Opinion No. 73-21

February 20, 1973

BY: OPINION OF DAVID L. NORVELL, Attorney General

TO: The Honorable Odis Echols, Jr. New Mexico State Senator Legislative-Executive Building Santa Fe, New Mexico 87501

QUESTIONS

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Can a state college or university require a student eighteen years old or older to live in campus housing?

CONCLUSION

No.

OPINION

*{*35}* **ANALYSIS**

There are a variety of approaches a college may take in justifying the use of rules and disciplinary actions. The approaches can generally be divided into three categories: non-constitutional and non-statutory, constitutional and statutory.

Three approaches fall into the category which might be loosely classified as non-constitutional and non-statutory in nature. The first is that the college and the student are in a contractual relation to each other. The courts have interpreted this to mean that the college student agrees contractually to obey the rules and regulations of his college. Typically, the terms and conditions of such a contract are found in school bulletins, admission applications, and registration forms. Lacking such specific *{*36}* clauses and conditions, some courts have found an implied contract between the student and the college. The second approach is based on a fiduciary relationship between the college and the student, and the third is the doctrine of **in loco parentis.**

The school standing **in loco parentis** is one of the oldest and most widely employed justifications for the use of disciplinary power.

"The first judicial indication that in loco parentis might also apply on a college level was not until 1866. However, there is authority to the effect that the concept of undertaking parental duties was employed by the colleges for some time before the courts took official notice of it. The use of in loco parentis on the campus has its roots in a colonial era that would be foreign to the contemporary colleges:

'[**In loco parentis**] was transferred from Cambridge to America, and caught on here even more strongly for very elemental reasons: College students were, for the most part, very young. A great many boys went to college in the colonial era at the ages of 13, 14, and 15. They were, for most practical purposes, what our high school youngsters are now. They did need taking care of, and the tutors were **in loco parentis.** ' [Henry Steele Commanger in Van Alstyne, **Procedural Due Process and State University Students,** 10 U.C.L.A. L. Rev. 368 (1963).]" **Colleges and Universities: The Demise of In Loco Parentis,** Comment, 6 Land & Water Law Rev. 715 (1971).

In **Gott v. Berea College,** 156 Ky. 376, 161 S.W. 204 (1913), a restaurant owner attempted to procure an injunction against a private college's regulation forbidding college students to eat at any place not owned by the college. The court said:

"College authorities stand **in loco parentis** concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents . . . and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy."

The **Gott** case was not the typical instance of a college taking disciplinary action against a student, but involved regulations intended to protect the welfare of the students. Relying on the **Gott** rationale, requirements that students live in dormitories have been upheld as within the discretionary power of college officials to regulate the discipline of their college.

While the doctrine has been attacked in the past, the last three years have evidenced the courts' increasing reluctance to base a college's power on a vague doctrine like **in loco parentis.** The first of these decisions is **Goldberg v. Regents of the University of California,** 248 Cal. App.2d 867, 57 Cal. Rptr. 463 (1967), a dispute over a college's authority to expel students. While the court upheld the college's inherent power to govern and discipline its students, providing proper procedural steps are taken, by way of dictum the court rejected the use of labels or fictions as justifications for control of student conduct. Shortly thereafter in **Buttney v. Smiley,** 281 F. Supp. 280 (D. Colo. 1968), and **Moore v. Student Affairs Committee Troy S. Univ.** 284 F. Supp. 725 (M.D. Ala. 1968), courts refused to uphold the doctrine of **in loco parentis.** See also **Soglin v. Kauffman,** 295 F. Supp. 978 (W.D. Wis. 1968).

Assuming however, that the doctrine of **in loco parentis** is still valid, the next determination is whether the doctrine leaves school officials with parental authority even over individuals who have reached the age of majority. While we find no direct answer to this query, it appears from the language **Gott** and other cases relying on the doctrine set forth in that opinion, that once, because most students were under the age of majority, all students, regardless of age, may have been considered under the protective custody of their schools. In more recent years however, the *{*37}* paternalistic

relationship between institutions of higher education and their students has been weakened by administrative rejection of the doctrine, due in part to the advanced age of most students, and now the lowering of the age of majority from twenty-one to eighteen. See Section 13-13-1, N.M.S.A., 1953 Comp. (1971 P.S.). Schools so acting include the University of California at Berkeley and Cornell University. **Colleges and Universities: The Demise of In Loco Parentis, supra.** Now that most students attending institutions of higher learning are over the age of majority and parents themselves cannot exercise parental control over such individuals, in our opinion there is no longer the need for the doctrine of **in loco parentis.**

Further, assuming the doctrine is repudiated, and the contractual and fiduciary approach to student-college relationships are also deemed too vague, an examination of both the statutory and constitutional methods of defining such relationships is then necessary.

The statutory method of defining student-college relationships is found in a state's enabling act. The acts usually grant broad discretional powers to those in charge of operating a college. The New Mexico State Constitution at Article XII, Section 13 provides that:

"The legislature shall provide for the control and management of each of said institutions by a board of regents for each institution . . . ."

Statutes further clarify this power by providing that the "regents shall have power and it shall be their duty to enact laws, rules and regulations for the government of the university." See Sections 73-25-7, 73-26-6 and 73-27-8, N.M.S.A., 1953 Comp.

While the statutory authorization for administrative regulation for the government of the university appears all-encompassing and broad enough to include the power of requiring students over eighteen to live in campus housing, such legislation must be veiwed in light of constitutional law. The constitutional approach is the latest to gain recognition, but it probably occupies the dominant position in school law today. It is established law today that the student does retain his constitutional rights while attending college, **Tinker v. Des Moines Independent School Dist.,** 393 U.S. 503 (1969).

Further, and more important, the traditional understanding of the Equal Protection Clause of the United States Constitution has been that it forbids a state to treat people differently unless there is a substantial difference between them, and the treatment based on that difference is rationally related to a legitimate state objective or purpose.

Chapter 213, Section 1 of Laws of 1971, lowered the age of majority in New Mexico to eighteen. This provision states in part that "any law,, except the Liquor Control Act [46-1-1 to 46-11-4, N.M.S.A., 1953 Comp.] which differentiates between treatment to be accorded persons who have reached their twenty-first birthday and those who have not, shall differentiate between treatment to be accorded persons who have reached their

eighteenth birthday and those who have not." Section 13-13-1 (4), **supra.** While the rules and regulations requiring students to live in university housing are not "laws" as contemplated by the Age of Majority Act, they are promulgated pursuant to the statutory authority cited above, and can well be interpreted to be in contravention of the intent of the Age of Majority Act. In view of the fact that the doctrine of **in loco parentis** appears to be on the decline, and colleges and universities therefore cannot justify different treatment for students under twenty-one but over eighteen, for the traditional reason -- paternalism, it is our opinion that requiring students to live in university housing when such students are over eighteen may well violate the Equal Protection Clause. See also **Anderson v. Laird,** 466 F.2d 283 (1972); **cert. denied** 92 S. Ct. 68. While we find no direct authority in this area, analogies can be made in the expanding field of education law. See Opinion of the Attorney General No. 73-16, dated February 5, 1973.

Therefore it is our opinion that a state college or university may not require a student eighteen years or older to live in university housing.

By: Leila Andrews

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