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ABSTRACT

The public school system should be so maintained, as regards courses of study, as to keep abreast of progress generally and to meet the needs of the times, and to this end it is the administrative function of school board members and superintendents to create new courses and rearrange the curriculum in proper cases. A rule or regulation prescribing a course of study for a particular school does not require that any particular branch of study shall be compulsory on those who attend the school. Nor does such a rule or regulation deny a parent all control of the education of his child. This paper discusses the status of legislation on sex education according to (1) Mississippi statutory law, (2) statutory law in five other States, (3) major cases that have been in Mississippi courts, (4) the status of the case law on the subject elsewhere, (5) model legislation that has been proposed or recommendations for legislative action proposed by various agencies, and provides (6) recommendations developed on the basis of the material presented in the paper. (Author)

THI LEGAL STATUS OF SEX EDUCATION IN MISSISSIPPI

by

Jerry H. Robbins, Ed.D.

This paper is one of a series sponsored by the Governor's Office of Education and Training. Special thanks must go to Governor William Waller and Dr. Milton Baxter, Executive Director of the Governor's Office of Education and Training, for providing the support for the research and writing that have gone into these papers.

Each of the papers in this series is designed to speak to the following questions: (1) What is the statutory law in Mississippi on the subject, if any? (2) What is the statutory law in approximately five other states on the same subject? (3) What major cases, if any, have been in courts in Mississippi? (4) In very general terms, what is the status of the case law on the subject elsewhere? (5) What model legislation, if any, has been proposed or what recommendations for legislative action, if any, have been proposed by various agencies? (6) What recommendations seem to follow from the information presented in the answers to questions 1-5?

The author wishes to acknowledge the assistance in developing this paper of Dr. J. Robert Blackburn, Chairman of the Department of Health, Physical Education, and Recreation; Dr. Jimmy Chambless, Associate Professor of Health, Physical Education, and Recreation; and George Lyles, a student in the School of Law; all at The University of Mississippi.

University, Mississippi
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Any state has the power to require that certain studies plainly essential to good citizenship be taught and that nothing be taught which is manifestly inimical to the public welfare (1). In the absence of courses prescribed by statute or by a higher authority than the local board, or in addition to courses thus prescribed, it is within the discretion of the local school board or the officers of each school district as the statute granting the power may direct, subject to constitutional or statutory limitations on such power, to provide for the teaching of such branches as they may deem best, without interference from the voters of the district (2), or the state board of education (3), or the courts (4), in the absence of a clear case of fraud or abuse.

The public school system should be so maintained, as regards courses of study, as to keep abreast of progress generally and to meet the needs of the times (5), and to this end it is the administrative function of school board members and superintendents to create new courses and rearrange the curriculum in proper cases (6).

A rule or regulation prescribing a course of study for a particular school does not require that any particular branch of study shall be compulsory on those who attend the school (7). Nor does such a rule or regulation deny a parent all control of

the education of his child. Instead it merely withdraws from the parent the right to select the courses to be studied by his child, to the extent that the exercise of this right will interfere with the system of instruction provided for the school and its efficiency in imparting instruction to all entitled to share in its benefits (8). Hence, a parent cannot insist that his child shall be taught subjects not in the prescribed course of the school, although he may make a reasonable selection from the prescribed studies for his child to pursue (9). On reasonable grounds, a parent may have his child excused from taking studies or exercises not desired (10); and his right to select is not limited to any particular school or grade (11).

Statutory Law

Mississippi. The sections of the Mississippi Code Annotated 1972 which bear in any way on sex education include:

> § 37-13-11. The curriculum of the grammar schools shall consist of. . .physiology, hygiene. . ., general science, and such other subjects as may be added by the state board of education. . . .
>
> § 37-13-13. The curriculum of the high school shall consist of. . .social science, pure and applied science, . . .and such other subjects as may be added by the state board of education. . . .
>
> § 37-13-19. The state board of education shall make adequate provision for instruction in general hygiene, individual hygiene, group hygiene and inter-group hygiene, and provisions for regular periodic and thorough health examinations and inspections of pupils and for such reasonable correlation as may be necessary for the betterment of health and treatment of abnormalities through available agencies inside or outside the public school system. Provision shall also be made for education and health training through physical exercises,

games, play, recreation and athletics. . . .

§ 37-13-21. The state board of health and the various county health departments are hereby authorized and empowered to establish and provide for health education programs in the public schools of this state and to employ county health educators for such purpose. In order to effectuate such programs the county superintendents of education of counties in which such programs have been established, with the approval of the county board of education, and the board of trustees of the municipal separate school districts, are authorized and empowered, in their discretion, to cooperate and join with the said state board of health and the county health departments in such programs. For such purposes the said county superintendents of education, with the approval of the county board of education, are hereby authorized and empowered to expend such funds as may be necessary from the common school funds of the county, and the board of trustees of municipal separate school districts are hereby authorized and empowered to expend such funds as may be necessary from the maintenance funds of such districts for the purpose of defraying the expenses of such co-operative health education programs. Those students whose parents or guardians shall make written application to the proper authorities on the ground that such programs is inconsistent with the tenents and practices of the known religious organization with which they are affiliated shall not be required to participate in the program.

The state board of health and various county health departments shall have the power and authority to enter into such agreements and joint programs with the said county superintendents of education and boards of trustees of municipal separate school districts as may be necessary, proper and desirable in carrying out the purposes of this section, and in establishing and carrying on health education programs in the public schools of this state, and the said county superintendents of education, with the approval and consent of the county board of education, and the board of trustees of municipal separate school districts shall have the power and authority to enter into such agreements and joint programs with each other and with the state board of health and county health departments as may be necessary for such purposes.

§ 37-63-15. No SEICUS (or any of its subsidiaries or connections known by any other name whatsoever) programming whatsoever shall be carried by any educational television station in the State of Mississippi.

California. The California law governing sex education reads as follows:

§ 8506. Sex education courses

No governing board of a public elementary or secondary school may require pupils to attend any class in which human reproductive organs and their functions and processes are described, illustrated or discussed, whether such class be part of a course designated "sex education" or "family life education" or by some similar term, or part of any other course which pupils are required to attend.

If classes are offered in public elementary and secondary schools in which human reproductive organs and their functions and processes are described, illustrated or discussed, the parent or guardian of each pupil enrolled in such class shall first be notified in writing of the class. Sending the required notice through the regular United States mail, or any other method which such local school district commonly uses to communicate individually in writing to all parents, meets the notification requirements of this paragraph.

Opportunity shall be provided to each parent or guardian to request in writing that his child not attend the class. Such requests shall be valid for the school year in which they are submitted but may be withdrawn by the parent or guardian at any time. No child may attend a class if a request that he not attend the class has been received by the school.

Any written or audiovisual material to be used in a class in which human reproductive organs and their functions and processes are described, illustrated or discussed shall be available for inspection by the parent of guradian at reasonable times and places prior to the holding of a course which includes such classes. The parent or guardian shall be notified in writing of his opportunity to inspect and review such materials.

This section shall not apply to description or illustration of human reproductive organs which may appear in a textbook, adopted pursuant to law, on physiology, biology, zoology, general science, personal hygiene, or health.

Nothing in this section shall be construed as encouraging the description, illustration, or discussion of human reproductive organs and their functions and processes in the public elementary and secondary schools.

The certification document of any person charged with the responsibility of making an instructional material available for inspection under this section or who is charged with the responsibility of notifying a parent or guardian of any class conducted within the purview of this section, and who knowingly and willfully fails to make such instructional material available for inspection or to notify such parent or guardian, may be revoked or suspended because of such act. The certification document of any person who knowingly requires a pupil to attend a class within the purview of this section when a request that the pupil not attend has been received from the parent or guardian may be revoked or suspended because of such act.

§ 8507. Venereal disease education classes; notice to and consent of parent or guardian

The governing board of any district maintaining elementary or secondary schools may offer units of instruction in venereal disease education in such schools with the assistance and guidance of the State Department of Education. The grade level at which such instruction shall be given shall be determined by the governing board of the school district.

Nothing in this section shall be construed as prohibiting or limiting any right provided for in Section 8701.

If venereal disease education classes are offered, the parent or guardian of each pupil enrolled or to be enrolled therein shall be notified in writing of the instructional program. Such notice shall be given at least 15 days prior to the commencement of the instructional program. The notice shall also advise the parent or guradian of his right to inspect the instructional materials to be used in such class and of his right to request the school authorities that his child not attend any such class.

Sending the required notice through the regular United States mail or any other method of delivery which the school district commonly uses to communicate individually in writing to all parents, meets the notification requirements of this section.

The parent or guardian may request that his child not participate in a venereal disease instruction program. Such request shall be in writing, but may be withdrawn by the parent or guardian at any time. No pupil may attend any class in venereal disease education, if a request that he not attend the class has been received by the school in the manner provided in this section.

> The parent or guardian of any pupil enrolled or to be enrolled in any venereal disease education class shall be provided the opportunity to inspect the textbooks, audiovisual aids, and any other instructional materials to be used in such classes.

Illinois. The laws of Illinois also permit a student to be excused from instruction in sex education, as indicated in this section:

> § 27-9.1 Sex education.
>
> No pupil shall be required to take or participate in any class or course in comprehensive sex education if his parent or guardian submits written objection thereto, and refusal to take or participate in such course or program shall not be reason for suspension or expulsion of such pupil. Nothing in this section prohibits instruction in sanitation, hygiene or traditional courses in biology.
>
> An opportunity shall be afforded to such parents or guardians to examine the instructional materials to be used in such class or course.

Michigan. Michigan is one of the few states that attempts to define "sex education" in the law. This state also permits students to be excused from instruction in sex education, as may be seen in the Michigan law given here:

> 340.789 Definition
>
> Sec. 789. Sex education is the preparation for personal relationships between the sexes by providing appropriate educational opportunities designed to help the individual develop understanding, acceptance, respect and trust for himself and others. Sex education includes the knowledge of physical, emotional and social growth and maturation, and understanding of the individual needs. It involves an examination of man's and woman's roles in society, how they relate and react to supplement each other, the responsibile use of human sexuality as a positive and creative force.
>
> 340.789a. Instructors, facilities, equipment, programs
>
> Sec. 789a. Any school district may engage competent instructors and provide facilities and equipment for

instruction in sex education, including emotional, physical, psychological, physiological, hygienic, economic and social aspects of family life and sexual relations, as well as socially deviant sexual behavior.

340.789b. Establishment of programs, library, training and leadership

Sec. 789b. The department of education shall:
(a) Aid in the establishment of educational programs designed to provide pupils in elementary and secondary schools, institutions of higher education and adult education, wholesome and comprehensive education and instruction in sex education.
(b) Establish a library of motion pictures, tapes, literature and other education materials concerning sex education available to school districts authorized to receive the materials under rules of the department.
(c) Aid in the establishment of educational programs within colleges and universities of the state and inservice programs for instruction of teachers and related personnel to enable them to conduct effectively classes in sex education.
(d) Recommend and provide leadership for sex education instruction established by the local school district, including guidelines for family planning information.

Tennessee. Tennessee requires the approval of both the state board of education and the local board of education before a sex education course can be taught. Unlike most other states, teaching sex education without the necessary prior permission is a misdeanor, which can be punished by imprisonment of up to one year, a fine of up to $1000, or both. The Tennessee law provides:

Sec. 49-1924. It shall be unlawful for any person in any manner to teach courses in sex education pertaining to homo sapiens in the public elementary, junior high, or high schools in the state of Tennessee unless the courses are approved by the state board of education and the local school board involved. Provided, however, this section shall not apply to general high school courses in biology, physiology, health, physical education or home economics taught to classes. It shall be a misdemeanor for anyone to violate the provisions of this section, and shall be punishable as such.

Wisconsin. The Wisconsin statutes are typical of many states in that there is no direct references to sex education.

> Sec. 118.01 Curriculum requirements. . .(2) Physiology and hygiene. Physiology and hygiene, sanitation, the effects of controlled substances under ch. 161 and alcohol upon the human system, symptoms of disease and the proper care of the body shall be taught in either the 6th, 7th, or 8th grade, but no pupil shall be required to take such instruction if his parents file with the teacher a written objection thereto. Instruction in physiology and hygiene shall be offered in every high school.
>
> (3) Physical education. Physical instruction and training shall be provided for all pupils in conformity with the course of instruction in physical education prescribed by the department. In 1- and 2-room schools such instruction and training shall take the form of supervised playground work. In this subsection "physical education" means instruction in the theory and practice of physical exercise and instruction in hygiene, but does not include medical supervision.
>
> . . .(5) Morals. Every public school shall provide instruction in morality and the individual's responsibility as a social being.

General. In general, sex education can be made compulsory in public elementary and secondary school if it is taught as part of otherwise compulsory classes. Many states require that all schools have courses in subjects like biology, health, hygiene, or physiology. These include California (health), Illinois (health, sanitation, and hygiene), New Jersey (health), New York (hygiene and science), Ohio (health), Pennsylvania (health, physiology, and hygiene), and Texas (physiology and hygiene). In some instances local school authorities have prescribed sex education courses as a compulsory part of the curriculum. For examples, Illinois, New Jersey, Ohio, and Pennsylvania are among the states which permit local school authorities to

prescribe additional compulsory courses as well as those courses specifically made compulsory by statute. Permissive statutes of this sort do not preclude local authorities from structuring additional courses in such a way as to grant exemptions. Additional courses such as sex education could be made optional by giving the student the choice of taking it as another course or by offering it during an otherwise free period.

Some of the states authorize exemptions from certain courses on religious grounds. These include California, with an exemption from health and hygiene classes for religious reasons; Illinois, with an exemption for religious reasons from instruction about diseases; New York, with an exemption for religious reasons from health and hygiene classes; Ohio, with exemption for religious reasons from periods of moral, philosophical, or patriotic meditation; Texas, with an exemption for religious reasons from education about disease; Texas, with an exemption from compulsory sex education for any reason, and exemption from discussion of human reproductive organs and their functions and processes upon parental request; and Michigan, with an exemption from sex education classes upon parental request.

Maryland appears to be the only state which requires schools to teach some type of sex education. Bylaws adopted by the Maryland State Board of Education give districts the option of offering a course on the "advanced physiology and psychology of human sexual behavior" as an elective in junior and senior high schools. The Board says the course shall cover such subjects as sex deviations, contraception, premarital intercourse,

family planning and venereal desease (13).

Case Law in Mississippi

There are no known cases in Mississippi dealing with the teaching of sex education.

Case Law Elsewhere

Cornwall v State Board of Education 314 F. Supp. 340, 1969 (Maryland). The bylaws of the Maryland State Board of Education provide that

> It is the responsibility of the local school system to provide a comprehensive program of family life and sex education in every elementary and secondary school for all students as an integral part of the currlculum including a planned and sequential program of health education.

A suit was brought against the State Board of Education seeking to prevent the implementation of a program of sex education in schools on the basis that this bylaw violated the First Amendment, the Equal Protection clause of the Fourteenth Amendment and the Due Process clause of the Fourteenth Amendment. The court quickly dismissed the question of any violation of the Fourteenth Amendment. The plaintiffs asserted that they had "the exclusive constitutional right to teach their children about sexual matters in their own homes, and that such exclusive right would prohibit the teaching of sex in the schools." The court noted that no authority was cited in support of this "novel proposition" and thus disallowed it.

The court did consider carefully, however, a number of First Amendment arguments. However, the court concluded that

the purpose of the bylaw was not to establish any particular religious dogma or precept, and that the bylaw did not directly or substantially involve the state in religious exercises or in the favoring of religion or any particular religion.

Considering the bylaw essentially a public health measure, the court dismissed the case. The case was appealed to the Fourth Circuit in 1970, and the lower court was upheld entirely.

Opinion of the Attorney General of Michigan, 1970. No. 4699. The Attorny General of Michigan issued an opinion in 1970 to the effect that the state public policy in Michigan is to encourage and provide for sex education within schools of the state. Sex education classes may not include specific instruction in birth control but may include other family planning information such as the social, economic, and psychological implications of various sized family units, effects of population growth upon our natural environment and resources, population studies, and birth and death rates.

Medeiros v. Kiyosaki 478 P. 2d 314, 1970 (Hawaii). The plaintiffs in this case were residents of the city and county of Honolulu and parents of 5th and 6th grade children in the public school system. The suit was brought to enjoin the defendents--the state superintendent of education, the members of the state board of education, and the program specialist of the department of education--from continuing with a film series called "Time of Your Life." The film series was being shown in the 5th and 6th grades of the public school system as part of a

newly adopted curriculum for family life and sex education. The parents based their case on the constitutional grounds that the program was an invasion of privacy and a violation of their religious freedom. They also alleged that the program was illegal because it was adopted by an improper delegation of authority by the state board of education to the administrative staff of the state department of education.

The court examined two major constitutional issues: the right of privacy and freedom of religion. On the first point, the court found that the schools had an excusal system. Parents had an opportunity to view the films on late-night educational television. If the parents did not want their children to see the films later in school, they could submit a written excuse. The court held that the program was in no way compulsory; therefore, no invasion of privacy was involved. On the second point, several freedom of religion precedents were considered. Again however, the court found that because there was no compulsion or coercion related to the program, there was no violation of the First Amendment. Further the court found no problem with the delegation of authority issue. Therefore, the court found for the state board of education and the state department of education officials.

Valent v. New Jersey State Board of Education. 274 A.2d 832, 1971 (New Jersey). The New Jersey State Board of Education notified school districts that local boards of education had a right either to establish sex education courses or to refrain from approving any sex education in the schools under their

control. However, the State Board felt that where sex education programs were established, the local boards should not be required to grant exceptions to taking the program. Parsippany-Troy Hills school district instituted a program in "Human Sexuality." The parents of some of the children in this school district brought suit against the district essentially on the basis of a violation of First Amendment rights. A number of freedom of religion cases were considered, but the motion by the defendants for a summary judgement was denied, and a pretrial conference date was set.

Hopkins et al. v Hamden Board of Education et al. 289 A.2d 914, 1971 (Connecticut). The major issue in this suit was that the parents of a group of children in the public schools of Hamden, Connecticut, sought temporary and permanent injunctions against the use of a printed curriculum by the state board of education in authorizing, and the Hamden board of education in teaching, a course entitled "Health Education." It was a course which required compulsory attendance and included, in addition to physical education, a comprehensive and planned sequential study of "reproduction," "hygiene," "sex education," "family life," and "growth." A detailed curriculum guide for grades K-12 existed.

The court held that since both the compulsory nature of health education courses and the alternative offered under the Connecticut statutes (which permitted parents to provide, in the home or in private schools, the equivalent to public school courses) applied to all pupils equally, and since the courses

were taught to pupils of mixed religious beliefs without discrimination, there was no lack of due process or equal protection of the laws, in relation to the establishment of such courses. The court further held that, in authorizing courses of health education in the public schools, the state did not act arbitrarily or unreasonably. The temporary injunctions were denied, and in 1972 the court denied the claims for permanent injunctions.

Commentary.

There is no question but that young people need guidance and instruction in human reproduction and other aspects of human sexuality. However, given the general conservative nature of the population of Mississippi (including many school personnel) and the strong religious views that prevail, the question of where and by whom such guidance and instruction should be provided remains a controversial question.

Although it appears clear that schools can, to some degree, offer such instruction in sex education, there are many who would prefer to see such instruction take place in the home or in the church, if at all. Indeed, there are likely to be many that would insist that such instruction should not take place in the schools.

If this matter came to the general attention of the public of the state, especially in the form of some proposed legislation, it could well be that legislation would prevail on the order of that of Louisiana, which apparently prohibits all teaching of sex education under penalty of denial of funds; or of

Tennessee, which makes it a misdeamor to teach sex education under any but the most restrictive of conditions; or of California, which in effect required permission of parents before students can be instructed in certain topics.

Legislation on matters of curriculum has not had a successful history in this state. The Mississippi law calls for a number of things to be taught in the schools. Many of these, such as "elements of forestry," are handled in the classrooms in a perfunctory way, if at all, because of the lack of instructional materials and the lack of any enforcement of the provisions of the law. Similarly, certain items, such as evolution, which have been prohibited from being taught, are widely but quietly included in the instructional program of many schools.

Accordingly, any law stating that sex education shall be taught is likely to be widely ignored unless substantial and enforceable penalties are attached for not doing so. Similarly, any law stating that sex education shall not be taught is also likely to be widely ignored through incorporation of topics in well-established courses, through cooperation with county health departments, etc. unless substantial and enforceable penalties are attached for doing so.

Perhaps it would be best to leave well-enough alone in Mississippi as far as the courts and the legislature are concerned. Apparently there is nothing to prohibit local schools from incorporating sex education into the curriculum.

Recommendations.

On the basis of the information presented in this paper, it is recommended that:

1. At the elementary level, sex education be taught informally and completely integrated into the study of such areas as science (plant and animal reproduction), social studies (the family and family relationships), health (care of the body and body processes), and physical education. Additional guidance from the Division of Instruction of the State Department of Education in developing units of study could be very helpful, and provision of additional instructional materials through the State Textbook Purchasing Board would facilitate this matter considerably. Leadership by such groups as the Mississippi Association for Health, Physical Education, and Recreation would help teachers improve their teaching methods in this area.

2. The prohibition against use of sex education materials by the state Educational Television network be removed, so as to provide instructional materials to many schools that are not likely to have them otherwise.

3. At the secondary level, certain aspects of sex education be taught to all or almost all students through required courses in health instruction, physical education, and others. The topics in sex education should be incorporated into the regular instructional program and well-integrated into the remainder of the instruction. It might be feasible to provide a procedure such that, upon parental request, and for religious

reasons, a student could be excused from certain portions of the instruction. Again, leadership from the State Department of Education, the State Board of Health, and appropriate professional associations, and the in-service training of local teachers are likely to produce the most effective results.

4. Elective courses be offered, whenever there is sufficient demand, in which students may study sex education in greater depth. From a practical point of view, it would be best, for the time being, to give these courses either a broader emphasis than just sex education or a euphemistic name. Such titles as "Family Life Education" and "Interpersonal Relations" are used in some places to designate courses which include sex education content to a greater or lesser degree.

5. Educational authorities at all levels be made alert to the need for well-qualified teachers and for effective teaching methods. At the present time, few teachers, especially at the secondary level, are very well qualified, except through personal experience, to teach the full range of topics that should be included in sex education. A biology teacher will be knowledgable about the "plumbing" but not necessarily about others. Home economics teachers are typically well-qualified in family relationships but not necessarily knowledgable about deviant sexual behavior, and so on. Female teachers, especially at the upper elementary level, may be in an awkward position in dealing with the onset of puberty in boys and vice versa. Some topics may best be taught to boys only and some to girls only, while

other topics may be best taught to mixed groups. Some topics may be best taught by non-school personnel, such as a physician or a psychologist.

6. Because of the great divergence in needs and the unlikelihood that any single approach can be applied statewide at this time, the State Department of Education, the State Board of Health, the appropriate professional associations, the colleges and universities, and the county health departments cooperate to establish, school district by school district, the most feasible program of sex education that can be offered in each district.

(1) People ex rel. Fish v. Sandstrom, 18 N.E. 2d 840, 279 N.Y. 523, 120 A.L.R. 674. West Virginia State Board of Education v. Barnette, 63 S.Ct. 1178, 319 U.S. 624, 87 L. Ed. 1628, 147 A.L.R. 674. Packer Collegiate Institute v. University of State of N.Y., 76 N.Y.S. 2d 499, 273 App. Div. 203, reversed on other grounds 81 N.E. 2d 80, 298 N.Y. 184.

(2) State v. Sumner County School District #2, 209 P. 665, 112 Kan. 66.

(3) Ibid.

(4) State ex rel. Brewton v. Board of Education of City of St. Louis, 233 S.W. 2d 697, 361 Mo. 86.

(5) Talbott v. Independent School District of Des Moines, 299 N.W. 556, 230 Iowa 949, 137 A.L.R. 234.

(6) Jones v. Holes, 6 A. 2d 102, 334 Pa. 538. Ehret v. School District of Borough of Kulpmont, 5 A. 2d 188, 333 Pa. 518.

(7) School Trustees v. People 87 Ill. 303, 29 Am. R. 55. Rulison v. Post, 79 Ill. 567.

(8) Ibid. State v. Dixon County School District #1, 48 N.W. 393, 31 Neb. 552.

(9) Garvin County School Board District #18 v. Thompson, 103 P. 578, 24 Okl. 1, 138 Am.S.R. 861, 24 L.R.A., N.S., 221, 19 Ann. Cas. 1188.

(10) State v. Ferguson, 144 N.W. 1039, 95 Neb. 63, 50 L.R.A. N.S., 266. Hardwick v. Fruitridge School District, 205 P. 49, 54 Cal. App. 696.

(11) Ibid.

(12) Education U.S.A. Washington, D.C.: National School Public Relations Association. October 1, 1973, p. 25.

(13) Ibid.