

GRADER'S GUIDE

*** QUESTION NO. 1 ***

SUBJECT: CON LAW

1. The Board's Decision To Close School - Equal Protection – 40%

Peter may have a claim that the decision violates equal protection. To prevail on an equal protection claim, Peter must first demonstrate that the School Board is treating similarly situated people differently. Matanuska-Sussitna Borough School District v. State, 931 P.2d 391, 397 (Alaska 1997). Peter should be able to do this. The Board's decision creates two classes of students: those that live near enough to school to participate in extracurricular activities and those who have to be bussed from the north end of town. Prior to the closing of North High, all of Florence's students attended neighborhood schools that allowed them to participate in all of the programs offered at the school. However, after the District closed North High, only the students who live in the Central and South High areas have that opportunity. The former North High students do not have the opportunity to participate in extracurricular activities because of the long bus ride. If the court concludes that there is disparate treatment, then the court will apply Alaska's sliding scale approach to equal protection analysis. Id. Alaska's sliding scale requires the court to evaluate three variables: the weight to be afforded the interest impaired, the purposes served by the government's action, and the government's interest in the particular means chosen to further its goals. Id.

The first variable is the most important variable and involves determining the importance of the interests impaired by the challenged action. Matanuska-Susitna Borough School District v. State, 931 P.2d 391, 396-97 (Alaska 1997)(quoting Alaska Pacific Assurance Co. v. Brown, 687 P.2d 264 269 (Alaska 1984)). Depending upon the primacy of the interest impaired, the government will have a greater or lesser burden in justifying its action. Id.

The second variable involves examining the purposes served by the challenged action and assessing their importance relative to the interests impaired by the action. Id. When the action impairs very important interests, the state must show a "compelling state interest" to justify it's action. Id. When the action impairs relatively minor interests, the state must show that it has a "legitimate" state interest in treating the groups differently. Id.

In the third step, the court must evaluate the state's interest in the particular means chosen to further its goals. Id. The state's burden to justify its means depends upon the importance of the interests impaired. Id. At the low end of the sliding scale, the state needs to show a "substantial relationship"

between the means and the ends. Id. When the challenged action impairs very important interests, the state must show that that the fit between the means and the ends is much closer and that the ends could not be accomplished with less restrictive means.

The first step in the sliding scale analysis involves determining the interest impaired by the Board's action. In Breese v. Smith, 501 P.2d 159, 167 (Alaska 1972), the supreme court stated that article VII, section I, of the state constitution guarantees all children the right to a public education. This statement provides a basis for arguing that the Board's decision adversely impacted Peter's fundamental right to an education. To prevail, Peter would have to also convince the court that participation in the after-school activities was a core element of the right to a public education. In Hootch v. Alaska State Operated School System, 536 P.2d 793 (Alaska 1975), the supreme court backed off the broad statement in Breese a bit. The court held that article VII, section 1, was intended to ensure that the legislature established a school system for students of all racial backgrounds. Id. at 801. In reaching its conclusion, the court stated that the section would allow some differences in the manner of providing the education. Id. at 804. The plaintiffs in Hootch were arguing that article VII, section 1, guaranteed them a right to a secondary education in their villages. The supreme court disagreed, but emphasized that its interpretation of the section would not permit classifications or disparities violative of equal protection. (Due to the posture of the Hootch case, the plaintiffs' equal protection claim remained in the trial court.) It remains an open question as to whether the supreme court would conclude that the right to a public education is a fundamental right for the purposes of equal protection analysis. Even if the court concludes that the right to a public education is a fundamental right, it must still conclude that participation in extracurricular activities is part of that right. Courts outside Alaska have tended to conclude that participation in extracurricular activities is not a fundamental right. See e.g. Letendre v. Missouri State High School Activities Association, 86 S.W. 3d 63, 67 (Mo. App. 2002).

The court's decision on the first prong is outcome determinative on this fact pattern. If the court concludes that the Board's decision does not impact a fundamental right, then the Board need only show that its purpose was legitimate. The Board closed North High because it wanted to use the building and land for an administration center and bus barn. This would be a legitimate purpose. If on the other hand, the court concludes that the Board's action impacted a fundamental right, the Board's interest must be compelling. In this case, the Board's interest is probably not compelling because it could have acquired land elsewhere in the city. Using North High is merely convenient not a necessity.

The third prong of the analysis requires an examination of the means chosen by the Board to accomplish its goal. Again the outcome is determined by the presence of a fundamental right to participate in extracurricular activities. If Peter has such a right, then the Board can accomplish its goal only by showing that there are no less restrictive means. The Board cannot meet this goal because it has alternative means available. It could buy land elsewhere and build the facility from scratch. It could also redo its bus schedule to accommodate participation in extracurricular activities. On the other hand, if no fundamental right is involved, the Board need only show that there is a close and substantial relationship. Using land and buildings it owns is closely related to the purpose of building an administrative center.

Because Alaska uses a sliding scale rather than the two or three categories that the federal courts use, it is conceivable that the court could use some intermediate level of scrutiny. If so, the court would require greater justification from the Board and a closer nexus between the means and goal.

2. The Decision To Suspend Peter

A. Procedural Due Process – 30%

Peter has a procedural due process claim. He was summarily suspended. He received notice of the reason for the suspension, but the principal gave him no opportunity to be heard. In Mathews v. Eldridge, 96 S.Ct. 893, 902-03 (1976), the Supreme Court set out the basic test for determining the amount of process due. A court must consider three factors: (1) the private interest affected, (2) the risk of an erroneous deprivation through the procedures used and the probable value of additional safeguards against the government's interest, and (3) the government's interest, including the fiscal and administrative burden that additional safeguards would entail. The Alaska Supreme Court uses the Mathews v. Eldridge standard when reviewing procedural due process issues. Whitesides v. State, 20 P.3d 1130,1135 (Alaska 2001).

The first factor is to consider whether Peter had a protected interest, for the due process clause only protects property and liberty interests. A property interest exists if the citizen is entitled to the benefit. Since article VII, section 1, guarantees a public education, Peter is entitled to his education and has, therefore, a property interest. See Goss v. Lopez, 419 U.S. 565, 574, 95 S.Ct. 729 (1975). Peter also has a liberty interest because his reputation, honor, and good name are on the line. Id. at 574-75. The discipline could damage Peter's standing with his fellow students and the faculty and it could impact his ability to pursue education. Id.

There is a “non-trivial risk” of an erroneous decision in school disciplinary proceedings because the allegations are often based on information gleaned from others and the facts are often in dispute. Goss, 419 U.S. at 580. On the other hand, imposing a requirement for trial-like procedures would vastly increase the administrative costs of imposing suspension as a disciplinary tool and may overwhelm the administrative facilities in some school districts. Id. at 583-84.

The United States Supreme Court has set the floor with regard to the process due public school students in cases involving short-term suspensions. The Supreme Court held that an informal meeting at which the student is advised of the charges and the basis of the accusation and then given a chance to respond is sufficient. Goss, 419 U.S. at 582. There need be no delay between the notice and the hearing, which can occur within minutes of the misconduct. Id. Although the state supreme court has not addressed high school suspension, it would probably adopt the Goss standard. In Nickerson v. University of Alaska, Anchorage, 975 P.2d 46 (Alaska 1999), the court cited Supreme Court precedent in determining the amount of process due a graduate student being dismissed from a graduate degree program. In Nickerson the court concluded that a disciplinary violation required oral or written notice and an informal “give and take” between the student and the administrative body which gives the student the opportunity to characterize his conduct and to put it in to context.

The principal’s action was sufficient to meet the notice requirement of Goss and Nickerson. Both decisions only require an informal meeting at which the student is given notice of the charges and the basis of the charges. The principal summoned Peter to his office and told him that he was suspending him because Peter’s haircut violated the prohibition against promoting a position regarding the school closure. However, the principal’s action did not satisfy even the minimal requirements of Goss and Nickerson for an informal hearing. The principal ordered Peter to leave the campus without giving him a chance to defend or explain himself.

B. Article I, Section 1, Liberty Interest and Article I, Section 5, Freedom of Speech – 30% (15% each)

Peter also has a claim under two other provisions of the state constitution. Article I, section 1, provides that “all persons have a natural right to life, liberty, the pursuit of happiness, and the enjoyment of the rewards of their own industry...” Peter has a claim that the prohibition on promoting either viewpoint violates his liberty interest in wearing the hairstyle of his choice. Peter also has a claim that the prohibition violates his freedom of speech.

In Breese v. Smith, 501 P.2d 159, 168-69 (Alaska 1972), the Alaska Supreme Court held that article I, section 1, gave high school students a “liberty” interest in wearing their hair at whatever length and in whatever style they wanted. The right is not absolute, however. Id. at 170. The state may abridge the right for a compelling reason. In Breese, the court reviewed the testimony adduced at trial and concluded that it did not support the school’s claim that short hair was necessary to discipline and educate the students.

The court applies the same basic analysis to state action prohibiting free speech. S.N.E. v. R.L.B., 699 P.2d 875, 879-80 (Alaska 1985). Only a compelling state interest can justify a curtailment of the right to free speech. Id. Moreover, a compelling justification is not sufficient if there are less restrictive alternatives available. Id. The Alaska Supreme Court recognizes that symbolic speech is protected by the constitution. Johnson v. Tait, 774 P.2d 185, 186 n. 3 (Alaska 1989)(citing Tinker v. Des Moines Community School Dist., 393 U.S. 503, 505-506, 89 S.Ct. 733, 735-36 (1969), in which the Supreme Court rejected a prohibition on wearing black armbands to school to protest war).

Peter chose to have a symbol shaved into the back of his head. Under Breese, Peter has a liberty interest in wearing his hair however he wants. Although the facts in Breese involve a rule regulating the length of hair, the court’s holding is very broad and protects a person’s choice to wear a particular style. Peter’s choice was also an expression of symbolic speech because it was a comment on an important public issue within the school.

In deciding the case, a court would balance the infringement of Peter’s rights against the school’s need to enforce the ban. The facts of this case might justify enforcement of the ban. There have been numerous noisy and lively discussions in the hallway, which, according to two teachers, has made it difficult to maintain order. There has also been one shoving match related to the issue. These facts tend to support a claim that the ban was necessary to maintain discipline. In Tinker v. Des Moines, 393 U.S. 503, 89 S.Ct. 733, 738 (1969), the Supreme Court stated that a school could not ban symbolic speech in the absence of a showing that the conduct “would materially and substantially” interfere with maintaining discipline. It is possible for a court to conclude that their discussions in the hallways are materially and substantially interfering with discipline. On the other hand, Peter says that his English teacher will say that the chaos is no worse than normal. Furthermore, there has only been one shoving match related to the issue. These facts suggest that there is no discipline problem. In Breese the court concluded that the state had not met its burden of proving that long hair was a discipline problem. The parties in Breese presented conflicting evidence, and the court concluded that it was not sufficient for the school to meet its burden of justifying the rule. Breese, 501 P.2d at 174. The school may not be able to

meet its burden of justifying the rule because of the apparent conflict in the evidence.

Arguably there are less restrictive means available. The school could deal with shoving matches by punishing the participants for fighting. The school could also punish students for blocking the hallways or being tardy to class. The school does not need to prohibit promoting a position on the closure of the school to maintain discipline.