In the

Supreme Court of the United States

JOHN P. WOOD, et al.,

Petitioners,

v. No. 73-1285

PEGGY STRICKLAND, A MINOR, BY MR. AND MRS. VIRGIL JUSTICE, HER PARENTS AND NEXT FRIENDS, et al.,

Washington, D.C.
October 16, 1974

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Wednesday, October 16, 1974

The above-entitled matter came on for argument at 2:09 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

G. ROSS SMITH, ESQ., 1100 Boyle Building, Little Rock, Arkansas 72201
For the Petitioners

BEN CORE, ESQ., P. O. Box 1446, Fort Smith, Arkansas 72901
For the Respondents

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: Mr. Smith, you may proceed whenever you are ready.

ORAL ARGUMENT OF G. ROSS SMITH, ESQ.,

ON BEHALF OF THE PETITIONERS

MR. SMITH: Mr. Chief Justice, may it please the Court, this case is here on certiorari to the United States Court of Appeals for the Eighth Circuit and involves a disciplinary sanction imposed against three tenth grade female public school students for violating a school board regulation prohibiting the possession or use of intoxicating beverages at school or at a school-sponsored function.

The Petitioners are members of the Board of Education of the Mena Special School District of Polk County, Arkansas.

The Petitioners submit that the basic issue here is whether the Court of Appeals properly reversed directed verdicts for the School Board defendants in a public school students' suit under 42 USC § 1983 on the grounds that the School Board had misconstrued and misapplied its own regulation and that the application of that regulation to these students deprived them of Fourteenth Amendment substantive due process.

The Petitioners' contention that there is nothing in this record to warrant the exercise of Federal jurisdiction in that Respondents have shown the deprivation of

no federally-protected right. For reasons which I hope to discuss later, we submit that the issue of procedural due process is not properly before the Court in this case, and would call the Court's attention to the fact that the amicus brief submitted on behalf of the Responsents deals only with the procedural due process issue and does not reach the substantive due process question.

The basic facts are uncontroverted. Early in the school day on February 7, 1972, three female students, two of whom are Respondents here, devised a plan to leave the school premises to purchase an alcoholic beverage which they intended to put in the refreshments to be served later that day at a joint parent-student function to be held on school premises. This function was sponsored by the Home Economics Department.

Since this school district is situated in a county in Arkansas which has exercised its local option, and has voted dry, the sale of alcoholic beverages in the county is unlawful, the Respondents drove out of the county, across the State line into the State of Oklahoma, where they purchased at a tavern a quantity of malt liquor beverage.

Returning to Mena, they then purchased a non-alcoholic beverage with which they mixed the malt liquor, returned to school and completed their plan.

Several days later their teacher learned of this

incident and confronted the girls with her information. After first denying that they had been engaged in this conduct, they later admitted their involvement.

The matter was then brought to the attention of the principal. He advised them that he would invoke a one-week suspension until such time as the Board of Education had an opportunity to deal with the question, and that it was their ultimate responsibility.

That evening the Board did meet to consider the matter. The principal and the teacher who had visited with the girls earlier that week relayed to the Board the information that was given them by the students, and the Board voted to suspend the girls for the balance of the semester pursuant to the regulation cited in our briefs.

Q Right there, Mr. Smith, what is the balance of the semester? This was in February, wasn't it?

MR. SMITH: Yes, Your Honor. This occurred on February 7. The hearing was on February 18.

Q So that would be until June?

MR. SMITH: Your Honor, normally the school year in Arkansas school districts lasts through May, yes, sir.

Q I think there are statements made in some of the briefs that the girls lost a full year. How could they lose the first half of the year then?

MR. SMITH: Your Honor, the Court of Appeals made

that observation in its opinion and, frankly, there is no evidentiary support in the record to sustain that. They had completed the first semester of that school year, and there is nothing to suggest that they lost any credit other than that which they would have earned in the spring semester; namely, two units.

Q Now that I have you interrupted, under Arkansas law, how long does a student -- how long is a student under compulsion to attend school?

MR. SMITH: Up until the age of fifteen, Your Honor, and both of these students -- one was sixteen and one was seventeen, so they were beyond the reach of the compulsory attendance law.

Q Has the third girl--

MR. SMITH: This is contrary to an observation of the district judge, I might add. Excuse me.

Q Has the third girl never been a party to this litigation?

MR. SMITH: That is correct, Your Honor.

Q And she, apparently, was the main force behind the enterprise, was she not?

MR. SMITH: According to the testimony of the other two girls, perhaps that is an accurate characterization.

Q Up to what age in Arkansas does a person have a right to attend a public school; or is there no limit?

MR. SMITH: Your Honor, I don't know that there is a right to attend the public schools up to a certain age. The schools may furnish instruction for students between the ages of six and twenty-one.

Q May or are they required to?

MR. SMITH: They are required.

Q Well, if there is an obligation on one side, I suppose there is a right on the other side, isn't there?

MR. SMITH: Yes, Your Honor, but I didn't mean to imply that a school district has to furnish courses of instruction for a person twenty years of age, for example.

Q Well, if he has graduated from the twelfth grade, I suppose--

MR. SMITH: Right.

Q --that's the end of it.

MR. SMITH: After the girls and the parents were informed of the decision made at the special Board meeting, they were later furnished, at their request and the request of their counsel, a special Board meeting to be held on March 2.

At the outset of this meeting, the Board presented a statement of facts which they had found and on which they had based their suspension. Included in this statement was the following, which appears at Appendix, page 137:

That the three girls in question travelled to

Oklahoma, purchased a number of bottles of malt liquor, a beer-type beverage and later went onto school premises with the alcoholic beverage and put two or more bottles of the drink into the punch or liquid refreshment which was to be served to members of the class and their parents. The Respondents and their counsel were then given an opportunity to respond, which they did. After the conclusion of this presentation, the Board again voted that the children would be suspended for the balance of the year.

Q What was the nature of the defent (sic)?

MR. SMITH: I beg your pardon, Your Honor?

Q What, if anything, was the nature of the defense?

MR. SMITH: Your Honor, the--

Q I really don't mean to disturb you, I was just curious.

MR. SMITH: The district judge, in his opinion, stated that there had never been any contention by the students or their parents that the rules had not, in fact, been violated. Their contention was the punishment was excessive.

On the other hand, their counsel did argue, it doesn't appear that this argument was presented at the Board hearing, but he certainly argued at the trial of the case that because of the low alcoholic content of this particular beverage, which evidence demonstrated later to be 3.2 percent, that there was actually no--

Q Is that 3.2?

MR. SMITH: 3.2 percent, yes, sir. That--

Q In solution only a little bit of the 3.2--

MR. SMITH: That's correct, Your Honor. That's correct.

The argument was that there had been no proof that the beverage was, in fact, intoxicating, that no violation of the rule had been shown, and that this constituted a violation of substantive Federal constitutional due process. And that is the basis upon which the Court of Appeals ultimately based their opinion.

Q The Court of Appeals said that it based its opinion on substantive due process, but I didn't read its opinion as saying that the School Board couldn't, as a matter of substantive regulation, provide that you could expel a person for putting beer in a punch. I read it more as a kind of review of the evidence type of opinion.

MR. SMITH: That's correct, Your Honor.

Q It's a Shuffling Sam case. Are you familiar with that case?

Q A no evidence case.

Q A no evidence case.

MR. SMITH: Yes, sir. Yes, sir, that's essentially what the Court of Appeals held. In doing so, however, I think the Court of Appeals conveniently overlooked the fact

that the School Board construed their regulation to reach alcoholic beverages. They so found in a statement issued March 14. The girls themselves admitted a violation. And, as a matter of fact, testimony at the trial demonstrated that when the regulation was adopted, it was adopted in response to an incident involving beer, which has -- well, I don't think the record shows what the beer would have had in terms of alcoholic content.

Q This was 3.2 I think you said, didn't you?

MR. SMITH: That's correct, Your Honor.

Q Is that intoxicating? I thought we used to be allowed to drink that because it wasn't.

MR. SMITH: Your Honor, in terms of the Arkansas statute's definition of an intoxicating liquor, from a criminal standpoint, it is in excess of 3.2. They define beer as a malt beverage containing up to 3.2 percent alcohol.

Q My question was 3.2, whatever you call it.

MR. SMITH: Not to exceed.

Q Not to exceed 3.2?

MR. SMITH: Not to exceed 3.2, yes, sir.

This particular beverage.

Q Is that beverage intoxicating?

MR. SMITH: Your Honor, in terms of the Arkansas statute, it is not.

Q Are you old enough to remember when we used to be

allowed to drink 3.2 beer?

MR. SMITH: I don't know how to answer that. I don't think I have ever drank 3.2 beer, Your Honor.

Q All right. I can tell you from personal experience--

Q Is it illegal in this county?

MR. SMITH: It is. And the prosecuting attorney, when inquired, when the Board president inquired of him as to the nature of this beverage, he said, in his view, it was an intoxicating beverage, its possession was unlawful, he had prosecuted individuals for possessing it in that county.

Q When was it mixed, in the school or out of the school?

MR. SMITH: I beg your pardon?

Q When was it mixed with all of these other juices?

MR. SMITH: It was mixed with the non-alcoholic beverage off the school premises.

Q So when it got on the school premises it was not intoxicating?

MR. SMITH: It is 84 ounces of solution, 24 ounces of which was alcoholic, and then, of course, 3.2 percent of that was the alcohol.

Q I understand. That's the point.

Q It was 3.2 diluted, which made it less than 3.2.

MR. SMITH: Yes, Your Honor.

Q I thought you said 3.2 made it intoxicating and below 3.2 was not.

MR. SMITH: That's the definition provided in the criminal statutes of the State of Arkansas. This rule was adopted by the School Board January 10, 1967. The Board president and two of the Board members who were on the Board at that time testified that when they adopted this rule, it was adopted in reference to an incident involving beer, and that they used the term "intoxicating liquor" in its commonly accepted lay sense. They had no reference to a criminal statutory definition of what is or is not--

Q But it wasn't beer. What they brought in there was not beer. It was beer diluted with ice and everything else. It wasn't beer.

Q Orange, black, strawberry soda, coca cola--

MR. SMITH: This Board of Education construed the conduct of these youngsters to be a violation of its regulations, and they imposed a punishment.

Q Well, I suppose--

MR. SMITH: They have a remedy provided by the State of Arkansas by their State courts,since 1909 the Courts of Arkansas have been available to issue Writs of Mandamus for wrongful suspensions. Now, we submit there is no Federal question involved in this somewhat ludicrous case and that the Court of Appeals erred in remanding this

case for trial on the Plaintiffs' claim for damages in the amount of $90,000 against the School Board members in their individual capacities.

The substance of our argument here is that this case doesn't belong in the Federal courts. There is no Federal interest in liberty or property involved in this case. There is nothing which would require or authorize this Court or the Court of Appeals toconsider whether or not the Board made an error in applying its intoxicating beverage rule to these facts. There is no Federally-protected right to set aside an erroneous decision made by a State officer, be it the school district or anything else. And we contend that this is the dispositive issue in the case. Whether we agree or disagree with their finding that a violation had occurred, or the assessment of the punishment, it is not a matter that is protected or involves the United States Constitution.

Q Your immunity claim was rejected below too, I take it?

MR. SMITH: Yes, Your Honor. The Court of Appeals stated that the standard by which the jury will determine whether or not to award damages against these Board members in their individual capacities is good faith, objectively determined.

Now, frankly, I don't know what that means, but I

would assume it means some standard calling for a judgment as to whether they acted as reasonably prudent school board members would have acted, without inquiring into their actual state of mind.

Q And you said there was something closer to absolute immunity?

MR. SMITH: Yes, Your Honor. We think that This Court's opinion in the Rhodes Case, or coming from Kent State, provides the very minimum standard that should be employed. And there--

Q That is objective, good faith standard, I take it?

MR. SMITH: Your Honor, if the Rhodes standard of conduct is objective, then fine, because it does require an actual inquiry into what the man was thinking at the time he did it and whether he had reasonable cause--

Q I thought that was an "or" in the Rhodes --

MR. SMITH: I'm sorry, sir?

Q Either a subjective bad faith or objective bad faith in Scheuer against Rhodes.

MR. SMITH: Your Honor, the Rhodes Case states that immunity depends on the existence of reasonable grounds for the belief formed at the time--

Q That's objective.

MR. SMITH: --in the light of the circumstances coupled with good faith belief.

Q Coupled with good faith belief--

MR. SMITH: Yes.

Q --so it has to be -- so it's either/or?

MR. SMITH: Yes, Your Honor. And that is, in fact, the manner in which the District judge instructed the jury.

Q Are you satisfied with the Scheuer standard, or not -- the Rhodes standard?

MR. SMITH: Your Honor, we think, actually, that there are grounds for absolute immunity here, but, frankly, there is very little authority to support that argument.

Q So you are not satisfied with it, but Scheuer is-- Rhodes is the law, isn't it, and the lower Court instructed--

MR. SMITH: Well, actually, Your Honor, the District judge in his findings at the temporary restraining order hearing said, "I find that the School Board members had reasonable grounds to believe that their regulation had been violated at the time they took their initial action in this case."

As a matter of law, the damage issue should never have been submitted to the jury.

Q Well, then, what did the Court of Appeals say?

MR. SMITH: The Court of Appeals stated that they could not say on the basis of this record that the defense of good faith had been established as a matter of law.

Now, I would point out to the Court that the District judge had before him a good deal more evidence than did the Court of Appeals, because the trial transcript, the trial consuming some four days, was not included in the Appendix in the Court of Appeals. It is in the record in this case at this time. And we submit that an examination of that would be illustrative of the actual good faith evidenced by these School Board members.

Q How was the Court of Appeals able to review the District Court's action if there wasn't a transcript of the evidence? What basis did it use to review it?

MR. SMITH: It reviewed evidence which had been compiled at the Temporary Restraining Order hearing along with Answers to Interrogatories and some other factual material that was in the case, affidavits submitted in connection with motions.

Q But you do maintain --

Q One of your questions you want reviewed here is whether the Court of Appeals was correct in its immunity ruling?

MR. SMITH: Yes, sir.

Q Or its standard ruling, whatever you want to call it?

MR. SMITH: Yes, sir. It is undefined in terms of whether it would permit someone who really believed they

were doing what they should be doing to be found in good faith. As I read their Opinion, it would not. It is a question of what a reasonably prudent person would have been doing under the same or similar circumstances.

Q I would suppose that Rhodes said you might subjectively think you were in good faith, but it might be that you didn't have reasonable grounds to think so, in which event you are not immune under Rhodes.

MR. SMITH: Yes, sir, as long as we don't get to a position where somebody makes a wrong decision, a decision -- what comes to mind, the Kirstein Case where the issue was whether the college officials had committed a constitutional violation by excluding women from what had previously been an all-male school. They did exclude them and the Court said there was no reason at the time for them to assume this was unlawful and we won't assess damages against them. They made a wrong decision, but they weren't liable for it.

One other point, which is very important, is that the Board all along has dealt with this case on the basis of admitted facts. There has never been any controversy as to a factual dispute, with the possible exception of whether or not this mixture was intoxicating. And under these circumstances, we submit that this is not an appropriate vehicle for the Court to reach the issue of procedural due process.

Q Was the Scheuer against Rhodes Opinion down by the time the Court--I think not.

MR. SMITH: I believe not, Your Honor. I think this was in April.

Q It was not cited in the Opinion.

MR. SMITH: Right, and the Court of Appeals decision was in August of '73.

We would urge the Court, however, to examine the question of whether there is in fact a federally-protected right here to establish the requisite elements of 1983.

We submit that Rodrigues stands for the proposition that unless there is a total denial -- and we don't have here a total denial. We have an expulsion, or a suspension, if you will, for a portion of one of 24 semesters that a public school student in Arkansas will be attending school. Efforts were made here to assure that these girls would graduate with their class by taking one correspondence course and one additional course to make up the two units they missed.

And, in connection with the previous inquiry, I believe of Mr. Justice Rehnquist, in the last case as to whether there is a property interest involved, even the District Court decision in Lopez against Gomez -- or Lopez against Goss, I believe conceded that education did not involve a property interest.

In Epperson against Arkansas this Court said that discretion to be accorded to public school officials is extremely broad and that this Court should intervene only in a clear case of constitutional violation. And we respectfully submit that this case involves no such clear case of constitutional violation.

If the Court please, I'll save the remainder of my time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr.Core?

ORAL ARGUMENT OF BEN CORE, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. CORE: Mr. Chief Justice, may it please the Court, I would like to start out by admitting what I am afraid will become obvious before I am finished, and that is, I am not a constitutional lawyer, and neither am I a civil rights lawyer.

I was in two civil rights cases before this one, and one was settled and the other was tried and not appealed. And this one has brought me all the way to the U. S. Supreme Court.

Probably I have read more Federal Court cases since this case has been going than I had read at anytime prior to that, and I still do not have any feeling of competence really to discuss constitutional law.

But I have been in this case since before it was a case. And if I can help the Court in any way, perhaps it would be more as a result of that than the ability to discuss constitutional principles.

This case got its start when these parents and children came to me to get me to help them get the School Board to meet again. They had been spending -- this was on the 24th of February -- and they had spent the intervening six days in an effort to get the Board to meet again to hear them.

And I first declined to take the case at all, but I did agree to go with them to see if I could get the Board to meet again and go with them and we would get on our knees, really, and beg for mercy, and see if we could get back in. That was the beginning of the case. And that was the preliminary to the meeting of March 2nd, 1972. And at that time they had been out of school some eleven days.

Q At that time were you representing the Wahl girl?

MR. CORE: No, sir. The Wahl girl never came to me, just Crain and Strickland, and I wish Wahl had because she was a full blood Indian.

Q A full blood what?

MR. CORE: She was a full blood Indian. But she didn't come.

Q How is her name in the pleadings if she never--

MR. CORE: She's not in the pleadings, Jo Wahl is not.

Q I'm curious, what difference would that have made?

MR. CORE: Well, I think the District judge would have ordered the School Board to put the kids back in school. I think if we had had a member of a minority race--

Q You could have made it a racial case?

MR. CORE: Well, again, I'm not familiar with those either.

Q Who was the District judge, Judge Williams?

MR. CORE: Yes, sir, Paul X. Williams.

Q And you feel that this would have made a difference as far as--

MR. CORE: Well, judging from what he said at the first hearing, Your Honor, he said, "If these were little Colored girls, I'd have to put them back in school." But they're white girls and, you know. If that made a difference to him, I think that might have helped, if we had had the Indian.

But, at any rate, we didn't. We just have Strickland and Crain. And, as I say, the first meeting, the one of February the 18th of '72 was more or less a secret meeting as far as the parents were concerned and it cannot begin to rise to the dignity of due process, either

procedural or substantive. And then the meeting of March 2nd was really not in the sense of a hearing. It was -- I had agreed to go with these people to see if I could have any influence with them. I had held office in that district and they were just convinced that I could. I was not convinced, but I went with them to try. And the meeting was -- it was really no meeting. It was just exactly what we had in mind, that is, go in an apologize and ask them to re-instate us. And they offered no evidence. We didn't see their witnesses. I had asked for the home room teacher to be there. And she had talked with the Superintendent and asked him if she had to be and he said she didn't, and so she didn't come.

So, really, the March 2nd meeting, '72, it was not a meeting that furnished either procedural or substantive due process.

Q Do you agree with Mr. Smith that there isn't any dispute as to the facts here?

MR. CORE: No, sir, I do not. He based that on the fact that there was not dispute about this being an alcoholic beverage or an intoxicating beverage.

Q Apart from that one feature, is there any dispute about the facts?

MR. CORE: Well, they have left out many facts which we feel to be pertinent. They have not disputed any

facts which we have submitted.

Q Did you put on, or try to, these omitted facts?

MR. CORE: Yes, sir, they're in evidence. We tried the case for four days, but we did not bring that record up simply because of the cost. You see, the girls took the appeal from the District Court. And the District Court had dismissed the case on the basis of these motions for judgment notwithstanding no verdict, which was the equivalent of a directed verdict. So it raised an issue of law. And we just took up enough proof to show that there were issues of fact that needed to be resolved. And, as a matter of fact, we couldn't afford that record.

Q You couldn't afford to print it you mean?

MR. CORE: Right.

Q But the record is here, isn't it, typewritten?

MR. CORE: Well, no, the__

Q There was never a transcript?

MR. CORE: No, sir, the evidence that was taken that four days of trial--

Q Was never transcribed?

MR. CORE: --was never sent to the Court of Appeals.

Q Was it transcribed?

MR. CORE: It has been since the Board took this appeal to this Court.

Q The original record is here.

Q I would assume the original record is here then?

MR. CORE: I don't know, Your Honor. I have seen it, but I returned it to the Clerk.

Q It never got to the Court of Appeals?

MR. CORE: No, sir.

Q And it may not be here then.

Q Before the School Board did your clients contest the basic factual claim that they had gotten the so-called malt beverage over in Oklahoma and put it in the punch bowl?

MR. CORE: Your Honor, of course, they were not at the February 18 hearing at all. But at the March 2 meeting the whole procedure was for the girls to tell the School Board what they did, and they did tell. When I say the girls here, I mean the Plaintiffs, Miss Strickland and Virginia Crain. They did tell the Board exactly what they had done.

Q It's a little cryptic to me, exactly what they had done. Was it what is alleged; that is, they went over to Oklahoma and got some beer and brought it back and put it in the punch bowl?

MR. CORE: Yes, sir.

Q There's no dispute over that then?

MR. CORE: That's again leaving out what we think are some important facts. Jo Wahl was the one who knew where to go. Virginia and Peggy didn't. And they went with her.

And then they came back to Mena and bought this King Kooler, some 60 ounces of it and mixed it all together and then took it to the campus. And then there they added enough water to make a gallon and a half. So you have 7.68 ounces of alcohol when they go up on the school ground.

Q Isn't this all in the record here? It seems to be that what you have just said is familiar.

MR. CORE: Yes, this is, or at least enough to make the computation 7.68.

Q I am curious as to what is still missing that you are complaining about.

MR. CORE: Well, all that's here, Your Honor, is the two hearings which we held, one being on March --

Q Yes, but the facts you have just recited, I certainly read them somewhere, either in the briefs or in the Court of Appeals opinion.

MR. CORE: They're in that testimony that was taken March 7th and April 7th.

Q Well, what, in addition, is still missing?

MR. CORE: Well, we had the parents testify. We had a doctor, hematologist testify about the effect of three-quarters of an ounce of alcohol on an average man. We had one of the School Board directors testify, two of them -- a Dr. Wood and Mrs. Goforth. We had some of the mothers there who attended this Mother-Daughter function and

didn't know there was anything in the spiking agent.

Q Well, doesn't it all come down to what is the difference between an intoxicant and an alcoholic? Here there is no argument, is there, about this being an alcoholic beverage? And is there any argument that it was non-intoxicating, even under Arkansas?

MR. CORE: Yes, definitely, there is -- well no, if the School Board admits that it was not intoxicating, there would be no argument because that is our position, that it was not intoxicating.

Q But they think for purposes of their rule that it is intoxicating? That's what they have held?

MR. CORE: That's the premise they proceeded under, but the President of the School Board admitted under cross-examination that the girls had not violated the rule.

Q Were you defending the Court of Appeals decision?

MR. CORE: Yes, sir.

Q And the grounds for it, your rationale for it?

MR. CORE: Well, yes. Do you mean from the standpoint of whether or not the children should be given any--

Q No, as to the reason of the Court of Appeals decision in your favor that there was no evidence of -- that there was an intoxicating beverage involved?

MR. CORE: Yes, I think that's true that there

was none. As a matter of fact, the truth is it was not intoxicating.

Q Was this illegal conduct in that county?

MR. CORE: Only possession.

First it was not, Your Honor, because it did not violate any law concerning intoxicating beverage.

Q Did it violate any law?

MR. CORE: Yes, it violated a law against possessing beer that did not have the Arkansas tax paid on it. And this is why they got rid of the bottles before they came back, I suppose. They said they poured it out in the milk carton before they came back across the State line. But, at any rate, it is against the law to possess it without the Arkansas tax being paid on it.

Q So that you do not question that the girls were guilty of some illegal conduct?

MR. CORE: True, Your Honor.

Q It is just a question of how you define that illegal conduct?

MR. CORE: Right. But, of course--

Q It is a question, isn't it, whether or not the girls engaged in conduct that is proscribed by the rule of the School Board 3(b)?

MR. CORE: That's true.

Q That's the question.

MR. CORE: Yes, sir.

Q Or, more propertly, to what extent should a Federal court in a 1983 action second guess a School Board decision that that regulation was violated?

MR. CORE: Well, I believe it is the procedural problem--

Q Yes.

MR. CORE: --Your Honor, because if they had proceeded in a correct manner, then they would have determined that there was no violation.

Q But the School Board construes its own regulation as meaning intoxicating is equivalent to alcoholic. What's the Federal court got to do with that?

MR. CORE: Well, it's not really that point, that I believe that there is Federal jurisdiction. It's the fact that by the manner in which the School Board proceeded that they had already pronounced a very serious judgment without ever having found out that there was either no violation or that it was very questionable whether there was any violation, or that, even so, these two or three children were not such as would justify this type of penalty. In other words, how far -- if they had proceeded in a correct manner, they would never have pronounced this judgment.

Q You are then pressing a procedural due process?

MR. CORE: Yes, sir. In fact the complaint, and

I take issue with Mr. Smith on that, the complaint attacks the rule as being invalid because it's mandatory and does not permit consideration of mitigating circumstances.

Q Is that a Federal claim. You say the Constitution prohibits the School Board from adopting a mandatory rule like this and not take into consideration mitigating circumstances?

MR. CORE: Yes, sir.

Q What case of ours do you rely on for that?

MR. CORE: I'm sorry, I couldn't cite you a case. But if it deprives them -- if they adopt a rule which when enforced will deprive them of a Federal right, then I would say it is pertinent, the Federal courts would have the right to declare it invalid. And that's our contention here. We attack the rule.

Q Mr. Core, let me approach it from this end: Suppose that this regulation spoke in terms of "alcoholic" rather than "intoxicating beverages", would you be here?

A Yes, sir, and I'm glad you made that point because, yes, we think the procedure, in addition to the problem with the rule, we think the procedure which the Board followed is really the reason that they pronounced such a severe judgment on a childish prank with girls that they had never had any trouble with before. We think that their procedure is what led them into this. They only heard from two

teachers. The teachers had done nothing except talk to the girls. And the girls knew nothing about what they had gotten or what they put in there. It could have been anything. And any sort of respectable investigation would have demonstrated that this was not a serious matter calling for the type of punishment which they inflicted.

Q Are you defending on the cruel and unusual punishment?

MR. CORE: Yes, sir, I think that's involved. It is cruel and unusual and I think also equal protection is involved and we leaded it in the complaint.

Q Suppose two students were found sitting in the class room drinking beer right out of the original bottles, your theory of this case would be exactly the same that the School Board could not do what it did here in the way that it did?

MR. CORE: Correct, yes.

Q So they could drink beer with impunity even though it is illegal to possess it in that county?

MR. CORE: No, I don't believe that follows, Your Honor. I would think this, that what should be done is the children should be called in and it should be discussed with them and if, indeed, they just flagrantly violated the school discipline by drinking beer, even though it is not included in any rule, I think, certainly, discipline should be

inflicted on them.

Q That brings us around to Mr. Justice Rehnquist's question, just precisely how is that a Federal question?

MR. CORE: Well, we feel--

Q Federal or Constitutional question?

MR. CORE: --that the State of Arkansas has provided this right or this opportunity for education, and the procedure which they have followed in this case has deprived these children of the right to take advantage of that education for a rather drastic period of time.

Q Was it the procedure or the beer?

MR. CORE: I think it's the procedure. I really do.

Q But you do concede that the School Board would have an inherent power to impose a punishment for drinking this same beer in the classroom?

MR. CORE: I certainly do.

Q But they could not impose such a severe punishment as was imposed here?

MR. CORE: I agree with that, yes, sir.

Q That's your point.

Q We could disagree with the Court of Appeals, I take it, on the ground that they abused here substantive due process?

MR. CORE: Yes.

Q And you could still win on the procedural--

MR. CORE: Yes, sir.

Q --question, which the Court of Appeals didn't reach?

MR. CORE: Yes, Your Honor. They bypassed that--

Q Except for one meeting. They passed the first meeting, February 18th meeting, no procedural due process?

MR. CORE: Right.

Q And they didn't decide the question with respect to the second meeting?

MR. CORE: Right.

Q And, of course, you don't know why they bypassed it?

MR. CORE: No, sir, except apparently they were satisfied on the deprival of substantive due process, and didn't feel it necessary to pass on it.

Q Do you think they felt the substantive due process issue was easier than the procedural due process for the second meeting?

MR. CORE: I wouldn't hazard a guess on that, Your Honor.

Q Would you explain to me, too, the injury to these girls? As I indicated in my question to Mr. Smith, did they lose a year's, a whole year's time?

MR. CORE: Yes, sir. What happened, they took correspondence courses and so forth. They lost the credit for the entire year, and they had to repeat the entire year.

Q Doesn't the system work on a semester basis?

MR. CORE: It is a semester basis.

Q Then how did they lose a whole year?

MR. CORE: Well, no, in fact, the Superintendent testified that if -- when you asked me if it would work on a semester basis, true they do cut it into semesters, but the Superintendent testified that it was the -- that they would fail the entire tenth grade, and have to repeat the entire tenth grade. He said that even if they were expelled on their last day of the second semester, they lost the entire year, because this was a penalty attached to being expelled. That's what he said. And that's in the testimony.

Q Well, the Court of Appeals in Footnote 1 said the practical effect of the suspension was to cause the girls to fail their entire sophomore year.

MR. CORE: That's right.

Q That's what the Court of Appeals said, but I want to know whether it is a correct statement.

MR. CORE: It is, indeed, a correct statement.

Q Well, Mr. Smith told us it was an incorrect statement.

MR. CORE: Right, and I have to disagree with Mr. Smith on that.

Q Well, at least, the girls missed three months of school and, of course, they had to make up in the next three months of school.

MR. CORE: No question of that.

Q Six months, now that's a long time.

MR. CORE: And it would have been subject matter which wouldn't have been covered until the second semester.

Q That's right.

MR. CORE: Which meant they would have to lay out an entire year.

Now, I think, really, the factual basis of the case is that it is so compelling that Mr. Smith says dire consequences if we hold that a Federal court has jurisdiction in this type situation. I would really rather look at it this way, is what's going to happen if Federal courts do not take jurisdiction in this type situation?

Q They'd go into the State courts.

MR. CORE: Well, that's true, but--

Q Wasn't that the custom until just a few years ago?

MR. CORE: Well, in my -- I have been practicing a little over -- well, I'm on my twenty-fourth year, and I don't recall any suits like this before. I don't remember reading any in the Arkansas Supreme Court Reports except that

one real old case where the father brought suit against the School Board, and they held that he had no interest in it. And that's the only case that I know of.

Q Well, isn't this just a new-fashioned kind of case, that when you and I were in Elementary school and we got bounced out, we went home and nobody made a Federal case out of it?

MR. CORE: That's true, back in the days of paternalism that our District judge referred to when he heard the case.

Q You have good courts in Western Arkansas, don't you?

MR. CORE: I beg your pardon?

Q I say you have working courts in Western Arkansas?

MR. CORE: Do you mean State courts?

Q Yes, sir.

MR. CORE: Yes, sir. And, of course, I've been in them quite often and I am personally acquainted with the judges.

Q Isn't that where Judge Williams came from?

MR. CORE: Yes, sir, he came from Booneville, which is only 35 miles from Fort Smith.

Q You mean he came from the State side on the judiciary? He was a State judge, a State Chancery judge?

MR. CORE: He spent over 20 years as a Chancery

judge, before he was a District judge.

Q Where is Mena?

Q In Polk County.

MR. CORE: It's 85 miles south of Fort Smith. It's in Polk County. It's the county seat.

Q Of Polk County?

MR. CORE: Right.

Q It's basically a small town community?

MR. CORE: It is some 4500 population.

Q And the School Board has county-wide jurisdiction, does it?

MR. CORE: No, sir, there are, I believe two or three -- three other consolidated schools in the county. And so their jurisdiction would be limited to their district, which is the Mena School District.

Q Which is Mena, which is basically the Town of Mena?

MR. CORE: Right.

Q And a population of less than 5,000, you say?

MR. CORE: Right. And, of course, the judges know all the school directors and you made a good point, Justice Blackmun, if you will read what Judge Williams said, you will see how reluctant he was to order the School Board to do what he fully believed they ought to do. And I think you would have the same problem with the other good judges there, and I don't mean to criticize them. I have a great deal of

respect for them. But you get away from that when you get into Federal court most of the time. We didn't here because Judge Williams was from Booneville, and had been on the School Board and so forth. As I say, he's a good friend of mine and Icertainly don't criticize him, but he expressed his great reluctance to order the school directors to do what he was telling them, in effect, they ought to do.

Q But he didn't actually order them to do anything, did he?

MR. CORE: No, sir, he never did. He let it go on to a jury and then he sustained these motions for judgment notwithstanding no verdict. But, again, as I say, I think the factual basis for the way these children were handled is the most compelling argument that I can make, that the Federal courts should take jurisdiction and should provide a remedy.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Core.

Do you have anything further, Mr. Smith?

MR. SMITH: Yes, Your Honor, if I might briefly address the issue of procedural due process.

As has been noted, the Court of Appeals acknowledge that the March 2, '72 hearing may have cured any prior procedural defect. Indeed, the students and their counsel were granted every benefit that they claim

in their brief. They had notice of the meeting. They had a statement of facts upon which the action was taken at the inception of the meeting. They had the opportunity to appear, to present any witnesses they could present. They were represented by counsel. And if that doesn't constitute procedural due process in the public school context, then I don't know what does.

The procedural due process issue will not sustain what the Court of Appeals has done. I would assume that if a defect is found in the procedures, the remedy is to remand the case and give them a new hearing.

Now what on earth are they going to do when we give them a new hearing? What kind of evidence would be presented at that point that hasn't already been presented?

The point is that the School Board construed its regulations to reach alcoholic beverages. Mrs. Goforth, a School Board member, testified at the trial that when the rule was enacted there was no discussion of a legal definition of an intoxicating liquor; that the words "intoxicating" and "alcoholic" were synonymous.

Q Have these children graduated now?

MR. SMITH: Your Honor, that is not in the record. I will be happy to answer the question.

Q Well, have they?

MR. SMITH: Yes, sir, with their class.

Q Their sophomore year ended June of '72, didn't it?

MR. SMITH: That's correct, Your Honor. They graduated this past spring.

Q They made up the year then?

MR. SMITH: Yes, sir, by taking a correspondence course and one other extra course.

Q Now, let's assume for the moment -- let's assume just for the moment that the School Board, that the Court of Appeals is reversed but the case is remanded and the Court of Appeals held that there was a denial of procedural due process, that the suspension had been imposed not in accordance with the Constitution, but in violation of the due process clause. Let's just assume that. That as far as they can tell validly there was good cause to throw them out?

MR. SMITH: I would assume that under those circumstances--

Q Would there be a remedy in which damage--

MR. SMITH: There would be a possibility that the students would pursue their damage claim against the individual school board members, since they have had to at least make up two courses.

It was a serious punishment. The point is whether any of the Federal Judiciary agrees with whether it was a

punishment or not. The point is whether it was a decision that this School Board is entitled to make. The Board is in a county in which the citizens of the county have made a decision that they think the possession or sale of alcoholic beverages is a serious matter. And we submit that this Honorable Court should not intervene to substitute its judgment for that of the School Board.

Q In other words, you are saying that a Federal question does not arise out of a mere mistake of judgment by the School Board?

MR. SMITH: Yes, Your Honor.

MR. CHIEF JUSTICE BURGER: Mr. Justice Blackmun has a question.

MR. JUSTICE BLACKMUN: No, sir.

(Whereupon, at 3:00 o'clock p.m. the argument was concluded.