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ABSTRACT

The author examines the factors of school administration today that have buoyed the rise of the importance of attorneys as members of the school district "management team"; and he discusses the legal and social environment in which a school administration must function. In addition, the author discusses the impact of such environmental forces as the increasing role of the courts in defining and protecting student rights; the expanded expectations of education; and the increased involvement of citizen groups in education. (JF)

Oregon School Study Council
BULLETIN

THE ATTORNEY: A MEMBER OF THE SCHOOL MANAGEMENT TEAM?

by

Thomas A. Shannon

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PREFACE

Thomas A. Shannon, Schools Attorney for the San Diego Schools and Community Colleges since 1963, spoke June 21 to the Summer Conference of the Oregon Association of School Administrators. Portions of his speech on the attorney as a member of the school management team are reproduced here along with selected material from his earlier article, "How School Attorneys Work with Superintendents"--published in The School Administrator by the American Association of School Administrators.

Mr. Shannon's background includes a Bachelor's degree in Finance and a Juris Doctor degree. He has served as chairman of the Council of School Attorneys of the National School Boards Association, chairman of the San Diego County Juvenile Justice Commission, and he has been a faculty member at the University of Minnesota.

Presently, Tom Shannon is president of the National Organization on Legal Problems of Education, is legal counsel of the Association of California School Administrators, and is active in the Juvenile Delinquency Task Force of the California Council on Criminal Justice and the San Diego County Delinquency Prevention Commission. He is vice-president of the San Diego Defenders Program, and is a member of the California State Bar's Resolution Committee.

Mr. Shannon has been a featured speaker on law at annual conventions of the National School Boards Association, the California School Boards Association, and other state school boards associations. His writings can be found in various professional journals on the law relating to public education.

Kenneth Erickson
Executive Secretary
Oregon School Study Council

THE ATTORNEY: A MEMBER OF THE SCHOOL MANAGEMENT TEAM?

When Ken Erickson and I discussed last December the prospects of my speaking to you this morning on the topic, "The Attorney as a Member of the School Management Team," I thought I would be talking strictly from the perspective of a school attorney. But, my situation in the San Diego City Schools and Community Colleges has changed considerably during the past several months.

On June 30, one of the finest school administrators I have ever been privileged to work with is retiring as Deputy Superintendent in San Diego, and our Superintendent of Schools, Dr. Tom Goodman (originally from Oregon), has appointed me to be Deputy Superintendent and General Counsel and function as No. 2 man in our school district administration.

I am not the first attorney to be appointed a Deputy Superintendent of a school district in California. In Los Angeles, Jerry Halverson, who served as legal adviser to the Superintendent for a decade, was named by the Los Angeles Superintendent to the post of Associate Superintendent.

I mention this at the outset this morning as evidence that a full-time staff attorney can, at the insistence and pleasure of the superintendent, become so much an integral part of the management team while functioning as an attorney that the superintendent concludes that the attorney should shift his emphasis from the legal aspects of school administration to an exclusive concern with school administration. Of course, this does not mean that one should go to law school and not a college of education to prepare himself for a career in school administration. It simply means that, in a large, urban school district, it takes a diversity of talent to effectively administer the schools. The attorney's association with the people who govern and administer the school district over a long period of years, in tandem with his close involvement in virtually every aspect of school district administration, can lead a superintendent to conclude that the attorney would better serve public education in a position of direct-line authority

in school administration.

This transformation of an attorney to primarily a school administrator is not likely to happen in smaller school districts which do not have full-time staff attorneys or in school districts which retain private counsel. But, regardless of the attorney's relationship to the school district--be it part-time, private counsel (on the one hand), or a full-time staff member (on the other hand), the attorney for the school district is a member of the management team of the school district. That is, his interests are in supporting and defending the efforts of the superintendent and the school board to move the district forward along the course recommended by the superintendent and adopted by the school board. While this has always been the case as far as the relationship of the attorney and his client school district is concerned, the function of the attorney has broadened considerably in the past decade.

Before a school administrator can really appreciate what attorneys can do in furtherance of effective school administration, the school administrator must clearly perceive the changes in school district governance and administration which today have brought the school attorney into the forefront, and have solidly entrenched him as a member of the school district's "management team" in three respects:

1. as an advisor on the law of public education;
2. as an advisor on the governance of public school districts;
3. as an attorney in litigation.

Let us first examine the factors of school administration today which have buoyed the rise of the importance of attorneys as members of the school district "management team."

As changes occur in society, the public institutions established to serve society also change. One of our most important institutions, public education, is not exempt from this cause-and-effect relationship. The extent to which a public institution can change is a measure of its vitality and usefulness in a changing society.

School administration has shifted in a subtle but profound way in the past several years. This shift has been subtle to the extent that many persons actively engaged in school administration

are not even aware that the shift has occurred, much less appreciate its magnitude. The shift is profound in the sense that it has required an entirely different response to the problems facing school administrators throughout the nation--and if this changed response does not come, the problems are confounded to the point where either legitimate interests are being repressed by sheer power, or chaos and disturbance are the order of the day.

There is in our nation today a new professionalism among school administrators. This new professionalism is a product of our changing world.

The school administrator today is different from his predecessor of even just a decade ago in many ways. The total of these differences is equal to the new professionalism of school administration because (1) it clearly sets apart today's school administrators from those of yesterday, and (2) it sharply separates today's school administrators from every other position currently held in the gamut of education generally. These differences are briefly described as follows:

1. Today's school administrator is UNDER the law; he no longer may safely presume that he IS the law. Public education always has been one of the prime functions of government. Government has always exercised fundamental control of public education. The state government has immediate and direct sovereignty over public education but, in recent years, the federal government, with its maze of regulations controlling the acquisition and expenditure of federal education project funds, has increased its capacity to set directions for public education. To the extent that school administrators work under a system of state law and federal project regulations, the school administrator today is not really much different from his predecessor of a decade ago.

But, in addition to the specific controls and regulations imposed by government, ranging from the federal government through the local school board, there is a broad area deeply affecting the operation of the schools and the lives of the persons associated with the schools, which could be called the domain of the school administrator. It is in this area that the new professionalism of school administration dramatically

comes to the surface, for the administrator must make decisions within the context of recently evolving legal standards of which he must be aware. Today, the school administrator's area of absolute discretion is narrowing.

This change in the school administrator's absolute discretionary power ranges from control over students to dealing with school employees and citizens. The administrator's discretion has been narrowed by (a) Legislatures (in their laws governing collective negotiations and the 18-year-old majority; (b) Courts (in their interpretations of the federal and state constitutions concerning students and teachers); (c) the People themselves (in their changing lifestyles and systems of values); and (d) the economy (in its demand for highly trained personnel and its rejection of the ignorant and unskilled).

This change in the school administrator's function has resulted in the construction of a set of legal standards by which the new school administrator must be guided in the exercise of his discretionary power. In short, the new professionalism of school administration requires more sophistication on the part of the school administrator than ever before demanded because he must gauge his actions against recently evolved legal standards which are, at best, general and imprecise when exercising his discretionary power. In this sense, he is faced with problems similar to King John after the Magna Carta; it was personally a lot easier and pleasant for King John to govern England before the Magna Carta was foisted upon him by an evolving society.

The new professionalism of school administration does not involve a surrender of administrative control. It cannot involve giving up control because the law, including state statutes and school board regulations, imposes the responsibility for control upon school administrators. Rather, the new professionalism demands a change in which the old control is accomplished. In essence, the new professionalism, from a philosophical standpoint, consists of (1) an awareness that our society is in an ever-evolving status; (2) a willingness to accept the fact of change; (3) a strong motivation to understand the nature of the change and

the reasons impelling the change; (4) a desire to participate positively and constructively in the dynamics of the change; and (5) an ability to work effectively in the change process. The new professionalism requires, as a practical matter, (1) an admission that perhaps yesterday's response is not today's answer; (2) a continuing observation of what the expectations of education are; (3) a regular study of the new standards being set for society affecting the schools by the Congress, the Legislatures, and the Courts; and (4) a willingness to apply the new standards in a positive way.

These elements of the new professionalism must be set within the context that presupposes that the primary purpose of education is to prepare our children for life and that the school administrator is responsible under law for the successful operation of the schools. Perhaps no other area of the law illustrates the new professionalism of school administration more aptly than the area of student conduct and discipline. And that brings us to the second difference between the old and new professionalism.

2. Today's school administrator is dealing with a student who is entirely different at law than the student of a decade ago. The legislatures and the courts have created a new person with whom school administrators must work. The 18-year-old is now an adult and all children enjoy an expanded aura of civil rights which vastly differentiates them from the status held by their mothers and fathers when they were children not many years ago.

Regardless of the merits of this new status of young people or whether it is a "good" or "bad" thing, the point is that it is a reality which today's school administrator must operate within. He does not have the luxury to damn it and oppose it; he must be solution-oriented and strive to manage it consistent with his responsibility over education. He is not a bystander; it is he who must devise new approaches to fit the new status of kids at law. He must balance the new approach with the old responsibilities for the safety and general well-being of children, and the preservation of an optimum learning environment, because the old responsibilities abide.

Today's First Amendment, "free" speech or conduct standards for public elementary and secondary

school students were set on February 24, 1969, when the United States Supreme Court handed down its decision in Tinker v. Des Moines Independent Community School District. In that case, several students in the Des Moines public schools decided to wear black armbands to school in 1965 to protest the Viet Nam war. They were suspended for violating a school prohibition against wearing armbands and they filed suit in the local federal court. Ultimately, the United States Supreme Court declared the school suspension unconstitutional; in doing so, the nation's highest court enunciated a three-pronged test to judge the constitutional validity of any law attempting to circumscribe the exercise of First Amendment "free speech" rights of students on school grounds. The Court said that:

> . . . conduct by the student, in class or out of it, which for any reason--whether it stems from time, place, or type of behavior--(1) materially disrupts classwork or (2) involves substantial disorder or (3) (involves the) invasion of the rights of others . . .

may properly be prohibited by school authorities.

As is the situation with any landmark case, such as the Tinker case, there is always a two- to four-year period of "shaking down," where the limits of the landmark case are established more precisely by subsequent litigation. We are in the midst of this "shaking-down" period now. The Tinker case's three-pronged standard is being invoked to test many kinds of state statutes and local school board rules governing student conduct, ranging from grooming and dress codes to banning so-called "underground" newspapers. If the statutes or school board rules do not measure up to Tinker standards, they are struck down as unconstitutional. That is, if school authorities cannot show that the student conduct to be prohibited will (1) materially disrupt classwork, (2) involve substantial disorder, or (3) invade the rights of others, it may not be prohibited.

But, the courts very carefully point out that the Tinker criteria:

> . . . does not mean the school authorities are without power to control their schools or discipline their students. All that Tinker and the other cases . . . say is that school officials must show a specific and substantial justification

in order to limit students' First Amendment ("free speech") rights.

But, it could be tragic if, through frustration or simple lack of understanding, school people erroneously concluded that because the courts since 1969 have greatly diluted the supervisory power of school people over the First Amendment "free speech" conduct of their students, their duty to preserve the health, safety and general physical well-being of students in their care also has been decreased. The fact that the regulatory authority of school administrators and teachers over "free speech" activities of students has been considerably narrowed by the courts in recent years should not, under any circumstances, be construed to mean that the important responsibilities of school employees for the safety, health and general physical well-being of the students on school grounds have in any way been lessened.

The courts continue to hold school people accountable for protecting their students against youthful folly. As the California Supreme Court remarked in June, 1970, in a case involving the death of a student on a Los Angeles High School campus as a tragic result of boyish horseplay:

> Supervision during recess and lunch periods (by school officials) is required, in part, so that discipline may be maintained and student conduct regulated. Such regulation is necessary precisely because of the commonly known tendency of students to engage in aggressive and impulsive behavior which exposes them and their peers to the risk of serious physical harm.

The Court outlined the standard of supervision by stating:

> The standard of care imposed upon school personnel in carrying out this duty to supervise is identical to that required in the performance of their other duties. This uniform standard to which they are held is that degree of care which a person of ordinary prudence, charged with (comparable) duties, would exercise under the same circumstances. . . . Either a total lack of supervision . . . or ineffective supervision . . . may constitute a lack of ordinary care on the part of those responsible for student supervision.

The duty to supervise extends also to ensuring, to the extent possible, that students will not be injured by criminal acts committed on school grounds. Hence, school people have the responsibility of involving law enforcement authorities where it appears that their students could become victims

of criminal acts, such as rioting, loitering, procuring, pimping, sale of drugs, or shakedowns, to mention only a few.

From a practical viewpoint, another factor here is the proclivity of individual students and student organizations for obtaining legal counsel and advice, independent from the public school system, and acting on such advice in their relationships with the public schools. There is a group of highly articulate, aggressive young people enrolled in the high schools today who not only are well informed about their expanding civil rights and want to enjoy such rights, but also are interested in being part of the effort to expand such rights and are sufficiently sophisticated to know where and how to obtain legal counsel. These young people are continually striving to open further the doors of responsible adulthood to persons who just a few years ago were described by courts throughout the nation as "being of tender years."

The new tactic involved here is that the schools attorney and the attorney for a student or group of students are effectively solving problems which, prior to 1969 and the United States Supreme Court's decision in the Tinker case, were exclusively the province of the school official and the student.

Then there's the new relationship with school employees. This is difference number three.

3. Today's school administrator must develop a new style of staff leadership never before seen on a large scale in American elementary and secondary school education. The old ways of dealing with school employees are simply not available to the new school administrator. Yet the old responsibilities for leadership and management continue as part of the school administrator's function. He is being held increasingly accountable for the old responsibilities. The "father figure," "paternalistic autocracy," "benevolent dictatorship"--regardless of what colorful idiom of the organized teaching profession one could conjure up to describe the old style of administrative leadership--is simply no longer viable.

From a legal standpoint, "teacher militancy" has brought forth more extensive, active legal counsel and representation of public school employee organization members

on issues affecting their employment relationship with the schools. Group legal services on a grand scale is a new dimension for the public schools. Like legal aid for the poor and disadvantaged, the principal value of a group legal services plan for school employees is that it permits judicial resolution of employment rights problems without necessitating the school employee-plaintiff to seriously alter his style of life, much less his standard of living.

Last year in California, the California Teachers Association (CTA) [an NEA affiliate] established a group legal services program. It charged each of its almost 200,000 members $2.00 apiece to finance the program for the first year. The CTA retained top-flight law firms through the state to represent and counsel CTA members in problems related to their employment relationship with their school board employers, and in credential disputes with the State Board of Education. Specifically, the areas of legal services provided by local private law firms under a "group legal services" contract include: assignments, credentials, demotion, discipline of pupils, leave, retirement, salary, suspension, and workmen's compensation.

The new tactics involved here relate to the new significance which individual cases assume. There are many gaps and voids in the law governing the whole range of the employment relationship between a local public school district and its teachers. It is a fertile field for judicial lawmaking. Thus, many cases which were relatively smoothly disposed of out of court in the past can now assume a new significance as levers to pry new law out of the courts. The era of the "minor" case may be gone. And probing for "weak spots" in the law, as seen from the vantage points of the teachers, will be rife.

The new leadership demanded by the new professionalism stresses collegiality and a more democratic participatory approach, but within limits roughly bounded by the school administrator's responsibilities at law, and the collective bargaining-type contracts in effect within the district. Often, the first ones to remind the school administrator of his responsibilities for control of the school operation are the parents. And

this is difference number four.

4. Today's school administrator deals with a more well-educated class of parents than ever before. The educational level of parents has increased considerably over the course of the past two decades. These parents are not only interested in their children's education but are better able to articulate that interest and influence the school administrator. These parents can be moved only by results and well-reasoned approaches to the problems of educating their children at the school. Moreover, these parents make up a better informed, more aggressive citizenry. The result is a plethora of threats to sue the public schools which must be carefully considered by the schools attorney's office. The threats of lawsuits against the schools are today a common thing. In many ways, threats are like tinkling brass. But, when a responsible school official contacts the schools attorney to discuss a threat with him, it is clear that the threat has had some kind of an impact. It is difficult to assess the effect of such threats on the governance and administration of the schools in light of today's expanding role of the judiciary in school operations. Initially, I believe that threats have an intimidating impact but, in the longer run, produce a new sophistication among school officials toward the court process. To the extent that threats to sue trigger a re-examination of the public school's disputed policies in light of our new days, a not unhealthy situation exists. But, when such threats inhibit the reasonable performance of the school official's responsibilities, grave damage to the instructional program ensues. And what parents and others expect of education leads us to difference number five.

5. Today's school administrator is in the middle of the maelstrom over the dramatically expanded expectations of education. The concept that education can cure all ills and solve all problems is still being tested; some claim that it's a fundamental truth while others view it as a shibboleth. Whatever the merits, society has structured its attitude toward education today in a way that looks to education to unite the races, to provide fullness in life, to educate the professionals and train

the skilled, and to preserve the democratic way of life. Because education must deal with all levels of society and because the poorer people have awakened to the call to better themselves and have vigorous spokesmen for the cause of their betterment, today's school administrators are subject to immense pressures in their school leadership. These pressures are dealt with in a new way by school administrators, and this is difference number six.

6. Today's school administrator must develop an expertise in working closely and effectively with a wider spectrum of citizen groups more active in education than in the past. The school administrator has always worked with citizen groups. Today, though, the push for maximum involvement of all people in education has resulted in an influx of citizen groups wanting to influence the course of education. Minority groups, conservative groups, liberal groups, civil rights groups, etc. are just a few of the labels these groups are given. Often, the expressed aims of the groups are in opposition to each other. The school administrator's week may start out Monday with a group of minority parents who claim that his discipline of minority students is too harsh; on Tuesday, he meets with a group of minority parents who urge that discipline in the school be strengthened; on Wednesday, he meets with a taxpayer's group who decry the high school tax; on Thursday, he meets with an organization demanding that the schools expand their programs in certain areas; and on Friday, he meets with teacher representatives who demand both program and salary improvement when they know full well that the available tax levy will hardly support either . . .

These active groups with competing viewpoints pose a real challenge in leadership to the new school administrator. He must possess a real sophistication in working with such groups, all of whom have both a legitimate interest in education and an effective way of expressing it. His adroitness in the new professionalism of school administration will determine to a considerable degree the success which he meets in (a) moving the educational enterprise ahead and off dead-center, and (b) weathering the onslaughts of the critics whom

he did not heed in moving forward. Sometimes these critics file lawsuits. And that is difference number seven.

7. Today's school administrator is far more vulnerable to judicial and legislative review of his leadership decisions than in days gone by. The expansion of civil rights for students and the increased social legislation have established standards which are subject to varying interpretations. Even when a school administrator acts in complete good faith and with a reasonable familiarity with the new standards, he may find himself defending his actions in court or before his school board in an almost deadly adversary proceeding. The increased free legal aid provided under federal funds virtually guarantees effective representation of the indigent in any serious dispute with the school administrator's actions. And "law reform" through significant litigation is one of the primary goals of the legal aid program.

On the legislative side, lobbying for law change as the result of "outrages" perpetrated by school administrators, as isolated as such acts may be, is common in the state legislatures. Moreover, complaints made to school boards invariably receive more attention and time when they involve the capacity of a school administrator to deal with issues in the school affecting parents or students. And this brings us to difference number eight.

8. Today's school administrator works under a school board which is closer to the people and more involved in the politics of governing local education than the school boards of old. Today, school boards are in a process of real evolution. They are becoming more "political" in nature in the sense that (a) their membership is drawn from a wider spectrum of the citizenry; (b) they meet more frequently; (c) they put themselves closer to the People by more active campaigning and more public appearances between elections; (d) they are required by law or newly established custom to negotiate with teacher organizations on a level closer to "equality" than in earlier years; (e) they are the natural objects of attention from sophisticated citizen groups who want to speak only to "the man"; (f) they are held accountable for strife in

the schools; and (g) the political battles involving new civil rights of youth and the racial integration of the schools are being staged in the schools and it is, as a practical matter, impossible for school boards to stay aloof of this activity. And, finally, school boards today are receiving increasingly better assistance from better organized and more generously funded state and national school boards associations. The value of this local, regional, state, and national interchange cannot be overestimated. This leads us to difference number nine.

9. Today's school administrator is expected to work more closely with other levels of government, locally, as well as at the state and federal levels. During our changing times, the whole fabric of government is being closely scrutinized and sweeping changes are being proposed and tried. This is due to changing conditions, inflation, increased costs of governmental services, and a duplication of effort in many areas of government which were established in the days when the county seat was not supposed to exceed one day's horseback ride from any place in the county. The changes affecting the schools include the year-round school, making expanded recreational use of school sites, racial integration of the schools (especially "metropolitan desegregation," which contemplates many school districts exchanging students with each other), and closer liaison with municipal, county, or regional planning officials in the growing field of "people planning" with the resultant "balanced communities." At the state level, new financial standards will require close interchange with state personnel. And the growing acceptance by federal officials of the necessity of increasing federal funding of education means more interchange of school administrators at the federal level. In a word, the view of the school administrator today must be cosmopolitan in his work as a leader of one segment of many governmental layers.

There is a plethora of governmental agencies which have enforcement responsibilities impinging upon some area of local public education, ranging from the educational course offerings in the elementary classroom to the complex business operations of a large school

district. These agencies run the gamut from the United States Department of Justice, through the State Attorney General's office to the local Grand Jury. Lately, the State Labor Departments and the expanded Equal Employment Opportunity Commission have joined the almost endless line of governmental agencies who have their legal inspection microscopes focused on the schools. The new tactic involves convincing one of these agencies that the public schools are in violation of some provision of law or administrative regulation, and watching the agency set into motion enforcement procedures against the schools; or, in the alternative, instituting legal action which attacks both the agency and the schools in an effort to make new law. Thus, other governmental agencies attempt (or are forced to attempt) to expand their powers over the relevant areas of local public education.

And finally, there are the dramatically expanded programs of vigorous and tenacious legal advocacy conducted by legal aid groups financed by public and private funds to champion the rights and privileges of poor and disadvantaged persons. In the middle sixties, the Economic Opportunity Act began pumping millions upon millions of dollars into free legal aid services for the poor and requiring that at least a portion of that money be spent on "law reform" activities. Generally, the term "law reform" means that in addition to handling the usual types of legal problems for the poor and disadvantaged, legal aid societies also should carefully select for special treatment those unusual cases which, if resolved in favor of the legal aid client, could have a significant impact on the lives of the poor. Of the many subjects for "law reform" lawsuits, public education was, and remains, a prime defendant.* The issues tested in litigation included student discipline, use of federal funds by local public schools, school bus

*See, "The Impact of Legal Aid Programs for the Poor on the Operation of Public School Districts in the United States," an address by Thomas A. Shannon, 15th Annual Convention of the "National Organization on Legal Problems of Education," Cleveland, Ohio (1969). (Or an abridged version thereof which was published in THE LEGAL AID BRIEFCASE, Vol. XXVIII, No. 4, February, 1970, National Legal Aid and Defender Association, 1155 East 60th Street, Chicago, Illinois 60637).

transportation, school tuition, school integration of pupils and state aid to local public schools, to mention but a few of the growing list.

Legal aid attorneys are excellent lawyers. And they are zealously crusading for a cause. Accordingly, the "gentlemanliness" of the practice of law is an anachronism. Unlike the admonition of Shakespeare in Act I, Scene 2 of "Taming of the Shrew" to:

> . . . do as adversaries do in law, strive mightily, but eat and drink as friends . . .

these lawyers never cease striving. And they're tough, aggressive, and tenacious. They bombard the governmental attorney with written pleadings, letters, meetings, and publicized confrontations. They never cease boring in. Their "law reform" case is the most important thing in the world to them. They spend massive amounts of time in case preparation. Accordingly, the schools attorney must be prepared to deal with an adversary of such zeal. As with other litigation instituted to make new law, any compromise out of court is virtually out of the question in "law reform" cases brought by legal aid societies. Certain realization of this fact, at the outset, conditions case tactics throughout the course of the judicial proceedings.

In this new time, the attorney can serve the superintendent and school board:

1. as an advisor on the law;
2. as an advisor on school district governance because of his special training and knowledge about how government works; and
3. as the attorney in litigation, defending the rights and professional reputations of school administrators and the political choices of school board members.

That's the attorney as a member of the school district's management team.

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