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STATE OF ALABAMA

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Alabama State Department of Education
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Department of Education -
Students - Education

Local school systems may
legally impose academic
sanctions for
non-attendance with certain
safeguards.

Dear Dr. Teague:

The Attorney General has received your recent request for an opinion in which you pose the following four questions:

1. Can a student be retained in a grade merely because of a certain number of excused absences?
2. Can a student be retained in a grade merely because of a certain number of unexcused absences?
3. Can academic sanctions (grade penalties) be imposed upon a student after a certain number of excused or unexcused absences?
4. Can a student be retained or academic sanctions imposed after exceeding a certain number of excused or unexcused absences if the student is otherwise academically succeeding in the particular course?

These questions are prompted as a result of your appointment of a Task Force on Retention Attached to Attendance and its study which is intended to develop model policies and procedures concerning attendance. Your request has defined excused absences as absences due to (1) illness, (2) weather preventing attendance, (3) legal requirements, (4) permission by principal; and unexcused absences as absences for reasons other than those listed as excused.

ANALYSIS

Ala. Code §16-8-8 (1975), provides:

The general administration and supervision of the public schools of the educational interests of each county, with the exception of cities having a city board of education, shall be vested in the county board of education; provided, that such general administration and supervision of any city having a city board of education may be consolidated with the administration and control of educational matters affecting the county and vested in the county board of education.

Ala. Code §16-11-9 (1975), provides:

The city board of education is hereby vested with all the powers necessary or proper for the administration and management of the free public schools within such city and adjacent territory to the city which has been annexed as a part of the school district which includes a city having a city board of education.

Ala. Code §16-3-11 (1975), provides:

The state board of education shall exercise, through the state superintendent of education and his professional assistants, general control and supervision over the public schools of the state, except institutions of higher learning which by law are under the general supervision and control of a board of trustees, and shall consult with and advise through its executive officer and his professional assistants, county boards of education, city and town boards of education, superintendents of schools, school trustees, attendance officers, principals, teachers, supervisors and interested citizens, and shall seek in every way to direct and develop public sentiment in support of public education.

Amendment 284, Constitution of Alabama of 1901, provides, in part:

General supervision of the public schools in Alabama shall be vested in a state board of education . . .

It is, therefore, the opinion of the Attorney General that, based upon these statutory and constitutional

provisions, local boards of education and the State Board of Education have the authority to adopt rules and regulations providing for the operation of the public school systems in this state, including the establishment of attendance policies.

Section 16-28-1, et seq., provides for a comprehensive system of school attendance in the state of Alabama. Section 16-28-15 requires that parents, guardians, or other persons having control or charge of any child who is required to attend school shall explain the absence of the child when the absence was without permission of the teacher. Failure to furnish such explanation is admissible as evidence in a determination of truancy. Section 16-28-16 provides that an attendance officer is required to investigate all cases of non-enrollment and non-attendance and is to cause notification to be made to the parent or guardian of a child who is not attending school or is not enrolled in school. The attendance officer is required to bring criminal charges against the parent or guardian of a child when a valid excuse for absence or non-attendance is not provided. The public policy of the state of Alabama concerning school attendance is very clearly set out in §16-28-2. This section provides:

The purposes of this chapter are to secure the prompt and regular attendance of pupils and to secure their proper conduct, and to hold the parent, guardian or other person in charge or control of a child responsible and liable for such child's nonattendance

The specific questions raised in your request for an opinion have not been decided by any appellate court in the state of Alabama. Other state and federal courts have dealt with the specific issues involved in your questions and the opinions of those courts are particularly instructive. In Campbell v. Board of Education of the Town of New Milford, 475 A.2d 289 (Conn. 1984), students filed suit challenging the policy of the local school board that imposed academic sanctions for non-attendance upon high school students. The policy in question provided that course credit was to be withheld from any student who, without receiving an administrative waiver, was absent from any year-long course for more than 24 class periods. 475 A.2d at 290. The policy also provided that a course grade of any student whose absence from school was unapproved was to be subjected to a five point reduction for each unapproved absence after the first absence. Id. The Supreme Court of Connecticut held that the stated purpose of the attendance policy was educational rather than

disciplinary. Id. The students challenged the policy on the grounds that it exceeded the authority conferred upon local school boards by state law, and that the policy was pre-empted by state statutes that were inconsistent with the policy. 475 A.2d at 291. The court held that local school boards were required [to] "implement the educational interests of the state," and to "provide such other educational activities as in its judgment will best serve the interests of the school district." 475 A.2d at 292. Connecticut law also gave power and authority to local boards of education to "prescribe rules for the management, studies, classification and discipline of the public schools," and to investigate and regulate "the irregular attendance of pupils at school." Id. at 292-293. The Connecticut statutes are similar to the Alabama statutes which grant to city and county boards of education the authority to provide for the management, administration, and supervision of the public schools. (See generally Ala. Code §§16-8-8 and 16-11-9 (1975).) It is the opinion of the Attorney General that, in Alabama as in Connecticut, the local boards of education as well as the State Board of Education have the authority to make rules and regulations imposing academic sanctions for non-attendance.

The plaintiffs in Campbell also challenged the school policy on state and federal constitutional grounds, raising the arguments that the policy violated the students' rights to substantive due process, procedural due process, and equal protection of the laws. The Connecticut Supreme Court rejected the challenge on substantive due process grounds for the reasons that the plaintiffs were unable to show that the challenged policy had no reasonable relationship to any legitimate state purpose. 475 A.2d at 296. The challenge on procedural due process grounds was based upon the plaintiffs' claim that the students were not given notice of the dates of their alleged absences and were not afforded the opportunity to contest the imposition of an academic penalty either at an internal hearing or before the board of education. 475 A.2d at 297. The Connecticut Supreme Court, citing Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978), rejected the plaintiffs' claims on the grounds that flexible standards of procedural due process called for far less stringent procedural requirements in the case of an academic dismissal than for a dismissal based on disciplinary reasons. 475 A.2d at 297. The court found that the plaintiffs had failed factually to prove this issue. The equal protection claim was rejected by the court on the ground that the plaintiffs had failed to prove that the waiver procedure had been applied in an arbitrary or capricious manner. 475 A.2d at 298. Similar arguments were made in Knight v. Board of

Education of Tri-Point Community Unit School District, 348 N.E.2d 299 (Ill. App. 1976); R.J.J. by Johnson v. Shineman, 658 S.W.2d 910 (Mo. App. 1983); Gutierrez v. School District R-1, 585 P.2d 935 (Colo. App. 1978).

In Gutierrez, the challenged attendance policy provided that academic credit would be denied where more than seven absences occurred in a semester, without regard to whether the absences were excused or unexcused. The Colorado Court of Appeals, in striking down the regulation, held that the regulation conflicted with Colorado law providing for attendance policies in that there was a legislative policy that non-attendance sanctions not be imposed for certain types of absences.

In Knight v. Board of Education of Tri-Point Community Unit School District, the challenged policy involved the lowering of the student's grades as a result of two unexcused absences. The plaintiff contended, on appeal, that the consequences of the refusal of the school administration to excuse the absences were so harsh so as to deprive him of substantive due process of law and equal protection of law contrary to the state and federal constitutions. 348 N.E.2d at 300. The court held that the proper test to be applied to determine the legality of this policy was "to weigh the severity of the punitive effect of the sanction against the severity of the conduct sanctioned." 348 N.E.2d at 303. The court found that the punishment meted out as a result of two days of truancy was not so harsh so as to deprive the student of substantive due process. Id. The student and amici curiae also contended that grades in public schools must be given solely on the basis of scholastic attainment and that a failure to award grades in such a manner served to deny the student substantive due process and equal protection because there existed no rational relationship between grades and the misconduct of truancy. Id. The court held "[t]he courts are not the forum for determining the best educational policy. In determining whether there is a rational basis between misconduct of pupils and the grades given to them we must determine what the grades are taken to represent." Id. In resolving this issue, the court held:

Most high school grading systems have comingled factors of pupil conduct with scholastic attainment in rendering grades. It is difficult to see how grading in physical education can be sensibly done without consideration being given to the pupil's conduct and effort. These factors are often considered in other subjects as well.

Particularly among inept students, it is common to give a higher grade to those who attend class and try than to the laggard truant. Several of the teachers testifying here indicated that they considered effort and conduct in determining grades. Truancy is a lack of effort and plaintiff here exhibited a lack of effort. There was, therefore, a sufficiently rational connection between the grade reduction he was given and his truancy to satisfy the requirements of both equal protection and substantive due process."

348 N.E.2d at 303-304.

All of the cases from other jurisdictions that have analyzed the imposition of academic sanctions for absences, whether upholding the policies or not, have common arguments for and against the policy and common conclusions. We believe that it is extremely important to discuss the common conclusions that courts from other jurisdictions have reached. It is clear that a school board may not apply a non-attendance policy in an unreasonable, capricious, arbitrary, or inequitable manner, Campbell v. Board of Education of the Town of New Milford, 475 A.2d at 293. It is also clear that, whether a fundamental right is involved or not, the school system should have some sort of procedure that allows a decision to impose an academic sanction to be reviewed by school officials. Although education is not a right protected under the United States Constitution, San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973), or a constitutional right under the Alabama Constitution, Mitchell v. McCall, 143 So.2d 629 (Ala. 1962), there will be a need for a due process procedure to review a decision to impose such sanctions. We believe that it is advisable for a school system to have a review procedure to avoid challenges to the policy on the grounds that it is unreasonable, capricious, arbitrary, or [is applied in an] inequitable manner. Campbell, 475 A.2d at 293. The cases from other jurisdictions also make distinctions between "excused" and "unexcused" absences. Campbell, 475 A.2d at 291; Knight, 348 N.E.2d at 301; Hamer v. Board of Education of Township High School District No. 113, County of Lake, 383 N.E.2d 231, 232 (Ill. App. 1978); Gutierrez, 585 P.2d at 936; R.J.J., 658 S.W.2d at 911. The final common thread in all of these decisions is the relationship of the attendance policy to educational purposes rather than disciplinary purposes. Campbell, 475 A.2d at 290-293; Hamer, 383 N.E.2d at 233; Knight, 348 N.E.2d at 303-304. Therefore, any

policy developed by a school board that imposes academic sanctions as a result of non-attendance should take all of these factors into consideration, including a clear provision to place students on notice of the policy. Hamer, 383 N.E.2d at 232; R.J.J., 658 S.W.2d at 912; Campbell, 475 A.2d at 290.

CONCLUSION

Based upon an analysis of the law from other jurisdictions and our own statutes, it is the opinion of the Attorney General that the following answers are appropriate to your questions:

1. Can a student be retained in a grade merely because of a certain number of excused absences?

No, excused absences, e.g., for illness, imply that the absences will not be counted against the student.

2. Can a student be retained in a grade merely because of a certain number of unexcused absences?

Yes, assuming the school board has and carefully complies with a policy relating attendance to academic achievement.

3. Can academic sanctions (grade penalties) be imposed upon a student after a certain number of excused or unexcused absences?

Yes in the case of unexcused absences; no in the case of excused absences, because the implication is that the school system has agreed to the absence of a child under certain conditions.

4. Can a student be retained or academic sanctions imposed after the student exceeds a certain number of excused or unexcused absences if the student is otherwise academically succeeding in the particular course?

Yes in the case of unexcused absences; no in the case of excused absences. Once again, the school system must have, publicize, and faithfully comply with a policy that equates academic achievement with attendance.

We hope that we have fully and completely answered your questions. If we may provide any further information, please feel free to contact this office at any time.

Sincerely,

Don Siegelman

By:

A handwritten signature in black ink, appearing to read "Richard N. Meadows". The signature is written in a cursive style with a large, prominent initial "R".

Richard N. Meadows
Assistant Attorney General

RNM:sf