a state medical school in that area, poverty and poor health in Appalachia—these are well-publicized indications of the health care delivery crisis in North Carolina.

Putting aside the perplexing problem of medical care financing (and spiraling costs), the most critical single facet of this crisis is the acute shortage of practicing doctors. The problem, however, may be as much one of distribution and manner of delivery as of sheer numbers. Nevertheless, the lack of primary medical care is an unavoidable finding of any study of North Carolina's health care system. Not only does the shortage of health manpower affect the **availability** of care, but the **quality** of care is bound to suffer by lack of time and means for practitioners and other team members to stay abreast of scientific advances. While part of the crisis must be attributed to the population's rising expectations for convenient and comprehensive health care, dissatisfaction with the system's handling of acute and chronic sickness forces the issue.

efforts to improve health manpower

North Carolina has tried in many ways to bridge the manpower gaps. The General Assembly has increased the size of entering medical classes at the University of North Carolina, authorized the establishment of a medical school at Greenville, and provided tuition assistance and school subsidies at Duke, Bowman Gray, and Meharry medical schools. The University of North Carolina medical school has provided increased services to the state by affiliating with several community hospitals. The University's new Department of Family Medicine is a pioneer program aimed at making primary care roles attractive to more medical students. The state has provided more loans for health students; several groups have conducted campaigns urging young people to enter any of the health team training programs; and the Regional Medical Program, OEO, Appalachian Regional Commission, and other federal programs have poured millions into locally administered health care personnel projects, ranging from in-service training for nurses to transporting physicians by small aircraft to remote clinics. Many of these efforts are designed to increase the number of new physicians, but these new doctors will not be trained and ready to serve until the next decade. Something else is needed—something that can begin affecting the health care delivery system relatively quickly.

Fortunately, additional developments are responding to this need. Among them is a program designed to increase the productivity of physicians delivering primary care by using a helper, who is specifically trained as a physician's assistant.

development of the physician's assistant concept

Realizing that much of the doctor's time was being absorbed in performing varied tasks not requiring his unique skills of judgment, Duke University's Dr. Eugene Stead in the early sixties conceived the idea of training a doctor's aide who would not be limited to one area of expertise but would receive broad general training that would provide comprehensive assistance to practicing physicians. With a broader competence than technicians and

other specialized workers typically have, the physician's assistants could in a variety of ways become an extra pair of hands for the physician. Since this person would always work under the supervision of a doctor who could insure the quality of his work and provide continuing training, the initial training period could be greatly contracted. With careful selection and concentrated training, a new primary care worker could perform numerous tasks previously reserved for the physician.

In the fall of 1965 Duke Medical School enrolled four ex-Navy corpsmen in the nation's first physician's assistant training program. The idea was widely publicized, and many varieties of doctor's aide programs have sprung up around the country. The first graduates of the two-year Duke program and other shorter programs were cautiously but gladly received by the medical profession. The nursing profession raised questions about the functional role of this new team member but did not oppose the development. For the public the physician's assistant program sounded like an answer to the doctor shortage. Encouraged by this reception, Duke put its tentative program on a permanent footing and has greatly expanded it to a current class of eighty. The Bowman Gray Medical School also began training graduates in order to meet the physicians' demands. However, the graduates of both these schools and their physician employers were troubled by the legal uncertainties caused by the North Carolina Medical Practice Act. Practicing physicians were reluctant to hire assistants, and the assistants tended to stay within the medical center awaiting legal clarification.

legal complications

The Medical Practice Act[1] is the physicians' licensing law. It is both the basis for the legal barriers preventing full use of a physician's assistant and the vehicle for accommodating new medical care practices. One way to avoid the barriers in the physicians' licensing law is to create a new law licensing certain persons as physician's assistants. A look at licensure, however, reveals problematic considerations.

Medical license laws were enacted long before standardization of medical training and were designed to protect citizens from charlatans and quacks. They have proved, like most other occupational licensure laws, to be double edged. While licensure is a valuable tool for checking the initial qualifications of those entering the profession, it also serves as a mechanism to restrict entrance to the field and hamper new developments in education and practice. Medical licensure in particular tends to lock-in prior established standards (amount and type of schooling, exclusive practice areas, definitions, etc.) and to hamper health career mobility (both geographic and functional) and medical care experimentation.[2]

While the obvious answer to legal recognition for the physician's assistant was licensure, there were enough questions about the desirability of another license law that other alternatives were suggested for legal recognition. Nevertheless, facing the clear wording of the Medical Practice Act, which forbids (with criminal penalties) anyone other than a doctor from doing the very things physician's assistants were being trained to do,[3] there was an immediate need to make some provision in the license law to enable the physician's assistant to begin work.

There were also other legal questions. What medical tasks could the physician lawfully delegate to an assistant? Obviously some should be delegable under existing law, but the law did not deal with delegation. What if a physician's assistant inadvertently injured a patient while performing some medical procedure? Would there be a presumption of negligence simply because the assistant was unlicensed? Would his physician-employer be subject to civil liability for negligent selection or supervision of an employee? Would he be aiding and abetting the assistant in the unlawful practice of medicine? Does the physician's professional liability insurance cover the assistant's acts? Could the assistant himself obtain insurance? What about fee schedules for the assistant's services? Who could call himself a "physician's assistant?"[4]

The authors are Institute staff members whose fields include health law.

1. **N.C. Gen. Stat.** §§ 90-1 et seq.

2. For a discussion of licensure see **U.S. Dept. of Health, Education and Welfare Report on Licensure and Related Health Personnel Credentialing** [Publication No. (HSM) 72-11, June 1971].

3. **N.C. Gen. Stat.** § 90-18 which reads (in part):

Any person shall be regarded as practicing medicine or surgery within the meaning of this Article who shall diagnose or attempt to diagnose, treat or attempt to treat, operate or attempt to operate on, or prescribe for or administer to, or profess to treat any human ailment, physical or mental, or any physical injury to or deformity of another person: Provided, that the following cases shall not come within the definition above recited: (thirteen exceptions are listed).

4. These and other legal questions are discussed in Duke University Dept. of Community Health Services' Model Legislation Project for Physician's Assistants (mimeo., June 1970).

legal study and legislative solution

To study these considerations, a conference of lawyers, doctors, educators, public officials, and others met at Duke University in October, 1970.[5] They decided to suggest an amendment to the Medical Practice Act that would specifically exempt physician's assistants from the definition of practicing medicine and permit physicians to delegate medical tasks. The recommendations of this conference were reviewed by several other groups and eventually incorporated into legislation enacted by the North Carolina General Assembly on July 12, 1971.[6]

With this new law, physician's assistants are given legal recognition and new security. At the same time restrictions on their sphere of medical activity are established. While providing an **optional** registration system for those who wish to be legally recognized (others may continue to function as assistants under the partial protection of the "medical custom" doctrine), the new law may tend to promote separate identity of the physician's assistant group with resulting standardization and immobility, but not to the extent that a mandatory licensing law would.

What, then, does the new statute provide? Who may be a registered physician's assistant in North Carolina? What may he do? How is the patient protected from poor quality care?

Pursuant to the new statute, regulations adopted by the Board of Medical Examiners in October 1971 require that for approval an applicant must demonstrate good moral character and be a graduate of an approved training program. The Board has approved the graduates of programs at Duke, Bowman Gray, and Chapel Hill. Not included in the initial regulations, though intended by the statute, are provisions for an applicant trained by experience to take an equivalency examination in lieu of a formal training program. Together, the regulations and the statute have established a new category of health workers or at least have given legal recognition to a new member of the team, the physician's assistant.

Several questions can now be raised and answered.

1. **What is a physician's assistant authorized to do?** A physician's assistant who is registered with the Board of Medical Examiners may perform any acts, tasks, or functions that a licensed physician is permitted to do. There are no limits on his scope of activity as a health professional but several conditions serve as important limitations: (a) He cannot be an independent practitioner; he must be associated with a licensed physician. While the physician's assistant need not be an employee of the physician (the hospital could be his employer), a specific physician must be named for registration approval.

(b) He can perform medical functions only under the supervision or at the direction of the physician to whom he is registered. This means that the physician's assistant can routinely do certain medical tasks subject to approval and review by his supervising physician. The physician's assistant can do other more specific acts when they are delegated to him upon his physician's direction. Of course, his performance of activities that do not constitute the practice of medicine is not restricted.

(c) The supervision of tasks and delegation of functions to the physician's assistant by his physician is subject to reasonable rules and regulations of the Board. While the law does not describe how close the supervision must be, the Board's rules state that the physician's assistant must ordinarily function within reasonable geographic proximity of the physician.

(d) The physician's assistant can perform only medical functions in fields for which he has been trained, approved, and registered. Both his prior training (formal and informal) and the description of his work field at the time of registration are limiting factors as to areas of specialization, though not as to specific medical functions. If additional training renders the physician's assistant capable of performing in other fields, supplemental approval of the Board should be sought.

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5. **Id.**

6. 1971 North Carolina Sess. Law, Ch. 817 (codified as **N.C. Gen. Stat.** § 90–18, subdiv. (13); and new paragraph to § 90–15):

§ 90–18 (13)

Any act, task or function performed by an assistant to a person licensed as a physician by the Board of Medical examiners when

a. Such assistant is approved by and annually registered with the Board as one qualified by training or experience to function as an assistant to a physician, except that no more than two assistants may be currently registered for any physician, and

b. Such act, task or function is performed at the direction or under the supervision of such physician, in accordance with rules and regulations promulgated by the Board, and

c. The services of the assistant are limited to assisting the physician in the particular field or fields for which the assistant has been trained, approved and registered;

provided that this subdivision shall not limit or prevent any physician from delegating to a qualified person any acts, tasks or functions which are otherwise permitted by law or established by custom.

§ 90–15

. . . For the initial and annual registration of an assistant to a physician, the Board may require the payment of a fee not to exceed a reasonable amount.

(e) The physician can, regardless of the physician's assistant registration law, delegate to a qualified physician's assistant any acts, tasks, or functions that are otherwise permitted by law or established by custom.

2. **Who can register as a physician's assistant?** Any person may register who is qualified by training or experience to function as an assistant to a physician. Pursuant to the law, the Board has adopted rules for approval and registration. The initial rules provide only for registering persons who have completed training as a physician's assistant in one of North Carolina's three medical school programs. The law contemplates that the Board will develop criteria for granting approval to applicants who are graduates of other physician's assistant or MEDEX type[7] of training programs, as well as to persons with measurable equivalent job experience. The statute is for "assistants to physicians" and not limited to products of formal physician's assistants training programs.

Since a physician's assistant must be associated with a particular physician, the application must be submitted by or through the physician. The Board's rules require the physician to state the general work field and functions of his physician's assistant. Also, one physician may not have more than two assistants registered as physician's assistants.

3. **What does registration accomplish?** Registration of a physician's assistant provides useful legal recognition, but a person may be called a "P.A." or "physician's assistant" or even "physician's associate" without being registered. Registration is most important, however, so that the physician's assistant can perform medical procedures for which he has been trained. Without registration, a physician's assistant can perform only those medical acts that are delegated by a physician in accordance with law (perhaps only emergencies) or custom (perhaps only very routine tasks). Registration provides the means for the Board to monitor the extent and pattern of physician's assistants utilization as well as the capability to protect the public from unqualified persons serving as physician's assistants. Registration, of course, does not prevent an abused patient from suing the physician or his assistant, or both, for negligent treatment.

4. **What are some potential problems in the physician's assistant registration law?** It is an optional registration system which avoids some of the criticisms of licensing laws; but it also misses some of the advantages, such as mandatory filing and full legal recognition of a particular profession. Some of the concerns that are apparent may or may not lead to problems: (a) Registration is exclusively in the hands of the medical profession, since neither physician's assistants nor consumers sit on the Board. The statute delegates to the Board nearly complete power over the development of the physician's assistant concept and trusts that the Board will use that power wisely to improve both the quality and quantity of available medical care manpower.

(b) The public's expectation that the physician's assistant can make medical care more accessible and effective, and perhaps more efficient, can be frustrated if the Board does not follow a sensitive course in developing full utilization of physician's assistants in the North Carolina health care system.

(c) The requirement that a registered physician's assistant be associated with a specific physician means that most will be physicians' employees, unemployable by any other physician. This servitude factor could inhibit geographic and career mobility for physician's assistants.

(d) Until the Board develops some equivalency test or other reasonable criteria for approving assistants who are not graduates of extensive formal programs, a group of functional physician's assistants will be overlooked.

(e) Vagueness of some provisions of the registration act will continue to create legal questions. How much supervision is required? Which medical procedures can be delegated at the doctor's direction but without his supervision? How far can the Board go in providing answers to these questions by way of rules and regulations? If relationships and activities established by custom are recognized by the law as being controlling, how much evidence of custom is sufficient? Since the "locality rule"[8] is gone in North Carolina, does the use of a physician's assistant in a medical center have any bearing on his use in a community hospital or clinic? Can a physician's assistant make routine house calls or must there be special circumstances? Should identifiable physician's assistant's services be billed at

7. MEDEX is a physician assistant program developed by the University of Washington to train former medical corpsmen. It is a three-month course followed by a one-year internship.

8. In Wiggins v. Piver, 276 N.C. 134, 171 S.E. 2d 393 (1970), the North Carolina Supreme court established the new rule in this state that evidence of recognized standards of medical practice in "similar communities" (rather than strictly within the "same locality") is admissible in court actions involving alleged medical negligence. This means that the plaintiff can utilize expert witnesses from outside the area, perhaps overcoming the so-called "conspiracy of silence" that protects the defendant doctor from adverse physician testimony.

a physician's rate? Is malpractice insurance coverage available to all physicians and their assistants?[9]

(f) Since the physician's assistant is registered to a particular physician, he cannot be used freely or fully by other physicians in the hospital, clinic, or emergency room. The law does not imply that the physician's assistants must always be in physical proximity to his physician; and, therefore, the physician's assistant could function in the emergency room "at the direction of" the physician. But the physician may be thereby uncomfortably exposing himself to significant civil liability if his "extra hands" are in the ER without his supervision.

(g) As an alternative to "supervisor" restriction and as a logical progression of a new profession, serious consideration will probably be given to the eventual independent status of the physician's assistant. Because of career identity pressures and perhaps to satisfy the public's demands, the question of the physician's assistant becoming an independent contractor cannot be avoided. Requirements for a physician back-up or referral system or other quality-control conditions would appear to be essential.

5. **What will be the actual role of the physician's assistant?** The concern of nurses is that the physician's assistant may upset the close, complex relationship worked out over the years between physician, nurse, and patient. He could.

The same may be true for physical therapists and other members of the team. The physician's assistant need not, however, duplicate the nurses' functions or compete with them or other groups. Obviously it will be critical that his training be carefully designed to provide a **new** element—specifically the performance for the physician of medical procedures previously performed only by physicians. The physician's assistant need not enlarge the role and attempt to be a doctor-substitute. The law contemplates that he is only an aide and does not exist independent from a physician. He might by repetition and special training be expected to perform some procedures more expertly than his physician. Others he will be able to carry out as a satisfactory alternate to the physician, giving the physician more options (and challenge, too) in organizing his practice.

the future

The development of the physician's assistant concept has already had an enduring impact on health care delivery, even before his numbers make a difference. By demonstrating that some exclusively medical acts, tasks, and functions can legally, ethically, and effectively be performed by a nonphysician, a system revision has perhaps begun in which the functional roles of health team members can be logically redefined, continuously reassessed and appropriately reassigned without the illusions of prior times. Whatever the response to the physician's assistant program, the recent development of the family nurse practitioner[10] is one striking example of system change. Others may be more subtle and difficult for the patient to recognize, such as variable insurance reimbursement rate schedules. Some changes still require legal recognition and accommodation, but the law can be changed when necessity demands.

9. The major insurers of North Carolina physicians (St. Pauls and Glens Falls) offer coverage for physician's assistants as an extension of the physician's policies.

10. A family nurse practitioner training program for selected registered nurses began at the University of North Carolina at Chapel Hill in the spring of 1971 as a six-month course. It has graduated twelve FNP's to deliver primary health care with physician back-up in clinic settings, thus extending the nurse's role into the realm of medical practice.

Comment *(Continued from page 5)*

> receive service which is adequate either in quantity or quality, and the costs of service are inequitably distributed. The result is a tremendous amount of preventable physical pain and mental anguish, needless deaths, economic inefficiency, and social waste. Furthermore, the conditions are largely unnecessary. The United States has the economic resources, the organizing ability and the technical experience to solve this problem.

You may be thinking that was taken from yesterday's newspaper or last week's Congressional Record. It was not. It was taken from a government report published in 1932.

1972 is well under way. Whether the conclusions of that report will be just as true this year as they were forty years before will partly depend on the ability of local boards of health to assess current and future health needs, to inform the public, and to deliver the requisite services.

Certainly, local health boards are only a part of the process. But they are a significant part, and their significance will increase rather than diminish. Quality health care can never be achieved by legislation alone, though there must be legislation. It also depends in no small way upon men and women of vision and dedication who access, inform, and implement at the local level.