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ABSTRACT

This monograph is a review of selected judicial decisions reported by state and federal courts during the past two years and related directly to the administration of elementary or secondary schools. The decisions were identified through a standard search of legal resources at the Temple University Law Library; each decision was read in its entirety as reported in the National Reporter System. Most of the 1973 and 1974 major school law decisions affecting administrators are included in this report. Treated in addition are two significant decisions rendered by the Supreme Court of the United States early in 1975. The 65 decisions in this publication are arranged under six headings: administrators, teachers, pupils, torts, religion, and contracts. The case reviews follow a consistent format: (1) the question to be resolved; (2) a brief summary of the facts; (3) the court's holding; and (4) the author's commentary, which is intended to explain the rationale of the decision as well as its general application to school administration. (Author)

ERS

monograph

School Administrators and the Courts:

A Review of Recent Decisions

By
H. C. Hudgins, Jr.

1975

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FOREWORD

School Administrators and the Courts. A Review of Recent Decisions is the third in a series of *ERS Monographs* designed to bring school administrators and others the experience, views, and thinking of noted authorities with regard to current issues, problems, and practices in school administration. Unlike other ERS publications that are limited to the presentation of facts and objective analyses of *what is*, the monograph series is designed to include each author's views about *what should be.*

This monograph was prepared through a cooperative arrangement between ERS and the ERIC Clearinghouse on Educational Management. Under this arrangement, the Clearinghouse commissioned the author and edited the manuscript for style. ERS selected the topic and the author and was responsible for the publication and distribution of the monograph.

H. C. Hudgins, Jr. was selected to prepare this monograph because of his extensive experience and academic interest in school law. Dr. Hudgins is professor of educational administration at Temple University where he teaches school law. His articles on school law have been published in most of the major educational journals. He also has written books on school law, including *The Warren Court and the Public Schools.* Dr. Hudgins has been an active participant in numerous school law conferences, seminars, workshops, and conventions and is currently Second Vice-President of the National Organization on Legal Problems of Education. He is a former public school teacher and principal.

This publication is intended to provide school administrators and others interested in school problems with a general review of court decisions involving school administrators during the past two years. It is hoped that this review will help administrators to avoid lengthy and costly court procedures where possible and, if litigation does come, to increase the prospects for rulings favorable to the school administration.

For Dr. Hudgins' ability to review and analyze these decisions and to discuss their implications for school administrators, both ERS and the Clearinghouse express their gratitude.

Glen E. Robinson
Director of Research
Educational Research Service

Philip K. Piele
Director
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Educational Management

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INTRODUCTION

This monograph is a review of selected judicial decisions reported by state and federal courts during the past two years that relate directly to the administration of elementary or secondary schools. The decisions were identified through a standard search of legal resources at the Temple University Law Library, each decision was read in its entirety as reported in the *National Reporter System*. Most of the major school law decisions affecting administrators handed down in the calendar years 1973 and 1974 are included in this report. Treated in addition are two significant decisions rendered by the Supreme Court of the United States early in 1975.

The 65 decisions contained in this publication have been arranged under six headings: administrators, teachers, pupils, torts, religion, and contracts. The case reviews follow a consistent format: (1) the question to be resolved; (2) a brief summary of the facts; (3) the court's holding; and (4) the author's commentary (the latter of which is intended to explain the rationale of the decision as well as its general application to school administration).

Caution should be taken not to formulate conclusions about the law based *only* on these 65 decisions. For a full understanding of a particular legal issue, one must be cognizant of the numerous decisions rendered prior to those contained in this report. Nevertheless, the decisions contained here reflect the most recent thinking of the courts on topics of vital concern to administrators. In consequence, this work serves to alert school administrators to the current thinking and rulings of the courts.

An additional caution: it should not be assumed that all the reviewed

decisions have direct bearing on all school districts. In some instances, a case relates specifically to the laws of a given state. In some lower federal court decisions, a holding applies only to those states within a given area of jurisdiction. Still other decisions have a more general application. All the same, the various opinions are significant regardless of an administrator's geographical location because attorneys and judges can, and do, cite judicial opinions from courts throughout the nation in arguing and deciding similar cases before the bar.

The case analyses in this report are intended to guide superintendents, principals, and other members of the administrative team in actions designed to avoid the time-consuming and costly process of adjudication or, should adjudication occur, to increase the prospects for a ruling that is favorable to the school administration. Although suggestions for specific actions are set forth at appropriate points in the text, ten general guidelines that school administrators should follow are offered here.

1. *Know the substance of law.* It is not enough to have a copy of the state codes on one's desk; it is necessary to be familiar with the provisions of those codes. It is also incumbent on the administrator to know the substance of the major court holdings as they affect him or her.

2. *Follow procedures.* Recent cases indicate that in a number of instances administrators failed to follow procedures prescribed by law, thereby leading to the court's voiding of the administrative actions. While one may have good intentions about what he is doing, if the law is specific about *how* he shall do it, the person must follow those procedures.

3. *Exercise good judgment.* In the absence of specifically stated procedures, courts will often uphold an administrator who exercised good judgment. An administrator who had good reasons for taking the action that he did will probably be upheld provided he has documented his case carefully. This documentation should include a thorough description of the circumstances of the situation and a detailed report of how the administrator attempted to solve it.

   When an administrator has to make judgments in the absence of clearly defined law or policy, he should attempt to overcome his biases and prejudices. Instead of determining his preferences, he should ask what is best for all concerned.

4. *Look ahead.* One way to avoid many problems is to anticipate what might happen and to take preventive measures. Where

matters are unclear, an administrator would be wise to propose policy development to clarify the issue. Where patterns of action deal with areas not yet settled, he would be wise to consult with his staff on how best to treat the matter.

5. *Seek counsel.* To be certain that he is following established laws and procedures, an administrator should seek the advice of the school district solicitor. His assistance may well save the district many hours of work and much money by helping to solve a problem before it gets into court.

6. *Be flexible.* The wise administrator will recognize that he must accommodate persons (teachers, students, staff, board members, and laymen) who have ideas different from his and with whom he will disagree. He should not work toward always getting conformity with his thinking. For the school to be a "marketplace of ideas," it must house many different groups with various tenets. A strength of the institution lies in the administrator's ability to provide a climate in which differing ideas may be tested, allowed to flourish, and channeled toward the good of the organization.

7. *Understand conflicting court decisions.* Some of the decisions reported here may seem to be in conflict with other court holdings. In law, this is not unusual. The facts of one case may differ only slightly from those of another, but this difference may prompt a contrary ruling. The statutes in one state may cause a decision to be counter to that handed down in another state. The amount of preparation for the case may well determine its outcome. Since a judge must render a decision on the totality of the facts before him, it is advantageous for the case to be thoroughly prepared.

8. *Respect the Constitution.* During the last decade and a half, many students and teachers have filed suit against school personnel on the grounds that their constitutional rights have been violated. To a considerable degree, the courts have expanded many of these rights as receiving constitutional protection. The administrator should apprise himself of the extent to which students and teachers have received federal court protection under the First and the Fourteenth Amendments.

9. *Educate the public.* Many people who do not understand the recent court decisions fail to understand the actions that

administrators do or do not take. It would be well for officials to inform the public about the current status of the law.

10. *Assume leadership.* Today's administrator needs to be a leader of the personnel working with him. Courts acknowledge this need and recognize and reaffirm the right and obligation of officials to take positive action. This duty should be continued and exercised in light of the rule of law.

Simply being knowledgeable about the law will not keep one out of court. However, adherence to these guidelines as well as to the specific suggestions offered in the remainder of the text will decrease (if not completely eliminate) the amount of time school administrators spend as litigants and increase the time they spend as educators.

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ADMINISTRATORS

In the area of school litigation, the thought of an administrator being in court usually evokes images of his defending some action he has taken. Not all litigation involving school administrators is of this type, however. To the contrary, an administrator often initiates a lawsuit. Like other persons, an administrator may feel that his rights have been violated and seek redress through the courts.

The cases reviewed in this section treat, for the most part, the administrator as the initiator of a court suit. Included in the general group of "administrators" are superintendents, principals, assistant principals, and other administrative personnel.

Most principles related to personnel practices involving administrators are essentially the same as those involving teachers. For example, in the matter of the reassignment of administrators two basic principles apply. the reassignment shall not involve a demotion in rank and it shall not entail a decrease in salary. Beyond that, state laws may control with respect to the procedure involved in the transfer or reassignment.

Like teachers, administrators are subject to dismissal. Often, however, administrators appear to be more vulnerable in contract termination than are teachers. The reasons for a administrator's dismissal may not always be given as specifically as they are in the dismissal of a teacher, and a number of administrators appear to be reluctant to challenge their dismissal in court.

Dismissal procedures are usually covered in the state statutes. These procedures must be strictly followed, they cannot be circumvented or short-circuited. Anything less than detailed adherence to the provisions of the codes will void the dismissal.

The cases in this section revolve around the major areas of appointments to administrative positions, reassignments, and dismissals. In a few cases there was a challenge to a state agency review of an administrative decision. These challenges are usually premised on the notion that the agency lacked the authority to make a ruling.

Finally, this section treats two cases involving administrator-teacher relationships. One case alleged that the administrator did not have tenure as a teacher; the other questioned whether an administrator was eligible for membership in the teachers' union.

PREREQUISITES FOR AN ADMINISTRATIVE POSITION

Board of Education of City of New York v. Nyquist, 293 N.E.2d 819 (1973).

Question: Does a state commissioner of education have the discretionary authority to bypass constitutionally mandated examinations and to require a school board to give an individual permanent appointment?

Facts: Timpson, who had been serving as a licensed assistant principal of a junior high school, accepted the position of acting principal. The regular principal had resigned after completing one year of a three-year contract. No one else on the eligible list would accept the position.

Timpson worked as acting principal from 1961 onwards. On six occasions she failed the elementary school principal test. The school board denied her numerous requests to be licensed, tenured, and salaried in the position of principal, even though she had been highly praised for her performance in an extremely difficult job. In 1969 she began receiving "first step" principal's salary.

In 1969 Timpson petitioned the commissioner to direct the board to grant her a permanent appointment with appropriate tenure and back salary dating from 1961. The commissioner upheld her request and ordered the board to do as she had asked. The school board proceeded to annul the commissioner's order on the grounds that appointments to civil service positions based on merit and fitness be determined by competitive examination where practicable.

The commissioner moved to dismiss such annulment on the basis that Timpson had served in excess of the three-year probationary period and had acquired tenure. In special term, the court agreed with the commissioner. On appeal, the decision was reversed.

Decision: The Court of Appeals of New York reversed in favor of the board of education. Although it sympathized with the plight in which Timpson found herself, it recognized that the solution lies "not in

the unconstitutional attempt of the commissioner to bypass arbitrarily the requirements of constitutionally mandated examinations, but in examination procedures which will provide a true test of a candidate's ability and probable performance in the position for which he is being examined."

Commentary. Prerequisites for a position may be short-circuited when there is justification for doing so. It is questionable, however, whether one can bypass a constitutionally ~~mandated~~ provision in securing a position.

Fitness on the job consists of many things. It is not always easy to equate academic performance and test results with success on the job. Undoubtedly, Timpson was highly rated in a number of categories wherein one ascertains job performance. That did not, however, obviate the necessity of her meeting specific criteria prior to becoming a principal. One who holds a job without possessing the necessary prerequisites does so at his own peril. The length of time one has held a position is less crucial than the fact that one does not possess the stated credentials.

COURT-ORDERED CREATION OF ADMINISTRATIVE POSITION

Davis v. School District of the City of Pontiac, 487 F.2d 890 (6th Cir. 1973).

Question. Can a court require a school district to create an administrative position to be filled by a black person?

Facts. The district court ordered the Pontiac (Michigan) school district to eliminate segregation at all levels of the school system. Under this order the district was required to hire a black assistant superintendent.

Decision: The circuit court upheld the order to hire a black assistant superintendent.

Commentary. The school system claimed that the court did not give the school district an opportunity to show that current conditions did not require an additional assistant superintendent. The court pointed out that the school district had filed two comprehensive reports, one in February 1972 and one in February 1973, describing the district's operations and its efforts to desegregate. The court took these reports into consideration when, in April 1973, it repeated its 1971 order for the district to hire a black assistant superintendent. The court also pointed out that the school system did not request an opportunity to submit additional evidence that an additional assistant superintendent was unnecessary.

The court considered the appointment of a black assistant

superintendent "an essential part of the judicial remedy" to eliminate segregation at all levels of the school system. Since the court established that the school system was segregated and, therefore, was violating the Constitution, the court had the power to give the order to hire a black assistant superintendent.

The burden of proof here was on the school district. School officials should have provided sufficient evidence in 1972 and 1973 or requested another opportunity to provide evidence showing that an additional assistant superintendent was not needed. This evidence should have described the district's needs, its administrative positions, its allocation of responsibilities, and its task and time schedules.

DEMOTION OF ASSISTANT PRINCIPAL

Board of School Directors of Abington School District v. Pittinger, 305 A.2d 382 (Pa. 1973).

Question: Can school officials demote a professional employee?

Facts: Albrecht, after teaching social studies for three years, contracted with the school district as an assistant principal. The contract was a ten-month, renewable agreement.

After approximately one and one-half years in this position and after one satisfactory and two unsatisfactory ratings, Albrecht was advised by the superintendent that he would not be continued in the position of assistant principal, rather, he would be reassigned as a teacher of social studies. Albrecht did not consent to his new assignment, which he considered a demotion. He wrote to the superintendent about his feelings and asked for a hearing before the school board.

The hearing took place after the demotion and reassignment. By a vote of six to one with one abstention, the board approved the transfer for reasons of "failure to perform the duties of the assistant principal, demonstrating poor judgment, and unbecoming conduct."

During these proceedings the Pennsylvania State Secretary of Education and his counsel opposed the school board's action on the ground that it did not satisfy the procedural requirements of the state's school code. The section in question states that the salary of any employee may be increased at any time during the person's employment but that there can be no demotion either in salary or position without the consent of the employee. If the employee does not consent, he is entitled to a hearing before the school board and to an appeal that is to be conducted in the manner spelled out in the code pertaining to the dismissal of a professional employee. Briefly, the dismissal procedure provides for a detailed statement of the charges, which may be heard by the

employee, his counsel, or both; a written notice, by registered mail, setting forth the time and place of the hearing; a hearing within 15 days after the notice is received; and a recording of the proceedings.

Decision: The court found that the school board had violated Albrecht's rights under the teacher tenure provisions of the school code. The school board was directed to reinstate Albrecht to the position of assistant principal.

Commentary. The question of the assistant principal's competence was not the direct issue before the court. That question was obscured by the failure of the school board to follow the procedures in the school code, which provide that only the school board can demote a professional employee and then only after a hearing has been held and other steps in the dismissal procedure carried out.

The court recognized that assistant principals should be accorded the same security as that given teachers. The school officials made a mistake in not considering the positions as equal under the school code. In this case, the administrative staff had accomplished the demotion and transfer before the school board was even notified.

As discussed in the opinion, it would have been a simple matter for the school board to have corrected the situation merely by notifying Albrecht of the intended demotion, explaining the charges, and informing him of his right to a hearing. At that point Albrecht could have decided to accept the demotion or to ask for a hearing. Instead, the administration acted without board action.

The board hearing was not held until months after the demotion had taken place. Further, the board did not know what the charges were until the first day of the hearing.

This case points out that school administrators must familiarize themselves with the codes of their states. If there is doubt about the status of the law on a given point, it may well save the district time and money to seek legal counsel to determine what the law is. According to the decision in this case, the power to demote a professional employee rests with the board of education rather than with school administrators.

REDUCTION IN PAY: PROCEDURAL ISSUE

Burns v. School Board of Palm Beach County, 283 So. 2d 873 (Fla. 1973).

Question. Can a school board place an employee in a new position at a reduced salary?

Facts. An employee who had secured a continuing contract as a principal and who was subsequently assigned as an administrative dean

in a junior high school brought action seeking judgment that he should receive the salary of a principal since he had achieved a continuing contract in this position.

Decision: In overturning the decision of the circuit court, the district court of appeals determined the action of the board of education in reducing the salary of a continuing contract employee to be void because the board had not followed the procedures set forth in the Florida State Code.

Commentary: After being on a continuing contract as a principal and as a pupil placement specialist through 1970, the plaintiff had his salary reduced when he became an administrative dean for the academic year 1971-72. The board of education argued that it was unable to pay the salary of a principal to someone in a lesser position and that the plaintiff had been offered but refused other principalships prior to his placement as an administrative dean.

The court considered the essential question to be whether the school board "had the authority to alter the compensation paid under a continuing contract" and found that certain statutory procedures of due process must be followed if such action is to take place. The employee must receive official notification that he is being returned to annual contract status before his salary can be altered to conform to the responsibilities of a lesser position. Since the school district had not followed the relevant sections of the Florida State Code, the appeals court vacated and set aside the decision of the lower court.

It must be emphasized that in this particular case the appeals court ruled on the basis of a procedural question under the statute and did not address itself to the substantive issue. The applicability of this decision as a precedent in other states rests on the specific language of the education code in a given state and on the interpretation given it by the courts. In any case, school boards and administrators would be well advised to make sure that they fulfill all statutory and procedural requirements before acting in reassignment cases.

BOARD'S RESPONSIBILITY IN DESTAFFING

Williams v. Albemarle City Board of Education, 485 F.2d 232 (4th Cir. 1973).

Question: Must the school district offer a reassigned principal another principalship?

Facts: A principal lost his job when his school was closed as part of a desegregation process. He was offered but did not accept an assistant principalship in another school at the same salary. He sued the school

board for the losses he incurred as a result of taking a job at a college in a different city. The district court ordered the board to offer a principalship and pay damages to the principal. The school board then appealed the decision.

Decision: The circuit court held that the board must offer the former principal a job as a principal; however, it did not grant him damages.

Commentary: The circuit court dealt with two issues: (1) the kind of employment the board must offer, and (2) the question of whether to award damages.

The circuit court accepted the claim that the principal had suffered racial discrimination and had been demoted in his reassignment to an assistant principalship. Although there was no change in salary, the assistant principalship involved less responsibility than the principalship and included some teaching duties. The court held that the board had to offer him employment as a principal.

The board did not, however, have to pay the principal any damages. The fact that the board had offered the principal a different position without loss of pay was accepted as proof that the principal could have avoided all the losses he incurred. Also, the board offered the assistant principalship without any conditions, the principal was not asked to surrender any claim he may have had against the board. When he declined the assistant principalship, he assumed a risk of financial outlay that could have been avoided by staying in the school system.

In this case the school board was protected from financial loss by its unconditional offer to employ the principal at his same salary. In rejecting the board's offer, the principal assumed a risk he could have avoided.

RACIAL BALANCE

Lee v. Macon County Board of Education, 483 F.2d 242 (5th Cir. 1973).

Question. Is a school district compelled to balance its staff racially?

Facts. After a court order closed his school, a black principal agreed to accept a teaching position, at no reduction in pay, with the understanding that he would be given consideration when a principalship became vacant. Principalships did become available, but the administrator was not considered even though he had a satisfactory record and was qualified for the positions.

In a separate incident that later was joined with the principal's case, the board failed to rehire two nontenured white teachers because the district was under a court order to increase the black/white ratio of its faculty members. The trial court held in favor of the school board, and

the administrator and the two teachers appealed on the grounds that their rights had been infringed upon. The school district cross-appealed.

Decision: The court of appeals ordered that the principal be appointed to fill the next vacancy for which he was qualified and affirmed the action of the lower court in the instance of the two white teachers who were not reappointed.

Commentary: When principalships became vacant, the board refrained from offering the positions to the principal on the grounds that he had been derelict in his duties. Because none of these derelictions could be substantiated by the board and no disciplinary action had been recorded, the appeals court established that the plaintiff was entitled to an appointment to one of the principalship vacancies.

In the case of the two white teachers, the court affirmed that the school board had not infringed upon their constitutional rights. The court further stated that the board had acted reasonably in trying to achieve proper integration of the faculty. Consequently, it is established that a school board must obey a court order and may take positive steps to achieve a court-ordered racially balanced staff.

REASSIGNMENT BY A DISCRIMINATORY METHOD

Miller v. Board of Education of Gadsden, 482 F.2d 1234 (5th Cir. 1973).

Question: Does the school board have to tender a principalship to a principal who was discriminatorily denied appointment and who subsequently found other employment with which he was satisfied?

Facts: Shaw had been a principal in the Gadsden (Alabama) school district. His school was consolidated with another, and he lost his principalship by reason of desegregation when the school board refused to tender him a principalship on racial grounds. Instead, the board offered him the post of assistant superintendent. He accepted the post and was satisfied with it.

In a hearing Shaw stated that he was willing to keep his job if an anticipated raise in salary became effective. It did. Shaw's raise of $3,000 per year placed his salary higher than that of any principal in the district. Subsequently, the principals' salaries were raised to a level higher than Shaw's salary. Shaw brought action against the school board, not only for equivalent pay but also for costs and attorney's fees for the appeal.

The district court ruled that since Shaw had expressed satisfaction with his new position, the school board was not obligated to offer him a principalship and that he was not entitled to further relief. Shaw appealed.

Decision. The circuit court agreed with the district court that Shaw was not entitled to an offer of a principalship since he had expressed satisfaction with his new job as assistant superintendent. However, the circuit court declared that the district court had erred in failing to guarantee Shaw's placement in a position monetarily equivalent to the principalship he would have had if it were not for the racial discrimination against him. The circuit court ruled that the judgment of the district court be remanded for further proceedings, citing Shaw's plea for costs and attorney's fees as an appropriate subject for consideration.

Commentary. In arriving at its decision, the district court adopted as the standard the case of *Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970) *(en banc),* in which the U.S. Supreme Court ordered the prompt merger of dual school systems into unified ones. But the circuit court held that the district court was in error in its application of this case because it failed to consider a guarantee for Shaw's placement in a monetarily equivalent position.

The basis for the circuit court's judgment was *Lee v. Macon County Board of Education,* 453 F.2d 1104 (1971), in which it was decided that a black administrator who had lost his principalship after a school desegregation order and was passed over in favor of white applicants for subsequent principalships was entitled to recover the differences in salary and retirement benefits, if any, between what he would have earned as principal and what he earned elsewhere.

The circuit court also cited *Johnson v. Combs,* 471 F.2d 84 (5th Cir. 1972), in which the court ruled that if judicial proceedings are necessary to enforce compliance with the Education Amendment Act, the Civil Rights Act, or the Fourteenth Amendment, the prevailing party (other than the U.S.) shall be entitled to attorney's fees as part of the costs.

POSITION ABOLISHED BY COMMISSIONER'S DECREE

Cutcher v. Nyquist, 349 N.Y.S.2d 837, 43 A.D.2d 58 (1973).

Question. Can a determination of the commissioner of education be reviewed, annulled, and set aside? If so, under what conditions?

Facts. Plaintiff Cutcher held the post of director of secondary education with the North Tonawanda (New York) Board of Education. This post was subsequently abolished by the board of education in a reorganization move. The plaintiff brought suit to have the action of the board appealed to the state commissioner of education on the ground that his post was eliminated for the sole purpose of defeating his tenure rights.

The commissioner upheld the board's action, maintaining that it was

not motivated primarily to violate Cutcher's tenure rights. The plaintiff then instituted proceedings to have the commissioner's determination annulled and set aside. The state supreme court dismissed the petition, and the appellant appealed to the Appellate Division, which reversed and remanded the decision. On remand, the Supreme Court at Trial Term dismissed appellee's application, and appellee appealed.

Decision. The Supreme Court, Appellate Division, affirmed the judgment of the lower court on the basis that the plaintiff had failed to show that the commissioner's decision was arbitrary.

Commentary: In *Matter of Bubell v. Nyquist*, 31 A.D.2d 569, 294 N.Y.S.2d 961, it was decreed that the decision of the commissioner is final and conclusive unless it can be shown to be "purely arbitrary."

Furthermore, in *Matter of Board of Education of City of New York v. Allen,* 6 N.Y.S.2d at 141, 188 N.Y.S.2d at 524, 160 N.E.2d at 67, the court of appeals decreed that the commissioner's determinations may be reviewed on appeal but that they may not be stricken down unless they are proved to be "purely arbitrary."

In order to have the commissioner's determination annulled and set aside, Cutcher would have had to show that the abolition of his post as director of secondary education was intended solely to defeat his tenure rights and, therefore, that the commissioner made the decision in bad faith. This the plaintiff failed to do. Therefore, the commissioner's determination was sustained.

GROUNDS FOR DISMISSING AN ADMINISTRATOR. I

Spano v. School District of Borough of Brentwood, 316 A.2d 162 (Pa. 1974).

Question. What are grounds for dismissal of a school administrator?

Facts: The plaintiff, Spano, began work as a curriculum coordinator with the Brentwood (Pennsylvania) School District on August 1, 1966. Dissatisfied with the employee's work, the school board on November 7, 1966, asked her to resign. She refused to resign and continued working until she was suspended on April 20, 1967.

The school district levelled charges of incompetency and persistent and willful violation of the school laws. Nineteen hearing sessions were held and voluminous records compiled. The school board voted to sustain the charges and dismissed her on April 16, 1968.

The plaintiff then appealed to the state Superintendent of Public Instruction. After hearing the case, the superintendent concluded that the plaintiff was properly considered as a professional employee, the charges of incompetence against her were unjustified, and the school

district was within its rights to dismiss her for persistent and willful violation of the school laws of Pennsylvania.

The plaintiff then filed an appeal with the Court of Common Pleas of Allegheny County. At the same time the school district filed a counterappeal questioning some of the findings of the state superintendent. The judge sustained the plaintiff's appeal and dismissed the school district's counterappeal, holding that the plaintiff had not been accorded a just and unbiased hearing by the local board. The board then appealed this decision to the Supreme Court of Pennsylvania, which ordered a new hearing before the Court of Common Pleas of Allegheny County. This time the common pleas judge sustained the school board's dismissal. The plaintiff then appealed this decision to the Commonwealth Court of Pennsylvania.

Decision. The commonwealth court affirmed the lower court's decision sustaining the dismissal of the plaintiff.

Commentary. The plaintiff challenged the lower court's finding that she willfully and persistently violated the state school laws. In exploring the facts, the commonwealth court found that some of the actions cited by the board as examples of the plaintiff's behavior in excess of her authority and therefore derogatory to the school district were in fact laudatory. For example, she had tutored a student, at the request of his mother, after school hours and without pay.

However, the court stated that a close examination of the voluminous record revealed instances in which the curriculum coordinator exceeded her authority and was, therefore, guilty of willful and persistent violation of the school laws. For example, she circulated a proposed kindergarten course of study without consulting the principal, thus demonstrating her lack of understanding concerning her position on the school district staff, in effect, she called the superintendent a "liar" and an "autocratic administrator"; she stated to the PTA president that the superintendent was not "her boss" and that she did not have to take orders from him. When her relations with the superintendent deteriorated, she had the president of the teachers association - a teacher under the supervision of the superintendent - initial all her written correspondence with the superintendent.

The court concluded that, by these actions, the curriculum coordinator demonstrated that she openly questioned the authority of the superintendent and violated his directives, thus exceeding her authority. For these reasons, her dismissal was consistent with the state statutes. Because the superintendent was her superior, it was the obligation of the plaintiff, once she understood her position and what was expected of her, to attempt to fulfill that role or, if in good conscience she found

it impossible to comply with that role, to resign. Since the plaintiff had refused to resign, the court ruled to sustain her dismissal.

GROUNDS FOR DISMISSING AN ADMINISTRATOR: II

Sorin v. Board of Education, 39 Ohio Misc. 108, 315 N.E.2d 848 (1974).

Question. Can a superintendent be fired for vague, unsubstantiated charges?

Facts: A superintendent was fired from his position on the basis of pressure from and an investigation by three of the five members of the board of education. The board clearly was split with respect to support and nonsupport of the superintendent. The superintendent alleged that the charges against him were biased and vague.

Decision. The Court of Common Pleas upheld the superintendent's charges. There was evidence that the three members of the board were vindictive; they investigated, prosecuted, testified against, and made a judgment against the plaintiff. There was evidence that they had decided at all costs to get rid of him. Although numerous, the charges against him were so vague as not to constitute any real cause for his dismissal.

Commentary. In a hearing, a nonpartial tribunal is necessary whether it be a criminal court or an administrative or quasi-judicial proceeding. Moreover, there must be a substantive reason to justify the dismissal of an administrator.

In Ohio, the law provides that grounds for dismissal shall be stated with specification. Here, no more than vague, generalized charges had been filed. There was no way that one could intelligently respond to them, either individually or collectively.

The superintendent was awarded back salary and attorneys' fees. He then waived his reinstatement to the position.

DUE PROCESS

Anderson v. Westwood Community School District, 212 N.W.2d 232 (Mich. 1973).

Question. Is a superintendent entitled to the same rights of due process as other professional employees of a school district?

Facts. The superintendent of the Westwood (Michigan) Community School District was under a three-year contract that began September 30, 1968. On October 8, 1968, he was notified that charges had been filed against him and that he would be dismissed as superintendent. He asked for a hearing in accordance with the Tenure of Teachers

Act. The school board denied his request, claiming that he was not entitled to such a hearing.

The superintendent filed a complaint in court asking that he be given a hearing by the school board. The court ruled in favor of the superintendent and a hearing was held. The hearing resulted in the superintendent's dismissal.

Upon this action by the school board, the plaintiff filed with the court claiming that he had not been given a fair and just hearing. He claimed that not all the board members were present at the hearing meetings, that no transcript was made of the proceedings, and that witnesses on his behalf were not permitted to speak.

Decision. The court ruled in favor of the plaintiff and awarded him a partial summary judgment. The court based its decision on the following arguments:

1. All the evidence was not considered by all the board members.
2. The board arbitrarily terminated the hearing without giving the plaintiff an opportunity to complete his case or make an argument.
3. There was a serious question whether the board was free from bias or prejudice.
4. The defendants had not shown good and just cause for discharge of the plaintiff.

The plaintiff was awarded $10,950 as compensation for reduced earnings. The court ruled that any employee who is wrongfully discharged is entitled to damages.

Commentary. The court upheld the superintendent's right to a hearing as outlined in the Tenure of Teachers Act. Although the superintendent was dismissed by the school board, the court clearly stated that administrators have a right to due process and to fair and just hearings of charges. By declaring a violation of due process for the reasons previously stated, the courts are, in essence, mandating the following procedure for dismissal hearings:

1. The individual against whom charges are brought must have ample opportunity to present his case.
2. The school board must clearly prove that it has just cause for its action.

School administrators cannot be dismissed at the whim of school boards or individual board members. They are entitled to the same due process rights as teachers and students.

STATE AGENCY VERSUS STATE AGENCY

State Board of Education v. Coombs, 308 A.2d 582 (Me. 1973).

Question: If the State Employees Appeals Board acts constitutionally within its jurisdictional framework and if a grievance alleged by a state employee falls within grievances reviewable by the board, is the appeals board's decision subject to judicial review?

Facts: Coombs began employment as assistant director of the Southern Maine Vocational Technical Institute on July 1, 1966, and signed annual contracts for this position until June 25, 1971. On March 19, 1971, Coombs was notified by the state commissioner of education that the state board of education had voted not to issue him a new contract because it had lost confidence in him.

Coombs filed a grievance with the State Employees Appeals Board. The state board of education asked that the grievance be dismissed because Coombs was being paid until the terminal date of his annual contract (June 25, 1971) and, consequently, "there was no dispute for the board to settle." The motion for dismissal was denied.

At a full hearing, the appeals board ruled that the state board of education did not have sufficient justification for failing to renew Coombs' contract since his contract had never been terminated. It was found that the school board had adopted policies providing for a two-year probationary period; according to these policies, appointment to a third year began a continuous contract of indeterminate length. Thus the board had not conformed to its own established policy for dismissing employees.

The board of education appealed the decision of the board of appeals to the Superior Court of Kennebec County, which subsequently upheld the decision. A second appeal was taken to the Supreme Judicial Court of Maine.

Decision: The Supreme Judicial Court of Maine dismissed the appeal for the following reasons:

1. The decision of the appeals board is conclusive when it acts within its jurisdictional framework.
2. The decision of the appeals board is final for state employees if the decision is not related to an employee's classification or compensation.
3. The decision of the appeals board that the local school board lacked justification for not renewing the administrator's contract is final.

Commentary: The question here is whether one state agency has the

power to make a binding and final decision concerning another state agency also in the executive branch of government. The facts were conclusive.

The legislative branch established the State Employees Appeals Board as a quasi-judicial agency to hear grievances. The decisions of this agency were meant to be binding and final. The purpose of the agency was to provide a system where employee grievances could be heard "expeditiously, inexpensively, and finally" and to minimize and quickly resolve labor disputes. The board had acted within its statutory bounds.

ADMINISTRATOR TENURE

Bryant v. Cuniff, 301 A.2d 84 (R.I. 1973).

Question: Is a principal who is a principal-administrator tenured under a state's teacher tenure act?

Facts: The Foster-Gloucester Regional School Committee hired Bryant as principal of Ponaganset (Rhode Island) High School effective September 1968. In July of 1969, 1970, and 1971, Bryant's contract was renewed on an annual basis. On October 14, 1971, the committee, dissatisfied with his performance, voted unanimously to terminate his services as of the close of school on the following day. Bryant sought injunctive relief from a superior court justice who, pending the filing of charges, ordered his reinstatement as principal and enjoined the committee from interfering with his employment in that position.

Charges were then filed, and public hearings before the committee followed. The committee found that the charges against Bryant had been substantiated and voted (with one member dissenting) not to renew his contract for the ensuing year.

Bryant then voluntarily discontinued action in the superior court and filed a petition to have his case heard by the Supreme Court of Rhode Island. While awaiting action on this petition, he appealed the committee's decision to the state commissioner of education. The court decided to review his petition even though his appeal had not been heard by the state commissioner.

Bryant maintained throughout his hearings that, in view of the fact that the law requires a principal to have been a certified teacher prior to his appointment as a principal, a principal is protected by teacher tenure laws.

Decision. The court found that Bryant was not a teacher who had administrative duties, but, instead, was a "principal-administrator who neither teaches nor engages in continuing service as a teacher. As such, claim for tenure does not fall within the purview of the Act."

Bryant's petition for a hearing before the state commissioner was denied and the court found it unnecessary to determine whether the committee correctly concluded that the charges against Bryant were substantiated.

Commentary: State tenure laws vary. In some states principals fall within the purview of tenure laws. In Rhode Island, however, the pertinent part of the law reads: "Where school principal was principal-administrator who neither taught nor engaged in continuing service as teacher, he was not tenured under Teachers' Tenure Act." It is incumbent on administrators to familiarize themselves thoroughly with the specific laws in effect in their states.

MEMBERSHIP IN TEACHERS' ORGANIZATIONS

Ellwood City Area School District v. Secretary of Education, 308 A.2d 635 (Pa. 1973).

Question: Does membership in local, state, and national teachers' organizations render a first-level supervisor incompetent on the grounds that such membership precludes him from performing all the duties expected of him?

Facts: Reese, a tenured teacher for the Ellwood City (Pennsylvania) Area School District, was promoted to assistant principal in August 1971. It was known to the district prior to and at the time of the promotion that Reese was a member of various teachers' organizations. Although it was clear that the district did not approve of his membership in such organizations, he was not asked to resign nor did he promise to do so.

Reese was dismissed from his position as assistant principal sometime later on the grounds of "incompetence and negligence based entirely on the fact that he was a member of employee organizations which, the School District concluded, made him ineligible to handle grievances or to otherwise perform duties properly assignable to an Assistant High School Principal."

Reese had never received an unsatisfactory rating. He appealed, and the state secretary of education ordered the district to reinstate him. The district then appealed to the Commonwealth Court.

Decision: The court held that an assistant principal's membership in various teachers' organizations did not render him, as a first-level supervisor, incompetent. Such membership does not prevent an administrator from performing duties he would otherwise be expected to do.

Commentary: In this case, the question was clear: Does membership in a teachers' organization create a conflict of interest in an

administrator's work?

Under the Pennsylvania State codes, no person who is a member of an employees' bargaining unit may participate on behalf of a public employer in the collective bargaining processes, but such a person, where entitled, may vote on the ratification of an agreement. Any person violating this section may be removed by the public employer from his role, if any, in collective bargaining negotiations.

In this case the question arose whether the handling of grievances fell into the category of collective bargaining. It was resolved that if such procedures did fall into such a category, the simple remedy would be to have the person stop handling grievances. Reese had not been asked to handle grievances, nor had any other assistant principal who was *not* a member of a teachers' organization.

Had the court not affirmed the order of the secretary of education, Reese would have been dismissed for incompetence for not performing duties that were not specified in his job description and that, moreover, he had never been requested to perform.

3

TEACHERS

One time-consuming area of administration is that of responsibility for personnel– the teaching staff in particular. Personnel concerns often involve administrators in disputes related to hiring, placing, assigning, and dismissing teachers. The cases reviewed in this section relate primarily to problems in hiring and dismissing teachers.

The responsibility for hiring teachers belongs to the school board; however, formal employment usually follows the administrator's recommendation. A number of years ago one did not have to justify or give reasons for *not* employing a teacher. Today the situation is different. In hiring, one cannot discriminate on the basis of race, sex, creed, or national origin. The Affirmative Action Program under the Civil Rights Act of 1964 and its 1972 amendments makes that clear.

School officials can, however, exercise considerable autonomy in screening teachers. They can investigate an applicant's background and past performance. Yet, this investigation cannot be without its limits. Not all activities and experiences of a teacher relate to his fitness as a teacher; an investigation beyond the bounds of appropriate inquiry cannot be sanctioned. Note, in particular, the first two cases treated in this section, *Johnson v. Dixon* and *Doherty v. Wilson.*

Administrators often find themselves challenged when they attempt to dismiss a teacher. They become involved with problems related to both the reason for dismissal and the procedure to be followed.

The laws on dismissal vary from state to state. Some of the more common bases for dismissal are immorality, incompetency, insubordination, inefficiency, neglect of duty, unprofessional conduct, intemperance, and just cause. Each of these reasons is without specific meaning

and subject to varying interpretation a situation that often results in court cases. That is, what may be viewed as insubordination by one person may not be seen as insubordination by another.

A teacher can be dismissed only for reasons set forth in the laws of the state. It is assumed that the administrator has kept a file on the teacher's conduct if it is serious enough to warrant dismissal and that the file fully documents the reasons for the dismissal. It is also assumed that the administrator has made an earnest effort to help the teacher improve prior to dismissal. This effort should include specific recommendations and allow for a time interval sufficient to discern any improvement in the teacher's conduct.

A number of years ago, almost any area of teacher behavior might have been subject to administrative scrutiny and action. That position has now been modified, and the criterion is determined by the effect the teacher's behavior has on his performance in the classroom and on the students. Unless the relationship is adverse, the school officials should not attempt to discipline the teacher.

Procedural matters are just as important as the substantive reasons for dismissal. Administrators and school boards must follow the law exactly because failure to do so will negate the entire dismissal process.

State statutes also vary with respect to the dismissal procedures. Some states make considerable distinction between the rights of tenured and untenured teachers while others minimize the differences. Two 1972 decisions by the United States Supreme Court held that, if state statutes allow it, tenured and untenured teachers may be treated differently for purposes of dismissal.

Typical dismissal procedures include the following: notice of charges, opportunity for a hearing, the hearing, the decision, and opportunity for an appeal.

The cases in this section treat a variety of reasons for teacher dismissal and a number of procedural questions. The reader will note changes in the thinking of the courts as he reviews these cases. Although the reasons for dismissal have not changed, the interpretations of the statutory provisions for dismissal have.

PLACE OF BIRTH REQUIREMENT

Johnson v. Dixon, 501 S.W.2d 256 (Ky. 1973).

Question. Must teachers be born in the county in which they work?

Facts. Two secondary teachers on one-year contracts were told they would not be reemployed at the secondary level because the board preferred to hire teachers who were born in the county. The

superintendent offered the teachers jobs at the primary level, but they refused. The teachers sued the superintendent, the board, and the individual board members, claiming that the board's action was arbitrary and discriminatory.

Decision: The court of appeals said that such a board policy is unconstitutionally discriminatory.

Commentary: In addition to the facts of the case, the court dealt with several issues: (1) employment classifications, (2) the existence of the policy, (3) the board's discretionary power to hire teachers, and (4) the question of damages.

The superintendent made an error when he gave place of birth as the reason for not reemploying the teachers. Kentucky law does not require that a cause or reason be given for not reemploying limited-contract teachers.

Public employment cannot, however, be denied on the basis of unconstitutionally discriminatory classifications. Classifications such as nationality, duration of residence, or place of birth are inherently suspect and void unless the state can show or promote some compelling state interest. Since the school system is a state institution supported by state funds, the board must show what this interest is. A policy that favors hiring county natives because they have stayed with their jobs longer than nonnatives does not show a compelling state interest; the policy therefore discriminates against the nonnatives.

Whether or not a policy actually existed was left in doubt. If it did and was used against the teachers in question, the court would then have had to consider remedies for the teachers.

The school board has discretionary power to determine which teachers it will hire for limited contract positions. The board can deny employment to teachers for reasons that show the exercise of fair discretion.

The lower court was directed to determine the amount of damages that would be allowed and for which school officials would be liable.

This case suggests the following recommendations for administrators: (1) Have a thorough knowledge of the law with respect to teacher contracts. (2) If reasons for not reemploying a teacher are not required, do not give them. (3) Publish all policies and be familiar with them.

FREE ASSOCIATION

Doherty v. Wilson, 356 F. Supp. 35 (1973).

Question: Can a school board refuse to hire a teacher because of residence on a communal farm?

Facts. Doherty and her husband lived on Koinonia Farms an interracial, religiously oriented, communal farm in Sumter County, Georgia. In February 1971, Doherty was interviewed by Superintendent Wilson. On learning of her living arrangements, the superintendent proceeded no further with his interview because he was afraid he would be fired by the board of education if he recommended it hire a person who resided on Koinonia Farms.

The superintendent notified Doherty that her residence on the farm created a problem in the consideration of her application. Doherty later substituted in the district and performed satisfactorily. The only adverse criticism was the short length of her skirts - a criticism he had also voiced about other teachers. The principal of Sumter County's Plains High School later discontinued use of Doherty's services when he was informed that many residents of the district did not approve of such contact with Koinonia.

In April 1971 Doherty made a second application with the Sumter County School System. This time she applied for a position as a remedial teacher in the district's federally sponsored Title I program. The director of the program found her qualified and indicated that he expected openings in the 1971-72 school year and that she would probably be hired. He noted that this would not be made official until the applications were submitted and approved by the board of education in August 1971.

The director recommended that Doherty be hired, but Superintendent Wilson refused to act on the recommendation. The director of the program notified Doherty late in August that she would not be hired. She subsequently applied to Terrell County but was told no more teachers were needed. She made no further attempts to seek teaching employment for the 1971-72 or 1972-73 school years.

After Doherty and a representative of Koinonia Farms met with the board and the superintendent, the board voted to direct the superintendent to send Doherty a letter stating she was not needed. Statements made by the superintendent at the meeting led some board members to believe that at that time there were no unfilled vacancies in the Title I program. There were, in fact, several openings for which the plaintiff was qualified. The members of the board ratified the action of the superintendent on September 14, 1971, and indicated that they would have ratified his action even if they had known that there were openings.

Doherty instituted a class action Civil Rights suit against the board and the superintendent and sought equitable relief and monetary damages arising out of the board's refusal to employ her.

Decision: A class action suit was disallowed because the evidence failed to show that other Koinonia residents had been denied employment. It was found, however, that Doherty had been denied her rights under the First and Fourteenth Amendments and that the Sumter Board of Education had acted wrongfully in failing to hire her. The court ordered that she be offered the first available teaching job for which she was qualified.

The court refused to order payment of back salary for two reasons: Doherty made little effort to seek other employment, and her life-style reflected a disapproval of personal wealth. Most of her salary would have gone to the commune rather than to herself. Therefore, the court felt that she personally suffered very little financial damage. The court did, however, order the defendants to pay her legal costs.

Commentary: A board of education has broad latitude in selecting teachers to be hired and fired. The primary purpose of a board's standards is to select highly qualified and effective personnel who will promote finer education. In refusing to hire someone, a board must examine its reasons carefully. The board can examine qualifications and recommendations and, where a teacher is unfit or may cause disruption in the flow of education, refuse such a person employment.

In this case there was no valid reason to refuse Doherty employment. The refusal of the board infringed upon her right of "free association" as guaranteed in the First Amendment. Mere speculation as to the undesirable effect a teacher may have on students is insufficient grounds for refusing employment. Not all teacher activities and associations may be regulated by a board of education as a condition for employment.

DECLINING ENROLLMENT

Davis v. Winters Independent School District, 350 F. Supp. 1065 (1973).

Question: Is declining enrollment sufficient grounds for not renewing a teacher's contract?

Facts: The plaintiff, a certified teacher, was employed by the Winters (Texas) Independent School District from 1964 until May 1971. In March, he was informed that his contract for the 1971-72 school year would not be renewed. The reason given for the nonrenewal was a declining student enrollment that required a reduction in the teaching staff.

The school district did not use a continuing contract method of employment. Although the state of Texas makes provision for it, the state does not require school districts to use this contractual arrangement. Therefore, each March the school district may, if it has legitimate reasons, refrain from renewing teacher contracts.

When notified that his contract would not be renewed for the 1971-72 school year, the plaintiff took the issue to court, naming the school board and the superintendent as defendants. The plaintiff claimed that his contract was not renewed because he had, in the past, disciplined the superintendent's son and a board member's niece. He also claimed that renewal contracts had been given to teachers who had been in the district fewer years than he had.

The defendants claimed that the plaintiff's contract was not renewed solely because of the declining student enrollment. They pointed out that some teachers with less time in the district had had their contracts renewed because they were certified to teach more than one subject, whereas the plaintiff was certified only in social studies.

Decision. The court ruled that the action taken by the defendants was justifiable and did not deprive the plaintiff of his constitutional rights. The plaintiff was not granted relief and was ordered to pay all court costs.

There was no evidence that either the board or the superintendent was vindictive in their action against the defendant because of his activities in the classroom or as a member of the teachers' organization.

The court ruled that the plaintiff had been granted all the procedural rights of due process, because he had received prior notification of impending board action and was granted a hearing before the board.

Also, the plaintiff was not denied his right of life or liberty because neither the board nor the administration in any way impeded his ability to obtain other employment.

The court denied the plaintiff's contention that there was de facto teacher tenure in the district. There was ample evidence including the plaintiff's testimony that teachers were apprehensive each March because of the possibility that their contracts might not be renewed.

Commentary. In this case the court upheld the school's right to reduce its teaching staff by not renewing a teacher's contract. The court did not intend to arbitrarily give school districts the right to deny teachers renewal of contract for reasons other than those that could be considered justifiable, legitimate, and pursuant to the needs of the district.

Generally, courts have demonstrated that when due process is followed and the individual's constitutional rights are protected by proper procedures, a case will be decided on its salient issues. Many of the cases brought before the courts do not question the action of the defendants but do question the procedures they used.

School administrators should be cognizant of the individual's right to due process and of the proper procedures to guarantee this right. Because of decreasing student enrollments, many administrators may

have to cut back their staffs. When this happens, it is essential to follow due process carefully and to examine closely the criteria for determining who will not be reemployed.

ELIMINATION OF POSITIONS

United States v. Cotton Plant School District No. 1, 479 F.2d 674 (8th Cir. 1973).

Questions: (1) What redress can be sought by administrators and teachers whose positions have been eliminated because of school mergers or the revamping of programs? (2) What redress can be sought by administrators and teachers who have been discriminatorily or otherwise wrongfully discharged from their positions?

Facts: Woodard, black principal of all-black Gartrell School, served as school principal from 1962 to 1970. In 1969 and in 1970 a suit was brought by the Department of Health, Education, and Welfare that in 1970 led to the disestablishment of the dual system. The resultant integration required the elimination of one of four schools. Woodard was the principal eliminated, although he had more qualifications and longer tenure than the two white principals who were retained. Woodard was placed in charge of a new vocational program.

In May 1971, the school board informed Woodard that his contract would not be renewed because he had failed to sufficiently account for funds at Gartrell the previous years. His position as vocational director was eliminated, and there were no comparable positions available for him in the district. He subsequently found employment in another school district at a lower salary. During this time, it was acknowledged that he had been active in achieving integration of the school district.

The district court ruled in favor of Woodard, declaring that it had balanced his civil rights activities against the insignificant and untimely question of the accounting problem, which, apparently, would never have been brought up if the case had not occurred, and found Woodard's discharge discriminatory. Furthermore, it asserted that he had not been given a proper hearing according to Arkansas law. The district court awarded damages for the salary Woodard lost the first year on his new job as well as for transportation expenses and attorney's fees.

The district court further said that since he now had a new position in another school district, it would not be in the best interest to require his former school district to reinstate him. Woodard appealed. He asked either to be reinstated in his old school district or to be entitled to future damages for the school years subsequent to 1971-72.

Decision: The circuit court affirmed the judgment that Woodard's

discharge had been discriminatory and remanded the case to the district court on the basis that Woodard was entitled to additional equitable relief in the form of reinstatement or future damages.

Commentary. The basis of the circuit court's decision was the well-established principle that a teacher who is wrongfully discharged is entitled to be restored as equitably as possible to his previous position and equivalent salary scale. The discharged person has priority of re-employment when vacancies occur, if he is still interested.

In answer to the first question, the court ruled that where positions have been eliminated due to school mergers, revamping of curriculum, or similar circumstances, the school board is obligated to offer the administrator or teacher concerned the first equivalent vacancy for which the person is qualified.

INSUBORDINATION

Bowles v. Robbins, 359 F. Supp. 249 (Vermont 1973).

Question. Can a school board deny contract renewal to a teacher because of insubordination and improper certification of driver education students?

Facts: Bowles, a driver education instructor, did not have his teaching contract renewed for the 1971-72 school year. Prior to the board's official decision not to renew his contract, Bowles instituted legal action against the superintendent, the high school principal, and the school board. He claimed that the board had not renewed his contract by the stated date (June 15, 1971) because he had criticized administrative officials and the board. He also claimed that he was not afforded the right of a hearing prior to the board's action on his contract renewal.

The board's decision was based on the teacher's improper certification of driver education students and his refusal to comply with administrative requests for information regarding his teaching duties.

Decision. The court ruled that the defendants' withholding of the plaintiff's teaching contract was justifiable and that there was no violation of his constitutional rights.

Commentary. This case is important to school administrators because of the various issues involved in it: the due-process rights of teachers, the right of public employees to speak out on public issues, and the responsibilities of teachers to comply with legitimate administrative requests and to uphold and enforce education statutes.

Bowles and his principal and superintendent were involved in an ongoing battle over the driver education program. Bowles was approving

students for driver education certificates without providing the number of hours of driving time required by Vermont law. In addition to certifying students improperly, Bowles had a problem attaining certification as a teacher for the ensuing year. As Bowles became increasingly embroiled in the driver education conflict, his lack of proper certification came to play a larger role in the controversy.

Because of Bowles' conflict with the principal and superintendent, the officials procrastinated in notifying Bowles that his contract would not be renewed. The official notification of this action did not take place until after the deadline for such notices and after Bowles had begun legal proceedings against the defendants.

When Bowles felt he was being unduly harassed by the administration and had not been notified of the intention of the board as to his contract renewal, he began legal proceedings. The court ruled that in taking this action he abrogated his right to a hearing before the board to discuss why he was not notified of the disposition of his contract on the proper date. Therefore, he could not claim that he had been denied due process because he chose to take legal action before he had exhausted all the administrative avenues open to him.

The court's ruling that the plaintiff was not denied his right to freedom of speech was based on an interpretation of what constitutes an issue of public concern. The plaintiff's plea that he was not offered contract renewal because of his criticism of the board and school officials was rejected by the court.

> He elected to present his side of the problem to an individual member of the School Board because the school principal in seeking to verify his certification of student's time had caused him embarrassment with his students and interfered with his teaching functions. In this, the plaintiff was not voicing criticism of his superior on matters of great public concern. He was merely complaining of the attitude and conduct of his principal.

The court ruled that the plaintiff's claim did not relate to a question of public controversy but was rather an issue of faculty discipline within the school.

INEFFICIENCY

Meredith v. Board of Education of Rockwood R-6 School District, 513 S.W.2d 740 (Mo. C.A. 1974).

Question: How inefficient must a teacher be to warrant dismissal?

Facts: A tenured teacher was dismissed on the grounds of excessive absenteeism, inefficiency, and noncompliance with school policy. She appealed, and the trial court upheld her. The school board then appealed on the basis that the trial court erred on two grounds: (1) in holding that the board's decision was against the weight of the evidence, and (2) in holding that the board had failed to comply with applicable statutes.

Decision: On appeal, the court sustained the school board's dismissal of the teacher. It held that the board had sufficient reasons, based on the evidence, to warrant the action it took. It rejected the teacher's excessive absenteeism as a reason for her dismissal but upheld the other reasons. It also held that the school board had complied with the state statutes covering dismissal.

Commentary: This case indicates that school officials and the school board had considerable evidence in support of dismissal. The administration had taken the following steps. (1) it had informed the teacher in writing and in conferences of its dissatisfaction with her performance and her absences; (2) it had warned her in writing of her failure to improve; (3) it had directed her to bring stated deficiencies up to a satisfactory level of performance; (4) it had assisted her in attempting to improve in her work; (5) it had transferred her to another school at the end of the year in an attempt to bring about an improvement; (6) it had brought charges against her, in writing, and (7) it had held an open hearing on her dismissal.

The dismissal charges were consistent with those brought to the teacher's attention earlier. That is, she was dismissed for failure to improve in the areas previously pointed out to her.

Not only did the administration follow a wise procedure, but it also had concrete evidence of complaints against the teacher. The following are examples of the evidence it had:

1. The teacher had failed to explain some of her absences, even after several requests had been made.
2. She had administered corporal punishment in the absence of the principal even though such punishment was permissible only in the presence of the principal.
3. She had refused to readmit a student to her class.
4. She had referred a disproportionate number of students to the principal for discipline.
5. She had failed to contact parents of students who had discipline problems.

6. She had failed to return many students' papers.
7. She had failed to mark many students' papers.
8. Her gradebook was inadequate in that grades were not identified and summaries for them were not entered.
9. An aide was assigned to mark first-quarter work after those grades had already been issued to students.
10. Lesson plans were inadequately kept.

The above evidence was sufficient to satisfy the court that the school board had sufficient cause to dismiss the teacher. It did not accept, however excessive absences as a legitimate reason for dismissal. The court noted that the school board had an unlimited 80-day sick leave policy, and there was no evidence that the teacher's absences were not for legitimate reasons despite the fact that she was absent 90½ days during the three year period of 1969-72 and 12½ days during the first 59 days of 1972-73.

NONCOOPERATION

Irby v. McGowan, 380 F. Supp. 1024 (S.D. Ala. 1974).

Question. Is noncooperation a sufficient reason for teacher dismissal?

Facts. The board of education fired a nontenured teacher for being noncooperative. The minutes of the board supported the accusation. The teacher challenged the entry and alleged three causes of action: (1) deprivation of liberty without due process, (2) a reasonable expectation of employment, and (3) a violation of her free speech. She sought relief under section 1983 of the Civil Rights Act, including reinstatement, a due-process hearing, and back pay.

Decision. The court disallowed her claim. It held that she was not rehired due to her inability to accept supervision and direction, her failure to follow the guidelines of the English program, and her nonprofessional attitude.

Commentary. In this case, the teacher was released for a number of actions, the sum of them constituting sufficient cause. With respect to her teaching, she had objected to her assignment. The English program was funded through a federal project and involved approval, auditing, and evaluation at the conclusion of each year. All the teachers taught on more than one grade level and were subject to periodic reassignment. The teacher raised objections to this. With respect to her professional attitude, the teacher was very outspoken and criticized social promotion and materials and methods used in the English project. She failed to

meet deadlines. At faculty meetings she asked more questions than any other teacher. It was evident that she had a personality clash with the administration as well as with fellow teachers.

The court held that the teacher had not been deprived of any liberty. Moreover, she had failed to prove that she had been deprived of any constitutional right.

For nontenured teachers, promotion, contract renewal, and tenure are not automatic.

The reference in the school board's minutes book was in no way damaging to the teacher, for its contents had been revealed not by school personnel but by the husband of the plaintiff.

Here, the Civil Rights Act did not apply to a cause in which one could not establish a violation of any constitutional rights.

OFF-CAMPUS BEHAVIOR

Fisher v. Snyder, 476 F.2d 375 (8th Cir. 1973).

Question: Can a teacher be dismissed because of off-campus behavior that the school board judges to be "conduct unbecoming a teacher"?

Facts: A middle-aged, divorced high school teacher, following the advice of the secretary of the school board, accommodated overnight guests in her one-bedroom apartment. On one occasion, a 26-year-old man who was completing college requirements by observing classes in the school district remained in the teacher's apartment for approximately a week. Based on the superintendent's recommendation that the teacher was involved in "unbecoming conduct" that "was not conducive to maintenance of integrity of the public school system," the school board dismissed her.

Decision: The appeals court affirmed the lower court's action in holding that the teacher's behavior did not constitute cause for dismissal. Because it was unsubstantiated, the school board's inference of misconduct was arbitrary and capricious and therefore constituted an impermissible reason for terminating her contract.

Commentary: On several occasions, at the suggestion of the board secretary, the teacher had permitted visitors to remain overnight in her apartment since hotel/motel accommodations in the town were limited. During the 1972 school year, a young male acquaintance of her son stayed at the teacher's apartment for a week while observing classes at the school. At the conclusion of the young man's visit, the school board informed the teacher that her contract would not be renewed. At a hearing before the board, the teacher was given the board's reasons for the dismissal: (1) she was a single woman, and (2) she had permitted

men to remain in her apartment overnight, one of whom had remained for approximately a week.

The board followed the procedures provided by Nebraska law for terminating a nontenured teacher's contract. However, the court determined that, under these laws, the board had acted arbitrarily, capriciously, unreasonably, and unlawfully, and, therefore, the teacher should be reinstated. While a school board may inquire into the character and the integrity of its employees, dismissals as a result of such inquiries may not be arbitrary, capricious, and unsupported by facts. The court stated that "idle speculation certainly does not provide a basis in fact for the board's conclusory inference of impropriety on the part of the plaintiff."

It would seem clear, based on this and other court decisions, that, where a statute provides, a school board may dismiss a teacher because of unbecoming conduct outside the classroom. However, the board must demonstrate that the conduct is injurious to the teacher's ability to function in the classroom. Any school board considering this type of action must investigate the applicable statutes and the merits of its case before proceeding.

DELIVERY OF REPORT AT BARGAINING SESSION

Gierienger v. Center School District No. 58, 477 F.2d 1164 (8th Cir. 1973).

Question. Can a teacher be dismissed for disrupting the district's operations by delivering, at a teachers' association meeting, a report on the district's presumed financial ability to pay teacher salary increases?

Facts. The school board summarily dismissed a teacher because, at a local teachers' association meeting, he delivered a report concerning the district's financial ability to raise teachers' salaries. In justifying its actions, the board cited the teacher's previous problems with the administration. Two years earlier, despite a recommendation for his dismissal, the board had reassigned Gierienger from his counseling position to one as a physical education teacher.

The district court ruled in favor of the school district. The teacher appealed.

Decision. The circuit court of appeals overturned the lower court's decision and ruled that the information contained in Gierienger's report to the teachers' association was a matter of public record protected by First Amendment rights and, therefore, its distribution was not a willful attempt to disrupt the operations of the school district. Gierienger was ordered reinstated and compensated for lost pay.

Commentary: Although Gierienger had had previous problems with the administration, his change in assignment was followed by a two-year period of satisfactory performance. The court held that, because of this period of satisfactory performance, it was invalid to consider Gierienger's previous employment problems as bearing on the present case. Therefore, it limited its ruling to whether the report delivered to the teachers' association was protected under the First Amendment right of freedom of speech.

In its ruling, as in the case of *Pickering v. Board of Education,* 391 U.S. 563 (1968), the court found that because the teacher had not intended to disrupt the orderly operation of the school district and because the information contained in the report to the teachers' association was a matter of public record, the teacher's actions were protected under the First Amendment.

In any situation in which teachers' associations meet with or engage in collective bargaining with school boards, the school district must carefully consider its actions in the light of possible unfair labor practice charges or court actions. It would be advisable for school boards to enact policies governing the conduct of negotiations so that there will be little question regarding the activities of the parties during collective bargaining.

Administrators are also advised that teachers unpopular with them are not necessarily incompetent teachers. Penalizing a teacher vindictively will not be supported by the courts.

VIOLATION OF BOARD POLICY

Whitsel v. Southeast Local School District, 484 F.2d 1222 (6th Cir. 1973).

Question: Is a teacher dismissal for violation of board policy in conflict with the First and Fourteenth Amendments?

Facts: A teacher was discharged for inefficiency, insubordination, and violation of a school board regulation. The board's charges were based on the teacher's conduct during an unauthorized assembly of approximately 400 students in the school gym. The students wanted an explanation for the dismissal of two popular student teachers.

The board charged that the teacher failed to keep his students in the classroom during the assembly, he violated a school district regulation that opposed the disruption of classes due to student participation in politically oriented activities, and he contradicted directions the superintendent and principal gave to the assembled students. The teacher's contract was terminated after the school board gave him a hearing.

Decision: The circuit court upheld the board's dismissal of the teacher.

Commentary. The court reviewed events that occurred before, during, and after the student assembly as well as all the written documents and legal procedures that were pertinent to the dismissal of the teacher.

The teacher was employed in a high school near Kent State University. The student-initiated assembly took place on May 6, two days after the antiwar demonstration on the Kent State campus in which four students were killed. The two student teachers dismissed by the school board were Kent State students who had attended the antiwar rally.

At the trial in the federal district court, the issues were limited to the events of May 6. Neither the teacher's classroom expression of ideas nor his teaching performance was at issue. The circuit court, therefore, focused on the teacher's activities of May 6 to determine whether he had been dismissed for conduct protected by the First Amendment.

The court observed that the teacher made statements that, in a different context, might be protected by the Constitution. In this situation the teacher was terminated for what he did not say as well as for what he did say. After the superintendent told the assembled students to return to class, the teacher did not urge them to follow directions. Rather, his remarks encouraged the students to disobey the superintendent. These actions violated a regulation that required the teacher to assist in "quelling" student disruptions and, thus, "interfered with the regular operation" of the school. The court decided that the teacher had been dismissed for insubordination and violation of a board regulation rather than for the advocacy of ideas.

In this case there were no procedural questions, the school board observed due-process requirements. The board gave the teacher written notice and time to prepare a defense. At the hearing the board made charges permitted by Ohio law. The board's charges against the teacher were based on the teacher's conduct before and during the student assembly and his violation of the board regulation that opposes loss of school time due to student political activities. A stenographic record of the hearing was made, and the teacher was given the right to appeal.

The court also determined that the teacher was not denied equal protection of the laws even though two other teachers who spoke at the assembly had not been similarly disciplined. The other teachers resigned before final disciplinary action was taken in their cases.

The court's decision illustrates the importance of restricting charges against teachers to matters allowed by law as well as of following statutory provisions for termination procedures. The board regulation

opposing activities that result in disruption was legally defensible, and the teacher was accorded all due-process safeguards. As a result, the court determined that the board did not violate the teacher's rights.

STATEMENTS RESULTING IN SCHOOL DISRUPTION

Birdwell v. Hazelwood School District, 491 F.2d 490 (8th Cir. 1974).

Question. If a teacher's statements result in school disruption, are those statements constitutionally protected?

Facts: A probationary teacher objected to the presence of ROTC on the school campus. The military were there to provide information to students about military service. In objecting to their presence, the teacher led a general discussion about the armed forces, became upset, and suggested that the military should leave the campus. He suggested further that apples should be thrown at the recruiters. The principal and the superintendent recommended that the teacher be dismissed. The school board agreed and voted to release him.

Decision. The court upheld the school board. Although a teacher is protected with some degree of free speech, that protection is not absolute. Unlike *Tinker* (which held that the standard for restricting speech is evidence of substantial and material disruption), the court held that "one does not have to wait for the blow to fall before taking action."

Commentary. The school administrators were protected on two counts. First, they had given the teacher adequate due process. The principal had asked the teacher to meet with him. The teacher did so only following a second request, there had been no response to the first request. Following the principal's recommendation to the superintendent that the teacher be dismissed, the teacher was invited to appear before the board of education. He did not show up.

Concerning the substantive issue, the teacher's conduct had been such that sufficient cause existed for his dismissal. The action in which he had engaged in the classroom was unrelated to his duties as a mathematics teacher. Students' time and attention had been diverted from their studies. The Constitution does not protect teachers' comments directed at inflaming students to violent action.

In both substantive and procedural matters, the school administrators had acted wisely and judicially.

THE BEARDED TEACHER

Ball v. Kerrville Independent School District, 504 S.W.2d 791 (Texas, 1973).

Question: Can a teacher be fired for refusing to shave his beard?

Facts: The superintendent of a Texas school system asked a teacher to shave his beard. The teacher declined. The superintendent then recommended that the teacher be fired. The school board held a hearing at which the teacher and his lawyer had an opportunity to present evidence and cross-examine witnesses. The board then terminated the teacher's contract.

Decision: The court ruled in favor of the teacher.

Commentary: The court reviewed the local school district's authority in adopting and enforcing reasonable regulations that promote the state's interest in maintaining an appropriate learning environment. The school district does not have to tolerate interference with school management or accept conduct that undermines school discipline or disrupts the orderly process of learning. The district has the right to make reasonable rules concerning the conduct and dress of teachers.

The school district's argument was that the teacher's beard caused (and would continue to cause) disruptions, distractions, and disturbances in the educational process. The teacher's beard had caused some distractions at a faculty meeting prior to the opening of school. Administrators testified that professional educators agree that teacher conduct that causes distractions should be avoided. The administration also stated that several parents had asked that their children not be assigned to the bearded teacher's classes. The superintendent and the principal testified that if the teacher were allowed to wear a beard, it would be difficult to enforce the rule prohibiting mustaches and beards on students. The superintendent also testified that he had received approximately 60 antibeard statements.

The court observed that the school district's evidence did not conclusively establish that the beard interfered with the orderly functioning of the schools. The court made several points about the administrators' testimony:

1. Almost all the testimony consisted of opinions of school officials.

2. No one testified that he had read or been told that wearing the beard would be a significant distraction from the educational process.

3. No one testified that, based on his personal experience, the teacher's beard would be a distracting influence.

4. At best, the administrators' testimony was to the effect that they feared that the beard would cause distraction among the

students; they did not give details that described the facts, experience, or opinion on which such fears were based.

5. The superintendent did not specify how many of the 60 antibeard statements came from the local community. (Some 200 people had signed a petition urging the school board to reconsider its action against the teacher.)
6. The school district did not object to mustaches on teachers.

This court decision is consistent with previous holdings on cases concerning teachers with mustaches. The court reaffirmed the school district's right to make and enforce rules governing a teacher's conduct and dress, provided the evidence justifies the necessity for the rule. Here, the administrators had not made a case strong enough to support the rule. The court also noted local community attitudes toward the case and the need for some consistency in rule-making. The court might have been more favorably disposed if parents, students, teachers, and administrators had collectively developed the rule against beards and the justification for it.

NEGLECT OF DUTY

Simon v. Jefferson Davis Parish School Board, 289 So. 2d 511 (La. 1974).

Question: Can a teacher be fired for neglecting his duty?

Facts. The school board charged that the following behaviors constituted neglect of a teacher's duty. using his free class period improperly, being late to class, leaving classes unattended, making statements concerning sexual practices between the races, assuming the role of supervisor in the hall, leaving no lesson plans or roll books for substitute teachers, and refusing to accept help from the principal. The teacher had a public hearing before the school board and was dismissed.

Decision: The court upheld the teacher's dismissal.

Commentary. The court considered the statute governing the teacher's dismissal, the evidence supporting the charges against him, and the evidence supporting the teacher's claim of First Amendment protection.

The teacher claimed that the statute providing grounds for dismissal was unconstitutional. The court gave two reasons for refusing to consider this claim (1) the teacher did not raise the issue in the lower court, so he could not raise it in the appellate court, and (2) at the time of the claim, the statute provided several bases for dismissal, including incompetency, dishonesty, advocacy of racial integration, and neglect of duty. The teacher was not fired for advocating integration.

Administrators, teachers, and students presented written evidence that the teacher had neglected his duty. The court found that the evidence supported the following charges against the teacher:

1. He had left his class unattended, and a disturbance between white and black students had occurred.
2. He had made statements in his class concerning the sexual practices of the black and white races.
3. On three occasions, he had walked the halls, assumed a supervisory position, made notes in a book, and upset teachers.
4. On 11 or 12 days he had not left his roll book for substitute teachers.
5. He had not accepted constructive criticism from the administrators.

The court did not accept two of the board's charges as sufficiently important to merit dismissal. the teacher's tardiness and his misuse of his free period.

The court record indicates that the school officials prepared carefully for this case. From all the grounds for dismissal provided in the statutes, the administrators selected the one that could be supported by evidence. They had records concerning the nature and dates of the teacher's actions, and they had personnel who could present evidence to support the charges. In addition, the administrators had made efforts to help the teacher improve.

NATIONAL TEACHERS' EXAMINATION TEST SCORES

United States v. Chesterfield County School District, 484 F.2d 70 (4th Cir. 1973).

Question: Are low scores on the National Teachers' Examination (NTE) valid criteria for dismissing teachers in a newly desegregated school system?

Facts: In the course of effecting a court-ordered desegregation plan, a South Carolina school district dismissed ten certified teachers who had been teaching for periods ranging from 4 to 30 years. South Carolina issues teaching certificates graded from "A" to "D." Of the ten teachers fired, one was a "B" certificate teacher who was dismissed for incompetency, and nine were "C" certificate teachers who were dismissed as a result of a newly adopted school district policy against employing "C" teachers. The policy against retaining "C" teachers was adopted in ttempt to upgrade the faculty.

The United States alleged that the dismissals were racially discriminatory. The district court denied the request for reinstatement of the teachers.

Decision. The circuit court upheld the dismissal of the "B" teacher for incompetency, however, the court found that the dismissal of the nine "C" teachers was racially discriminatory and directed the district court to order their reinstatement.

Commentary. The court dealt with South Carolina's certification practices and the school district's employment practices and policies. The court applied two different legal principles to the two facets of the case - the dismissal of the one "B" teacher and the dismissal of the nine "C" teachers.

The letter grade on a South Carolina teacher certificate is based on the teacher's score on the NTE. The assigning of the letter grades has been somewhat inconsistent: since 1945 score requirements for the various grades have changed four times, and at different times the state has assigned different grades to the same NTE scores.

The school board, on the basis of recommendations from the principal and an advisory council, annually determines whether to rehire each teacher in the district. In 1970 the superintendent initiated a policy of terminating "C" teachers. The nine "C" teachers in question were terminated in accordance with this policy. No white teacher was terminated as a result of this policy. At the same time, the school district retained 26 "B" teachers and hired 3 new "B" teachers whose NTE scores were lower than or identical to the NTE scores of the 9 dismissed "C" teachers.

The court said that the school district must present clear and convincing evidence that the dismissals were not racially motivated, otherwise, the teachers had to be reinstated with back pay. The school district's "good faith is an important factor, but it is not a determinative factor unless and until complete absence of racially discriminatory intent is also shown." In addition, the school district had to show that its requirements for employment were related to job performance.

Although the court reviewed testimony concerning the relationship between the NTE and teacher knowledge, the court did not take a position on whether the NTE was validly used in the dismissal of the nine "C" teachers. The court held that the nine dismissals were racially discriminatory because the school district applied its policy against employing "C" teachers in a nonuniform and uneven fashion. The 26 "B" teachers retained had "NTE scores that would have qualified them for 'C' or 'D' certificates of later vintage."

When a school district retains "a substantial number of white teachers

with NTE scores" that are lower than the scores of the black teachers it dismisses, it is racially discriminating against blacks. Even though the district may have been trying to desegregate and even though "the inconsistency created by the use of 'C' grades rather than numerical scores was 'unknown' " to district officials, the "discriminatory *effect*" of the action makes it invalid, and the school district had to reinstate the teachers.

Racial discrimination was not evident in the case of the "B" teacher discharged for incompetency. The school district showed that her class was unattended and in disorder "a number of times," that she did not "preside" or "function" as a teacher, and that she "had no enthusiasm for in-service training in remedial reading and declined to implement" techniques taught at the training sessions. This evidence supported a dismissal based on incompetence.

Other facts added to the conclusion that her dismissal was not racially motivated—seven white "B" teachers were also terminated, and, since the faculty at the school where she taught had been integrated, her retention or discharge would not significantly affect the faculty's racial balance.

In the case of the "B" teacher discharged for incompetence, the court's decision illustrates the importance of documenting evidence that describes the unsatisfactory aspects of the teacher's performance and proving that an effort was made to help the teacher improve. The decision regarding the nine "C" teachers points out the importance of examining in detail both the facts that underlie proposed school policies and the possible effects of the policies.

In this case the school district should have checked with the state certification bureau and with the Educational Testing Service to obtain complete information regarding certificate grades and NTE scores before it adopted a policy to terminate "C" teachers. The effects of this policy were discriminatory, and the district could not show an "absence of racially discriminatory intent."

The administrator should also note that employment requirements and practices must be related to job performance. The NTE assesses the knowledge of recent college graduates. The exam is an inadequate measure of an experienced teacher's knowledge and, as a result, is inadequate as the sole basis for a decision regarding the retention or discharge of an experienced teacher.

INCOMPETENCE BASED ON STUDENTS' LOW TEST SCORES

Scheelhaase v. Woodbury Central Community School District, 488 F.2d [illegible] (8th Cir. 1973).

Question. Can a school board fire a teacher for incompetence on the basis of students' low test scores?

Facts. In November 1968, the state (Iowa) gave the school system one year to correct program deficiencies or face removal from the list of approved schools. By October 1969, the state had commended the school district for correcting its deficiencies, and the school district was continued on the approved list.

At the end of the 1969-70 school year, a nontenured teacher's contract was not renewed because of her students' low test scores. A federal district court ruled that the teacher had a "property interest" in her employment and that she could not be dismissed without due process. The court held that using low test scores as grounds for dismissal was arbitrary and capricious and thus denied the teacher due process. The court ordered her reinstatement and granted her damages. The school board appealed.

Decision. The circuit court overruled the district court and upheld the board's dismissal of the teacher.

Commentary. The teacher contended that the district's failure to renew her contract on the basis of her students' low test scores violated her right to due process. The school system argued that the use of test scores as a measure of teacher competency was a valid and reasonable exercise of its discretion, the federal court did not have jurisdiction on the matter, the teacher did not have a constitutionally protected "property" right to contract renewal; and the choice between contract renewal or nonrenewal was a discretionary power of the board granted to it by the state.

The circuit court reviewed the question of federal jurisdiction in the case: Did the board's refusal to renew the contract violate a right protected by the Constitution? In Iowa, teachers are hired on a year-to-year basis. The statutory one-year limit on board-teacher contracts gives the school board the right to review its staff annually. In the absence of a tenure statute, the board has the right to refuse employment for any reason or no reason as long as the decision does not violate a specific constitutional right. The court observed that not every civil right is protected by the Constitution. Rights not derived from the Constitution or federal law are left to the protection of the states.

The court also quoted Chief Justice Burger in *Roth* and *Sindermann* as having said that the relationship between a state institution and its teachers is a matter of state law; therefore, state law, except as prohibited by federal law or the Constitution, governs teacher contracts. Moreover, "property interests" are created and defined by "an independent source such as state law." Since Iowa imposes a one-year limit

on board-teacher contracts, a property interest may not be created, and, thus, the board's refusal to renew the contract did not violate the teacher's constitutional rights. Further, the power to remove comes with the power to appoint; the school board has the power to hire and fire teachers in accordance with provisions created by state law.

The court also maintained that the determination of competency is a responsibility of the school district. Using low test scores as grounds for dismissal may lead to "wrong" decisions, but the court would not interfere as long as school officials were honestly trying to perform state-mandated duties and not violating constitutionally protected rights.

The court's decision does not imply that low test scores are adequate grounds for dismissal for incompetence. The one-year statutory limit on teacher contracts protected the school district in this case. In states with tenure statutes property rights may be created, and due process will be required. In such cases dismissal for incompetence must be supported by evidence that proves incompetence and shows that administrators made an effort to help the teacher improve.

MATERNITY LEAVES

Cleveland Board of Education v. LaFleur, 414 U.S. 632 (1974).

Question: Is an inflexible maternity leave for teachers constitutional?

Facts: This Supreme Court decision involved two similar cases. In the first, the Cleveland board of education required that all pregnant teachers take a maternity leave beginning five months prior to their expected confinement. The policy allowed the teacher to return to work the first semester after the child reached three months of age, but it did not guarantee that there would be work for her when she became available. The teacher on leave received no sick leave pay.

In the second case, the Chesterfield County (Virginia) board policy required that teachers take maternity leave four months prior to the expected birth. Under this policy, a teacher was eligible to return to work when her physician furnished permission and she gave assurances that child care would not interfere with her work.

Decision: The U.S. Supreme Court held that these maternity leave policies were in violation of the due-process clause of the Fourteenth Amendment.

Commentary: The justices in the majority held that personal decisions such as those related to family life are protected by the Fourteenth Amendment. While the school may seek to provide for an orderly continuation of instruction, the restrictions placed on individual teachers through an arbitrary policy is the greater problem. Further, it was

not shown that all pregnant teachers would be unable to discharge their duties effectively. The Court determined that the pregnant teacher and her physician should judge when she should stop teaching. That is to say, the judgment is more medical than administrative.

The Court also declared void the part of the Cleveland policy determining when a teacher could resume teaching. This part of the policy was found arbitrary and irrational. On the other hand, the Court upheld the Chesterfield County policy on returning teachers.

The Court was of the opinion that maternity leaves should be handled on an individual basis. This recognizes that one teacher may have to withdraw from teaching shortly after becoming pregnant while another may teach almost to confinement.

This decision raises questions about maternity leaves for noninstructional staff. The Court did not, however, address itself to that question.

SUBSTANTIATION OF REASONS

Serignet v. Livingston Parish School Board, 282 So. 2d 761 (La. 1973).

Question. Can a superintendent recommend that a teacher be fired on the grounds of incompetency and willful neglect of duty if these charges are unsubstantiated conclusions?

Facts: In a letter dated April 5, 1971, the superintendent of schools notified a teacher that he was being dismissed after less than three years of service because of "incompetency and willful neglect of duty." The superintendent cited the part of the state code that deals with "how and under what conditions a probationary teacher may be dismissed", the board ". . . may dismiss or discharge a probationary teacher upon the written recommendation of the superintendent of schools, accompanied by valid reasons thereof."

The trial court set aside the teacher's dismissal and awarded him the back salary due under his contract. The teacher contended that the trial court had properly declared his dismissal illegal because the superintendent's written recommendations were not accompanied by valid reasons and that no such valid reasons existed. The school board appealed this decision.

Decision. The appeals court affirmed the judgment of the lower court. The court decided that the school board did not act on "detailed written charges specified by the Superintendent." The appeals court instructed the school district to pay all costs for which it was liable under law.

Commentary. The court held that the superintendent and the board must comply with the terms of the applicable statute. In the present

case the school board's resolution did not state that the superintendent's dismissal recommendation was accompanied by valid reasons, even though such alleged reasons were given later. At no place in the appropriate board minutes did any valid reasons for the dismissal appear.

The decision in this case was based on the school board's lack of compliance with the terms of the state statute governing teacher dismissal. Particularly in light of the spread of collective bargaining agreements that contain teacher evaluation clauses, boards of education must be sure to comply with all required procedures when dismissing staff members. When valid reasons exist and proper procedures are followed, school boards can terminate a teacher's contract.

STATUTORY REQUIREMENTS

Blue Springs Reorganized School District IV v. Landuyt, 499 S.W.2d 33 (Missouri 1973).

Question. Can a school district fire a tenured teacher without following required procedures?

Facts. After the teacher slapped one student and paddled another, administrators asked her to resign. She refused. On March 8, 1972, the superintendent sent her a 25 item notice charging incompetency, inefficiency, and insubordination and warning that if she did not correct her behavior she could be fired.

Three administrators, the teacher, and the teacher's lawyer met on March 22; the teacher was told that if she corrected the 25 items the problem would be resolved. Subsequently, the principal spent time observing the teacher. She no longer administered corporal punishment, but she was a few minutes late to class on several occasions, and she did not keep her students in a straight line on the way to the cafeteria.

On April 30, ten charges were issued against the teacher, and she was given notice that a board hearing would be held on May 24. Except for the charge that the teacher did not follow school policies, the charges made on April 30 were different from the 25 items on the March 8 list. The school district did not give the teacher 30 days in which to correct the complaints made on April 30. At the board hearing, supervisory personnel testified that the teacher had corrected all the original charges except one—not following school district policies. The board terminated her contract.

Decision. The teacher won the case. The court observed that the school district did not follow dismissal procedures required by the Teachers' Tenure Act and ordered reinstatement.

Commentary. The court reviewed the facts of the case, the statutes

that pertain to teacher dismissal, and the errors made by the administrators and the school board.

Statutory requirements for teacher dismissal in Missouri are detailed and specific:

1. The teacher cannot be dismissed until after he or she receives a written notice of charges that specify "*with particularity*" the grounds for dismissal, a notice of a hearing, and a hearing by the board, if the teacher desires it.

2. At least 30 days before a notice of charges is sent, the teacher must receive a written warning that specifically states the causes that, if not removed, may result in a notice of charges. The administrator must make an effort to help the teacher overcome the problem. This provision is designed to ensure that the teacher knows what the problem is and is given a chance to remove the deficiencies. The warning notice is required only when the charges are incompetency, inefficiency, or insubordination. (There are five other grounds for dismissal that do not require a warning notice.)

3. If either the board or the teacher wants a hearing, it must take place between 20 and 30 days after a notice of the hearing has been sent. This provision gives time to prepare for the hearing.

Referring to the law governing dismissals, the court pointed out the errors school officials had made. One mistake was made on April 30. Except for "not following school policies," the April 30 charges were "new and different" from the 25 items on the March 8 list. New and different charges required an additional warning notice and an additional 30-day atonement period, neither the warning notice nor the atonement period was given. In fact, the teacher was suspended on April 30 and thus blocked from making an attempt to overcome the new problems.

Some of the April 30 charges did not specify "with particularity" the grounds for dismissal. The principal testified that on March 30 when the teacher had asked how she was doing (with respect to the 25-item list) and if he had any suggestions, he had no complaints at that time. The court did not think that this represented a good faith effort, as the law requires, to help the teacher improve.

The court also pointed out that there were alternative grounds for dismissal that do not require a warning notice and a 30-day atonement period. Failure to obey regulations of the school board is one basis for

dismissal; however, this charge was not made. Also, all the rules the teacher was charged with violating were issued orally or in a written memorandum from the principal. The court observed that the clear solution would be to make sure that all the school district's important rules appear in published regulations. Oral communication and written notes are not considered published regulations.

This case illustrates the importance of detailed preparation when the dismissal of a teacher is being considered. Administrators must read and follow the law. A lawyer might well be asked to review all the legal requirements necessary to show that the district has complied with the statutes and has a valid case. The grounds for the action must be chosen carefully. Specific charges allowed by law should be set forth and specific efforts made to help the teacher improve should be documented. In this case, observations, assistance, and the collection of evidence should have begun in December when the corporal punishment took place.

HEARING NOT REQUIRED

Robinson v. Jefferson County Board of Education, 485 F.2d 1381 (5th Cir. 1973).

Question: Can the school district dismiss a nontenured teacher without giving the teacher a hearing?

Facts: A teacher was dismissed for use of profanity in class, inefficiency and incompetency in the performance of her duty, and inability to relat to ninth-grade students. She was not given a hearing.

Decision: The court upheld the board's refusal to renew the teacher's contract without giving her a hearing.

Commentary: The court dealt with two aspects of the case: (1) the board's refusal to renew the contract without giving a hearing, and (2) the reasons for the dismissal.

The court said that the teacher's argument that she was entitled to a hearing was without merit. The teacher contended that her contract with the board created a "property interest" within the meaning of *Roth* and *Sindermann* and that she had the right to a hearing prior to dismissal. The court disagreed. The court also maintained that the language of the teacher's contract did not require that an impartial body determine the cause for dismissal.

In addition, Alabama law provides that nontenured teachers can be dismissed "whenever, *in the opinion of the board*, the best interests of the schools require" dismissal. Determining whether a basis for dismissal exists is a discretionary power of the board. The teacher,

therefore, did not have a protected "property interest" in reemployment, and the board had the right to refuse reemployment without giving a hearing.

It should be noted that the school district did not create property rights by promising or implying continued employment. Also, the court decided that, although the board's charges might affect the teacher's ability to find other work, the effect did not deprive her of liberty. The judge decided that the charges did not damage the teacher's standing or attach stigmas to an extent that would prevent her from getting another job.

The teacher claimed that the principal of the school did not accept her ideas about teaching and that she was dismissed for "expressive behavior" protected by the First Amendment. The court reviewed the reasons for the teacher's dismissal and upheld her dismissal for ineffectiveness.

SUFFICIENCY OF NOTICE

Fisher v. Independent School District No. 118, 215 N.W.2d 65 (Minn. 1974).

Question. Can a school board fire a teacher without giving the teacher time to prepare for a hearing?

Facts: The board notified the teacher on March 16, 1972, that a new program would begin in the fall, employing two part-time teachers. The board discontinued the teacher's position and offered her a part-time job. The teacher was advised that she was allowed a hearing if she made the request within 14 days. The teacher obtained an attorney and, on March 27, requested a hearing. The board stated that it received the request on March 29.

Operating under a law that required teacher dismissals to be completed by April 1, the board sent the teacher and her attorney telegrams setting the hearing date for March 30. This notice gave the teacher 18 hours to prepare for the hearing.

Decision: The court ruled that the dismissal was invalid.

Commentary. The school board's action was prompted by the incomplete advance planning of its educational program and as an attempt to satisfy legislative requirements for teacher dismissals.

Although the school officials had been planning the special education program for a year, they had almost no state guidelines for it. There was also little evidence that the school officials had assumed any initiative in exacting more specific guidelines from the state.

The court observed that part of the problem was caused by the state

statute. The law required only that the board give the teacher "appropriate and timely" notice of the date of the hearing. The law did not specify how many days constituted such notice. Here, the court ruled that 18 hours did not constitute timely notice.

The court made a strict interpretation of the legal requirements governing teacher dismissals. It held that discontinuing a position is a legitimate reason for firing a teacher. However, a hearing is required, and that hearing must constitute a "meaningful process." The board had to show that the dismissal was based on facts, not on an arbitrary whim. Adoption of the program on March 14 and the legal requirement to terminate teachers by April 1 was an insufficient defense. The court stated that the board, not the teacher, had the obligation to plan its actions in advance. The board initiated the dismissal, and it was obliged to anticipate and perform all the procedures the law required.

PROBATIONARY PERIOD

Provus v. Board of Education of City of Chicago, 298 N.E.2d 405 (Ill. 1973).

Questions: Does a teacher's probationary period begin when he receives his temporary certificate or when he is formally appointed to position? Must the dismissal of a probationary teacher occur during the probationary period itself or can it occur within a reasonable period after he completes the probationary period? Does the superintendent have the authority to dismiss a probationary teacher or does the board alone have the authority?

Facts: Provus was awarded a temporary teaching certificate and worked as a full-time substitute until he received a formal appointment on March 17, 1969.

On November 29, 1971, he received written notice of his unsatisfactory performance, and the principal gave him advice about the steps he should take to improve his performance.

On February 15, 1972, he again received written notice that his teaching performance was unsatisfactory. On March 3, 1972, he attended a conference at the teacher personnel office to review his unsatisfactory evaluation. This conference resulted in a recommendation to the general superintendent that Provus's services be terminated as of March 15, 1972, due to "his failure to maintain order and discipline in his classroom, his neglect of his pupils in failing to give them necessary individual attention and to correct their mistakes, his failure to prepare assignments, and finally his failure adequately to teach the pupils in his [illegible]h grade class."

On April 12, 1972, the board dismissed Provus.

On May 9, 1972, Provus filed suit against the general superintendent and the board seeking declaratory relief, injunctive relief, and damages. The Circuit Court of Cook County upheld the discharge of Provus, who then took his case to the appellate court.

Decision. The appellate court reversed the lower court and ordered that Provus be reinstated as a "tenured" teacher in the Chicago public schools.

Commentary. In this case the facts are not in dispute. The fact that Provus may have been an unsatisfactory teacher is not in question. The real legal issue revolved around procedure. According to the state statutes,

1. The teacher's probationary period begins on the date of his appointment.
2. The dismissal or discharge of a probationary teacher must be accomplished during the three-year probationary period.
3. Only the board of education, by formal action, can discharge or dismiss a probationary teacher, the superintendent of schools cannot do so himself.

Because the board did not discharge Provus until 26 days after his three-year probationary period ended and did not follow the procedure for discharging a tenured teacher, the discharge was improper.

In this case, as in others, the best interests of improved education may be foiled because administrators and boards fail to follow the steps prescribed by statute. It is imperative that administrators be mindful of state statutes because the courts construe contractual law as inflexible. Where dismissal must occur within a specified period, dates should be established whereby recommendations for dismissal can be properly considered before tenure is automatically granted.

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PUPILS

Over the last two decades, the most active area of school law has been that dealing with student rights. On numerous occasions the courts have been called on to determine the degree of control administrators and teachers have over pupils.

Prior to the recent avalanche of student cases, courts consistently deferred to the judgment of school officials. In fact, judges often shunned involvement in school-related matters unless it could be clearly shown that administrators and school board members had acted arbitrarily, unreasonably, or capriciously. That is to say, the courts usually did not question an administrator's wisdom or lack of it. Consequently, school officials exercised considerable autonomy.

The autonomy administrators had in controlling students began to undergo legal modification in the early 1960s. Recent court opinions have, in effect, redefined the administrator pupil relationship. Whereas previously judges may have questioned only whether an administrative decision was arbitrary, recently judges have looked to the Constitution and its application to the rights of school students. As the U.S. Supreme Court stated in *Tinker,* a pupil's rights do not stop once he enters campus.

Many decisions of the last decade, then, have their roots in the federal Constitution. In particular, the First, Fourth, and Fourteenth Amendments have been cited as bases for clarifying the rights of pupils.

This section treats a variety of decisions based on the First and Fourteenth Amendments. The holdings cited are, on the whole, consistent with the general trend of court decisions on the topic. Before presenting specific cases, an overview of the current trends is in order.

Generally, students are now permitted to dress as they wish unless there is a compelling need to restrict their dress. Three criteria may justify a restriction disruption, health, and safety. Some dress codes have been and are being upheld, others have been overturned because they were arbitrary and vague. Where administrators have involved teachers, pupils, and parents in the formulation of the code, the courts have tended to be more accepting of the code. Administrators are advised not to unilaterally draft a dress code that reflects their predilections; the school cannot exercise exclusive control over a student's appearance.

The courts have protected students in allowing them to speak and to refrain from speaking. On the first issue, the courts have found in favor of students who massed for demonstrations and rallies that were peaceful and did not disrupt the school program. On the latter issue, courts have upheld students in their refusal to salute the flag for a variety of reasons, primarily religious and ideological.

To a considerable degree, students have been upheld in cases testing their right to publish and disseminate material that administrators find tasteless or unrelated to education. School officials can, however, restrict libelous, obscene, or pornographic material from being published in the campus paper, and they can restrict, but not forbid entirely, the dissemination of nonschool material. In upholding the students, a number of courts have expressed the view that education should benefit by covering a variety of topics and encouraging discussion of lively issues.

In recent years, the Fourteenth Amendment has been cited often in cases concerning student discipline. It protects a student threatened with suspension or expulsion in that the principle of reasonableness and fairness must be exercised. That is, the more serious the alleged offense and the more serious the expected penalty, the greater the need to afford the student procedural due process. This may or may not involve a notice of charges, a hearing, counsel, cross-examination, and an appeal.

Courts have consistently ruled that a discipline hearing is an administrative conference, not a courtroom trial. To the extent that an administrator or school board displays fairness and relates the student's punishment to his offense, the courts will uphold the administrator or board. This standard allows for both flexibility and discretion.

Courts have also consistently ruled that school officials can discipline students. Even corporal punishment is not disallowed unless it is otherwise forbidden by law.

On the question of married students, the courts have viewed them as no different from other students. Any attempt to punish a student for

being married or to deny him an opportunity otherwise available to an unmarried pupil is unlikely to receive judicial support. Thus, for example, a student should not be denied the right to participate in interscholastic athletics simply on the basis of his marital status. Similarly, married girls should not be singled out for discriminatory treatment—even if they are pregnant.

One of the newer developments in school law is the matter of integrating sports teams by sex. Some of the few courts that have handed down decisions are allowing integrated team sports if girls currently do not have a team and if the sport does not involve physical contact. Litigation will likely be forthcoming concerning the unequal amounts of money being spent for boys' and girls' athletics.

This discussion suggests, in general terms, the current stance of the law toward student rights. The following court decisions consider the specific findings in a variety of student cases. In each case the court holding and the rationale for that holding are discussed.

PERSONAL GROOMING AND DRESS

Mick v. Sullivan, 476 F.2d 973 (4th Cir. 1973).

Question: Can a student who has been graduated bring a class action suit concerning a school board's regulations about personal grooming and dress?

Facts: A graduate of a high school brought a class action suit against the board for its regulation on student hair length. The lower court favored the school district on the grounds that long hairstyles went against the standards and ideals of the small, sparsely populated district and might disrupt the orderly operation of the schools. The youth appealed the decision.

Decision: The circuit court reversed the lower court's ruling on the grounds that the suit was a class action and that styles of personal grooming and dress are protected under the Fourteenth Amendment.

Commentary: The lower court expressed sympathy with the ideals and standards of the community and its right to guard against disruption of the schools. The circuit court determined, however, that the right to choose one's own hairstyle or other mode of personal grooming or dress is guaranteed under the Fourteenth Amendment.

The argument that long hair is a potential disruption was overturned here as it has been in other cases. It is now well established that school district policies that go too far in dictating standards of personal dress and grooming are subject to being overturned.

The second issue involved in this case also carries implications for

school boards: the bringing of a class action suit by a youth not currently enrolled in school. Since the court ruled that the suit was a proper class action, school boards must reevaluate their positions about the rights of students and nonstudents and establish appropriate policies. Not all courts, however, would sustain a class action suit. A 1974 ruling by the U.S. Supreme Court *Eisen v. Carlisle*, 42 U.S.L.W. 4804 (1974) - makes it more difficult to initiate class action suits.

Courts continue to disagree on how far schools can go in restricting dress style. Two choices appear clear: either accept student appearance or have a strong justification for curbing it.

WEARING OF SYMBOLS

Genosick v. Richmond Unified School District, 479 F.2d 482 (9th Cir. 1973).

Question. Does a policy statement prohibiting the exhibition of peace and ecology symbols violate a student's First Amendment rights?

Facts. After the district assistant superintendent issued a memorandum to the teachers dealing with the wearing of pants suits by female members and prohibiting the display of peace and ecology symbols by students, a parent brought suit against the school board and the administration charging that the First Amendment rights of her child had been violated. Although a second memorandum was issued to clarify that teachers were not to discipline, discriminate against, or intimidate students for wearing such symbols, the district court issued an injunction ordering that enforcement of the policy be discontinued. The decision was appealed.

Decision. The appeals court held that the lower court acted improperly in issuing the injunction and ordered the injunction dissolved and the action dismissed.

Commentary. The *Tinker* decision [393 U.S. 503 (1969)] guaranteeing students' freedom of expression under the First Amendment right of freedom of speech set the precedent for the district court decision. Even though the second memorandum requested that the staff not discipline, discriminate against, or intimidate students wearing peace or ecology symbols, the district court ruled against the school district and issued an injunction.

In overturning the lower court's decision, the circuit court of appeals found that it was not the intention or the practice of the school district to limit student expression. It is well established that school districts cannot limit the freedom of speech or expression of their students, provided that the exercise of those rights does not disrupt the orderly

process of education carried out by the schools. It is advisable, however, for boards of education to establish policies concerning student rights so that difficulties may be circumvented before they arise and become the subject of litigation.

DISTRIBUTION OF NON-SCHOOL-SPONSORED MATERIALS

Vail v. Board of Education of Portsmouth School District, 354 F. Supp. 592 (1973).

Question: Can a school board prohibit the distribution of all written material not sponsored by the school?

Facts: On November 12, 1969, the Board of Education of the Portsmouth (New Hampshire) School District adopted a rule forbidding "the distribution of non school-sponsored written materials within the schools and on school grounds for a distance of 200 feet from school entrances." The students and the general public were apprised of this rule, which provided that students would be suspended for 10 days for defiance of school officials and teachers.

Subsequently, several students, including Vail who had previously been suspended three times for violating the rule, were suspended for distributing written materials outside the school door, before the start of the school day but while the school was open. The suspensions were for a period of up to five days and were effected without prior hearings. During the suspensions, the students were not permitted to make up academic work missed and received zero grades for such work missed. A copy of a letter informing the parents of the suspensions was placed in each student's permanent file.

In November 1971, an attorney representing Vail and other students petitioned the board to discuss distribution of literature and materials. The board denied the petition because of the 1969 rule prohibiting such distribution. Further, the board claimed that one of the publications in question "had no redeeming educational, social, or cultural value; that its distribution could substantially disrupt normal educational activities; and that its distribution might incite lawless action."

Decision: The court enjoined the school board from enforcing the rule concerning the distribution of written material not sponsored by the school. All suspensions resulting from the breach of the rule were void, and records of the suspensions were ordered expunged from the students' permanent files. Furthermore, the plaintiff's counsel was granted access to the students' records to see that the proper action had taken place and that necessary adjustments were made where grades had been affected by the suspensions.

The Portsmouth school board was ordered to apply due-process requirements concerning suspensions. The court specified

> . . . an informal administrative consultation with a student before any suspension is imposed so that the student can know why he is being disciplined and so that the student can have the opportunity to persuade the school official that the suspension is not justified. . . . However, when a student is expelled or suspended for more than five days, the minimal standards of procedural due process require the following.
>
> a. Student and parents receive written notice of charges and evidence against the student.
> b. The student and at least one parent be offered a hearing with sufficient time to prepare a defense.
> c. That the suspension be based on fair and proper reason.

The court ordered that notice of the provisions of the statute concerning suspensions be given to students who are suspended for more than five days, and to their parents, and that procedural requirements relative to suspensions and expulsions be made part of the student handbook. The court's opinion was to be posted on the school bulletin board and copies were to be made available in the school library.

Commentary. In the last decade, there has been an increase in the number of judicial decisions concerning and supporting the rights of students. Because of access to mass communications, today's students are better informed than students were in the past. Being more informed, they are also more knowledgeable about the rights of citizens under the Constitution.

The courts have recognized that young people have as legitimate claims to Constitutional rights as do adults. There are, however, certain stipulations about the application of these rights to the young. As Judge Bownes noted in his discussion of the facts in the *Vail* case, "Free speech under the First Amendment is not absolute, and the extent of its application may properly take into consideration the age or maturity of those to whom it is addressed." A similar view was expressed by Justice Stewart in his concurring opinion in *Tinker v. Des Moines School District* "the First Amendment rights of children are not co-extensive with those of adults."

In the *Vail* case, it was the feeling of the court that the right to freedom of speech and expression might be modified or curtailed if the action taken by the student or students clearly forecasted "disruption and interference" with school activities. However, Judge Bownes stressed that such modification be based on reasonableness rather than on "undifferentiated fear or apprehension of disturbance."

CONTROVERSIAL OR BIASED STUDENT ORGANIZATIONS

Dixon v. Beresh, 361 F. Supp. 253 (1973).

Question: Can administrators refuse to recognize high-school organizations that advocate controversial ideas or address only one side of an issue?

Facts: A board of education policy on student organizations forbade its schools to recognize student groups that advocated controversial ideas or stressed one side of an issue.

The Mumford Committee to End Stress and the Mumford Young Socialist Alliance were two groups that, in the opinion of the principal, violated the school board policy, therefore, neither group was officially recognized. The plaintiffs wanted and needed this recognition in order to use school facilities and to have access to other rights and privileges that came with recognition.

Decision: The court ruled that the school administration's action in not recognizing the plaintiffs as organizations was unconstitutional because it denied the plaintiffs' rights granted under the First, Fifth, and Fourteenth Amendments. The Mumford Committee to End Stress and the Mumford Young Socialist Alliance were to be granted recognition immediately.

Commentary: This case makes it clear that if a student organization is to be denied recognition and, thereby, all the rights and privileges accompanying recognition, there must be clear evidence that the organization will interfere with the educational process. School officials cannot arbitrarily and capriciously deny recognition to a student organization because the organization advocates controversial ideas or promotes only one side of issues. The evidence cannot be speculative, and it must be clear that the educational process will be endangered by the activities of the organization. In other words, the school may have to accommodate unpopular or controversial ideas to the point of inconvenience, but it does not have to accommodate to the point of disruption.

COMPULSORY RESERVE OFFICERS TRAINING CORPS (ROTC)

Sapp v. Renfroe, 372 F. Supp. 1193 (N.D. Ga. 1974).

Question: Can ROTC be required of all male students?

Facts: A tenth-grade student objected to being required to take ROTC. The student's objections were for personal reasons.

For 25 years the Decatur County board of education had required ROTC of all sophomores, with two possible exceptions—the physically

disabled and music students. Sapp objected, refused to enroll in the course, and was suspended. He was later allowed to attend class pending a review by the board of education. The board refused to alter its requirement.

Decision. The school board's action was upheld. The requirement was seen as being reasonable in that the program was not limited to military training but also encompassed leadership, personal hygiene, discipline, and first aid. Completing the course does not commit one to military service.

Commentary. The court recognized that there may be legitimate exceptions to the compulsory course requirement. A key one would be conflict with one's own religious beliefs. The question of religious objection was not an issue, for the student's defense of personal belief was not tied to religion. Although the student had considered ROTC as being preparation for killing repugnant to his personal philosophy that philosophy did not establish a religious belief under the First Amendment. His belief was a repugnance to killing without its being based on religious grounds.

The student was not allowed to attend his school, rather, he became a tuition-paying student at a technical school.

SEARCH AND SEIZURE

People v. D., 34 N.Y.2d 483 (1974).

Question. Can school officials require that a student undress if he is suspected of having narcotics on his person?

Facts: A teacher reported to the coordinator of security what he perceived as being strange behavior on the part of a student. The student had been under observation for having possibly dealt in drugs. The student was brought to the office and, in the presence of the boys' dean and the principal, was ordered to strip. This search found him to be in possession of narcotics. He alleged that the search was in violation of the Fourth Amendment and the evidence should be suppressed.

Decision. The court held that the search went beyond the bounds of reasonableness. Students are protected, even in high school, from unreasonable searches and seizures. The student's previous conduct and the imprecise nature of the information from the confidential source were insufficient to justify the search.

Commentary. The primary purpose of searches at school is to protect the school environment. At the same time, the rights of a student must be protected. This apparent dichotomy necessitates balancing an individual's rights against social necessity. In this instance, the rights of the

student were paramount.

Factors to be considered in determining if there is sufficient reason to conduct a search are the following: the child's age, history, and record in the school, the prevalence and seriousness of the problem, and the necessity of making a search without delay.

In this case, the court also treated the question of the possible psychological harm done to young persons required to submit to the indignity of a strip search. This harm may well vary due to the age and mental development of the child.

This court decision runs counter to the recent cases involving student searches. The justification here was that a search by school officials can go too far, particularly when it requires students to undress.

DUE PROCESS IN SUSPENSION AND EXPULSION

Graham v. Knutzen, 362 F. Supp. 881 (1973).

Question What procedures ensure the due-process rights of individuals in suspension-expulsion cases?

Facts The plaintiffs filed suit challenging the constitutionality of the suspension expulsion procedures of the Omaha school district. The court decided that the procedures did not provide due process as it is guaranteed by the Fourteenth Amendment and directed the school district to submit amendments to the existing procedures. Prior to approving the amendments, the court held the matter open for six months to consider any other amendments that might be recommended.

On the plaintiffs' suggestion, the following amendments to the suspension expulsion procedures were submitted:

1. Suspension expulsion procedures will be distributed to all students and parents.
2. Students and parents have a right to be represented at a hearing by a person of their own choosing.
3. The student may automatically return to school if he is not notified of suspension expulsion procedures within a specified time limit.
4. The student and parent are to be notified of the names of those school officials who have knowledge of the facts in a suspension expulsion referral to the superintendent's office.

In one case heard after these amendments were adopted, the court found that a parent was not knowledgeable about the school procedures against expulsion cases and this inhibited his ability to secure his

son's right to due process. In a second case the question whether a lay person may represent the student and her parent at a hearing was raised. Further, in both of these cases the court established that the hearings were not held within the time specified by the approved suspension-expulsion procedures.

Decision. The court held that the following amendments, as rendered by the plaintiffs, were to be adopted by the school district to guarantee the right of due process to students and parents in suspension-expulsion cases:

1. The school district is to distribute to all students and parents its procedures for implementing and conducting suspension-expulsion hearings.
2. In suspension expulsion hearings, parents and students have the right to be represented by an attorney, but not by a layman.
3. Every effort shall be made to have a suspension-expulsion hearing within the time limits established by the suspension-expulsion policy.
4. Prior to the hearing, parents and students are to be notified of those persons having primary knowledge of the facts.

Commentary. This case is important to school administrators because it outlines acceptable procedures for meeting the due-process requirements for students who are being referred to the superintendent or school board for expulsion from school.

In clarifying the due-process guarantee the court declared that "the Fourteenth Amendment draws no bright lines around three-day, ten-day or fifteen-day deprivations of property." Although there is no rigid time limit within which a hearing must be held, the school district must attempt to hold a hearing within a reasonable time after the student's suspension from school. The school has a responsibility to inform students and parents of the procedures in a suspension expulsion case; however, the school satisfies the legal requirements of due process when the student and parent are notified of the hearing and of their rights under the procedures of the hearing.

These clarifications do not refer to suspensions of students for lesser infractions that do not warrant referral to the superintendent or board for exclusion. This area remains gray in regard to the student's right to due process and the administrator's obligation to provide it. Courts in general have interpreted due process as containing the element of fairness and reasonableness. The more serious the infraction and the greater

the expected penalty, the greater the need to ensure that due process is observed. This allows for flexibility in terms of notice, hearing procedures, and days excluded from school.

HEARING IN SUSPENSION AND EXPULSION: I

Black Coalition v. Portland School District No. 1, 484 F.2d 1040 (9th Cir. 1973).

Question: Are a school district's suspension and expulsion procedures constitutional if they do not provide for a hearing?

Facts: As the result of alleged assaults on fellow students, three black pupils were suspended or expelled from high school. One student said that he had acted in self-defense. The second student, a girl, allegedly assaulted two white girls. The third student, who had a long history of assaultive and disruptive behavior, admitted committing an assault. The first two students were suspended for six to ten days. The third student was expelled for the remainder of the school year. None of the students was given a hearing.

Decision: The procedures used in effecting the expulsion were held to be unconstitutional because no hearing was given, but, in all other respects, the suspension and expulsion procedures complied with due-process requirements.

Commentary: The court dealt with three areas: the students' right to challenge the constitutionality of the disciplinary procedures, the specific applications of the disciplinary regulations, and the question of relief.

In the first area, the court ruled that the students could not attack the entire set of disciplinary regulations. They could challenge only those parts of the regulations that affected their interests. The two suspended students could, therefore, challenge being suspended without a prior hearing, and all three could contend that "the disciplinary procedures are unconstitutionally vague *insofar as they provide that a student may be disciplined for assaulting another student.*" Further, the expelled student could assert on behalf of the class he represented that the expulsion procedures are unconstitutional. Since the constitutional rights of other members of the Black Coalition disciplined under other portions of the disciplinary regulations were not immediately before the court, there was no need to grant the Black Coalition the right to sue.

The specific applications of the regulations that were challenged dealt with the legality of suspending and expelling students without a prior hearing and the vagueness of the regulations. The court rejected

the students' contention that no student could be suspended for any period without a prior hearing. The court determined that whether a hearing is required depends on "the nature of the penalty imposed, the extent to which the underlying facts are in dispute, and the need for swift action to preserve order and discipline within the school." Long-term suspensions without a hearing are not allowed, but brief suspensions without a hearing are often justified by an interest in maintaining an appropriate learning environment. Since the students agreed that the court need not consider whether their suspensions were of such duration that a due-process hearing was required, the court found no error in the district court's refusal to find that the students' right to a hearing was violated.

The court did, however, rule that the expulsion procedures were unconstitutional because no hearing was provided. An expelled student must be granted a hearing at which the student has a right to a lawyer, as well as the right to present witnesses on his own behalf and to cross-examine adverse witnesses.

The students' challenge that the disciplinary regulations were vague was disallowed. College rules do not require the same specificity as criminal statutes, and greater flexibility is allowed in high school regulations than in college rules of conduct. Further, the school district's regulations were not vague, they specifically stated that "assaults" are abuses that necessitate disciplinary action that may range from a conference to an exclusion from school.

Since the two suspensions were constitutional, no relief was granted to the suspended students. The court also held that the school district could show in the students' records that suspensions took place as a result of assaults. No relief was granted to the student who was expelled without a hearing because he had admitted all the essential facts that a hearing would have established.

The court's decision has several implications for administrators. *Specific* rules regarding student conduct should be adopted. Written procedures for handling discipline cases should be established, and programs that clearly communicate the content and implications of disciplinary regulations should be conducted. A grievance procedure should be provided so that students can challenge the regulations that affect their interests.

Whenever possible, policies, evidence, and notices should be in writing. Even in the case of a temporary suspension that might not require a prior hearing, it would be helpful to gather written evidence showing that the suspension helped maintain an appropriate learning environment. Administrators should keep copies of letters sent to suspended

students and their parents noting the reasons for the suspension and its duration. A written notification as well as a fair hearing should be provided when an expulsion is being considered. In such cases, the student should be told that he has a right to obtain counsel, to inspect evidence, to present witnesses on his own behalf, to cross-examine witnesses, and to protect himself against self-incrimination.

The degree to which these standards are followed, particularly in severe cases, may well dictate the success the district will have in avoiding court cases and in winning those that do arise.

HEARING IN SUSPENSION AND EXPULSION: II

Goss v. Lopez, 43 U.S.L.W. 4185 (January 21, 1975).

Question: Are notice and a hearing constitutionally required for a short-term suspension?

Facts: Based on a number of disruptive incidents in the Columbus, Ohio, school system, nine students were suspended. This action was consistent with the state codes that provided for principals to suspend a pupil for misconduct for up to ten days or to expel him. The principal must notify the parents within 24 hours and state the reasons for the action. The parents may then appeal to the board of education, in which case a hearing shall be granted.

The disruptions varied, and some of the students denied the misconduct. A three-judge federal court held that the suspensions were invalid in that the students were denied due process because no hearing had been held. The appeal then went to the United States Supreme Court.

Decision. The Court held that, prior to suspension, minimal due process requires that a student be given notice of the charges against him and, if he denies them, he must be given an explanation of the evidence against him and an opportunity for a hearing. At the hearing he shall be given an opportunity to explain the circumstances from his point of view.

Commentary. In *Gault* (1967) the Supreme Court clarified the procedural due-process rights of juveniles outside the school setting. *Goss* has established that students have procedural due process rights within the school.

The Court stopped short of declaring that education is a right protected by state constitutions, it held in *Rodriguez* that it is not a right protected by the federal Constitution. Rather, the majority took the position that one has a claim of entitlement to a public education. This entitlement takes the form of a property right protected by the due-process clause. The right may not be taken away from another without

minimum due-process procedures.

Due process is a flexible rather than a rigid concept. In application it is the nature rather than the weight of it that is significant. In terms of applying it to the instant case, the Court viewed a ten-day suspension as not being minimum action. Some kind of notice and some kind of hearing are required for suspensions of less than ten days. The hearing can immediately follow the notice, both should precede suspension.

For some kinds of disciplinary infractions, the Court held that suspension may precede a hearing. If the presence of the student is a danger to persons or property or is a threat to the academic process, the student can be removed from school prior to a hearing. The hearing should then be conducted as soon as practicable.

The Court held that the following are not requirements for short-term suspensions: counsel, confronting witnesses, cross-examining witnesses, and calling one's own witnesses.

The Court observed that more formalized procedures may be needed for exclusions of longer than ten days, although the justices did not spell out what those requirements might be.

SCHOOL BOARD LIABILITY

Wood v. Strickland, 43 U.S.L.W. 4293 (February 25, 1975).

Question. Can a school board be held liable for suspending a student without a hearing?

Facts. Two secondary school students were suspended from school for "spiking" the punch at a school function. The incident became known two weeks later. At first, the teacher attempted to resolve the matter; as news of it spread, she asked the girls to confess to the principal. They did, and the principal suspended them for two weeks, subject to a decision by the school board. The school board met on the same day of the principal's action and suspended the girls for the remainder of the school term (approximately three months). Neither the girls nor their parents attended this meeting. A meeting also was held two weeks later, at which time the board reviewed its earlier decision and voted not to modify it. The girls alleged that the action violated their constitutional rights of due process, they sued individual members of the school board and the principal as well as the superintendent. They sought damages and injunctive relief.

Decision. The federal district court directed a verdict in favor of the defendants after the jury had failed to reach a decision. It held that the school officials were immune from suit as long as there was no proof of malice. The Court of Appeals reversed in holding that the students

had been denied substantive due process.

The United States Supreme Court held that individual members of school boards are not immune from suit by students under section 1983 of the Civil Rights Act of 1871. They may be liable for damages growing out of their actions under three conditions: (1) if they knew that the action taken was in violation of the student's rights, (2) if they should have known that the action taken was in violation of the student's rights, and (3) if they acted out of malice.

Commentary: This case may well have as much significance for school officials (including board members and administrators) as has the *Tinker* case. The Court has reaffirmed not only that the rights of students cannot be overlooked, but also that they must be protected. If anyone contravenes those rights, the student may sue for damages. Ignorance is not an acceptable reason for disallowing the exercise of a student's rights. The implication here is that one must be aware of the present state of the law and act consistently with it.

The Court assured officials that it is not necessary for one to predict or attempt to predict the future course of constitutional law. Rather, it is necessary that one act within the bounds of reason, in which case good faith immunity is applicable. This flexibility allows for school officials to make errors, for failing to make decisions may produce as severe consequences as acting precipitously.

In this case the Court held that compensation will be awarded students only if school authorities have acted with a clear disregard of the student's clearly established constitutional rights so that the action could not be characterized as being in good faith.

While the Court did not decide the question of procedural due process, it did suggest that one should act only on the basis of evidence. For example, in this case there was no actual showing that the punch was intoxicating. Further, there was no evidence that anyone was harmed by it.

A far reaching consequence of this decision is that school boards may need to take another look at liability insurance. It also means that attorneys may play an increasing advisory role for the board or that board members will need to become periodically updated as to the status of the law.

CORPORAL PUNISHMENT

Gonyaw v. Gray, Laduc v. Moffatt, 361 F. Supp. 371 (1973).

Question. Does the use of corporal punishment for the purpose of obtaining discipline in a school violate the equal protection and

due-process clauses of the United States Constitution?

Facts: Gonyaw, a 12-year-old student, alleged that his principal punished him with several belt strokes across his buttocks after Gonyaw admitted sending "dirty notes" to a classmate. Ladue, the other student involved in the case, stated that a mathematics teacher struck him across the face when the student questioned one of the teacher's disciplinary decisions.

Decision. The district court found in favor of the school district and dismissed the suits brought by the parents on behalf of their children.

Commentary. According to a Vermont statute, a teacher or other school official ". . . may resort to any reasonable form of punishment, including corporal punishment, and to any reasonable degree, for the purpose of securing obedience of any child enrolled in such school, or for his correction, or for the purpose of securing or maintaining order in and control of such school."

The court found that this statute did not violate the equal protection clause against cruel and unusual punishment under the Fourteenth Amendment of the Constitution since this amendment provides for the civil rights of citizens. Moreover, the equal protection clause was not encroached upon in any manner since the Vermont statute specifies that *all* Vermont schools are covered by the statute. And, since criminal behavior was not involved, the court ruled that the due process stipulations of the Eighth Amendment did not apply.

The court stated, " 'Liberty' as guaranteed by the Fourteenth Amendment does not guarantee the freedom of a school child from the reasonable imposition of school discipline." Parents must be willing to delegate to the schools some disciplinary authority over their children. Although the court did not condone the actions of the principal and the teacher as described by the students, it pointed out that the state statute provided adequate remedy for extreme cases of corporal punishment.

Any school district in a state that statutorily authorizes the use of corporal punishment in its public schools should adopt an appropriate board policy governing the use of such punishment and should establish necessary rules and regulations to ensure its proper use. Such rules may cover the reasons for using corporal punishment, identify personnel who administer it, and ensure that the punishment be adjusted to the infraction as well as to the physical characteristics of the child.

THE UNMARRIED MOTHER

Houston v. Prosser, 361 F. Supp. 295 (1973).

Question. Can school officials deny an unmarried mother readmission to school as a regular daytime student?

Facts: A 15-year-old unmarried mother was denied readmission to the ninth grade at Decatur (Georgia) High School by school officials, who enforced a school district policy forbidding regular daytime attendance of married students or students who have become parents. According to the policy, the girl could attend evening classes that were fully accredited and that would provide the courses she needed to meet diploma requirements.

Students attending the evening educational program were, however, required to pay tuition and to buy their own textbooks. The plaintiff alleged that she was not able to afford the cost of attending the evening school. Subsequently, she petitioned the court for relief.

Decision: The court ruled constitutional the school district policy denying regular daytime class attendance to married students or students who have become parents. However, the court found that charging for tuition and textbooks denied the plaintiff her right to equal protection. The defendants were prohibited from assessing tuition and textbook charges in the future.

Commentary: The plaintiff contended that the school policy was a denial of her constitutional right to personal privacy under the Fourteenth Amendment. However, because the school district provided an alternative educational program equal to the one received by daytime students, the court did not feel that her right of procreation was denied.

The court upheld the school district's rationale that married students and students who had become parents were more precocious than other students and that their presence could result in disruption of the educational process.

The obvious question of the plaintiff's right to equal educational opportunity was answered by the Supreme Court's decision in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). The Court declared that education is not a fundamental right or liberty guaranteed by the federal Constitution. Based on this decision, the plaintiff's contention that she was denied equal educational opportunity was dismissed.

The case has the following implications for school officials in Georgia:

1. The school district may adopt policies that prohibit married students and students with children from attending day classes provided that there is an alternative educational program for these students and that this program is equal to the regular program.

2. The school district cannot charge for tuition or textbooks in the alternative program.

EXCLUSION OF MARRIED STUDENTS FROM ATHLETICS

Hollon v. Mathis Independent School District, 358 F. Supp. 1269 (1973).

Question. Is the exclusion of a married student from interscholastic athletics an infringement on the individual's constitutional rights?

Facts: Hollon was a high school athlete who participated in football, basketball, and baseball. On January 13, 1973, he was married. Subsequently, he was informed that he could no longer compete in interscholastic sports. A school board policy in effect since 1959 stipulated that married students were not allowed to participate in interscholastic athletic contests.

Because Hollon was a good athlete who expected to attend college on an athletic scholarship, his father sought a temporary restraining order that would allow his son to play in a basketball game on January 26, 1973. This plea was denied and the plaintiff's case was heard in an open court four days later. The defendants were the school board and the superintendent.

Decision: The court ruled that the 1959 policy pertaining to student marriages was unconstitutional. The plaintiff was permitted to rejoin the basketball team, and he became eligible to participate in all interscholastic athletic contests.

Commentary: The defendants in the case claimed the policy prohibiting married students from participating in interscholastic sports was necessary to keep students from dropping out of school. The school district had determined that a statistical relationship existed between marriage and dropping out of school. The court did not see this relationship and subsequently based its decision on several precedent-setting cases.

In this and other recent cases, the courts have expressed the opinion that the exclusion of married students from extracurricular activities is unconstitutional. These holdings should cause administrators to re-evaluate any policy that prohibits married students from participating in athletic and nonathletic events and activities sponsored by the school. The contemporary standard is that a student who otherwise qualifies for an activity shall not be excluded from it on the basis of marriage.

PARTICIPATION OF GIRLS ON BOYS' ATHLETIC TEAMS

Gilpin v. Kansas State High School Activities Association, 377 F. Supp. 1233 (D. Kan. 1974).

Question: Can a girl be barred from participating on a boys' athletic team?

Facts. An eleventh grade female sought and was given permission to participate on the boys' cross country team. Such participation was in conflict with the state high school association, which barred sexual integration in sports. The participation was not in conflict, however, with the local school board's policy permitting boys and girls to compete in noncontact sports, among them being cross-country. Although local high school officials did not object to the student's participation, she was not allowed to do so for fear that the high school would be penalized. In her court action, Gilpin alleged discrimination against her based on sex and a violation of her rights under the equal protection clause of the Fourteenth Amendment and section 1983 of the 1871 Civil Rights Act.

Decision: The court held that she was discriminated against, based on her sex, and that she should be allowed to participate on the cross-country team for the remainder of the year. The state athletic association was barred from imposing any penalties against the school or against any school competing with it. The court disallowed any claim for punitive damages, for there was no showing that the association had acted out of malice. A supplemental order awarded the plaintiff attorneys' fees and expenses.

Commentary: Like most other state high school athletic associations, the Kansas association is an extralegal organization (that is, it is sanctioned and regulated by law but otherwise operates outside the aegis of the state and local governmental units). Its peculiar status, however, does not sanction its operating outside the color of state law. This fact makes it subject to the Civil Rights Act.

The court recognized that participation in athletics is not a fundamental right but such a holding does not foreclose one from seeking relief under federal law. Numerous benefits can be derived from engaging in sports; these benefits are no less valuable to girls than to boys.

The association had failed to prove that its separate classification of boys and girls bears a substantial relation to a legitimate governmental objective. Its rule ignored individual qualifications of particular applicants and commanded dissimilar treatment for men and women. The notion of the association's attempt to effect some equitable competition by its rule was rejected. For example, there was only one cross-country team at the school.

This case is not unlike many situations in other school systems. It points up two key facts: (1) for many years boys have had many more opportunities for participation in interscholastic athletics than have girls, and (2) athletic associations have favored boys' athletics over girls' teams. Unless associations as well as schools take steps to remedy

these two problems, more court decisions will be forthcoming to force the remedy.

PARTICIPATION OF PARTIALLY BLIND STUDENT IN FOOTBALL

Spitaleri v. Nyquist, 345 N.Y.S.2d 878 (1973).

Question. Can a student be disqualified from participating in interscholastic high school football because of a nonfunctioning vital organ?

Facts. Officials at Levittown Memorial High School in Hempstead, New York, disqualified a student from participating in high school football. In 1964, the student had received a serious injury that caused loss of sight in his left eye. Despite his injury, the student had participated in all sports while in grade school.

The student was disqualified after examination by the school physician who based his decision on regulations established by the board of education and the state education department and on standards presented in an American Medical Association pamphlet. The pamphlet reasoned that if a person has already lost the use of a vital organ, such as an eye or a kidney, it is not in that person's best interest to allow him to participate in a sport in which there is danger of losing the use of the remaining functioning organ.

The plaintiff and his father pleaded with the court to allow the boy to participate in the football program. They were willing to assume all responsibility for any injuries that he might incur and were willing to sign any agreement that would protect the school board if any injury should occur while the boy was playing football. The case reached the New York commissioner of education, who upheld the school district's original decision.

Decision. The court dismissed the plaintiff's petition and upheld the defendant's decision to prohibit the plaintiff from participating in the high school football program. The court based its decision on a previous case in which the court ruled that the commissioner of education's decision is final and cannot be set aside by the courts unless it is proved that the decision was made in an arbitrary and capricious manner.

Commentary. The message in this case is that the courts will not arbitrarily and capriciously overrule a decision made by school officials if that decision is based on sound logic and accepted standards.

School officials have an obligation to protect students from situations that may cause serious and irreparable damage. In instances such as this case, school officials must stand firm despite fervent parental pressure to act otherwise. The school administrator who succumbs to parental essure, acts contrary to established school policy, and puts the student

in a situation in which he could incur serious injury is placing himself in a far more precarious legal and moral position than does the administrator who remains firm in his resolve to enforce local and state regulations.

SCHOOL PROBATION FOR STUDENT FIGHTING

School District of Harrisburg v. Pennsylvania Interscholastic Athletic Association, 309 A.2d 353 (Pa. 1973).

Question: Does the action of a statewide athletic association in placing a high school on probation constitute a violation of due process?

Facts: After a 1971 football game between Harrisburg High School and Cedar Cliff High School, incidents of fighting among the spectators resulted in injuries to several spectators.

The Central Pennsylvania Football League (CPFL) subsequently held fact-finding meetings attended by the principals of both schools, the president of the CPFL, the district chairman of the Pennsylvania Interscholastic Athletic Association (PIAA) District III, and the executive director of the PIAA.

After these meetings, the PIAA censured Harrisburg and placed the school on a two-year probation during which the school could not participate in any athletic contests or practices beginning later than 4:00 p.m.

The school district filed a complaint in equity in seeking an injunction against the sanctions imposed by the PIAA. The complaint was dismissed, whereupon the district appealed to the state supreme court.

Decision: The lower court's decision was affirmed. The Pennsylvania Supreme Court held that the high school had violated provisions of the athletic association and that the violation justified the sanctions. The principal had admitted his responsibility for the high school's culpability for the fighting.

Although the association's sanction constituted state action, in a constitutional sense, the court elected not to interfere because there was no evidence of fraud, invasion of property, or capricious or arbitrary discrimination.

Commentary. The PIAA is an association composed of all the public high schools in the state except for those in Philadelphia. All states have similar associations. The constitution of the PIAA provides that "the principal of each school, in all matters pertaining to the interscholastic athletic relations of his school, is responsible to the Association." In light of this provision, the court placed considerable importance on the principal's admission of responsibility for the lack of control of the crowd at the game.

The court decided not to treat the question of denial of due process, though it did observe that the district was afforded notice of the action taken against it and took advantage of an opportunity to be heard.

5

TORTS

A tort is a civil wrong in which an individual has sustained an injury and for which he may claim damages. Like other persons, school personnel are subject to the law of torts. Because administrators supervise a large number of people, they may be especially vulnerable to tort suits.

Courts usually ask three questions in deciding if an individual can successfully sue another in a tort suit. (1) Does one owe a care of duty to another? (2) Did one fail to exercise that duty? (3) Was the failure to exercise that duty the direct cause of the accident?

Although approximately half the states do not allow school districts to be sued for negligence, administrators have always been subject to tort suits. In such suits, the courts look to the facts of the individual case and attempt to determine the extent to which the administrator did or did not discharge his duty.

School administrators are expected to foresee possible accidents and to take measures necessary to prevent them. Such measures may involve altering the physical facilities, requesting maintenance, or providing extra supervision. Administrators are also expected to take appropriate measures after an accident has occurred. The usual judicial standard of care applied in tort cases is that which would be exercised by an ordinary, reasonably intelligent person under the circumstances. However, some courts have held administrators and teachers (because of their training and experience) to a greater degree of care than is required of the average person.

In determining what the average person would do under the circumstances, courts may decide that the average person would take action

or that he would not take action. For example, it may be better to leave an injured athlete under careful observation but otherwise medically unattended until an ambulance arrives rather than to attempt to determine if a leg is broken. The unskilled but well intentioned person may compound the injury and be subject to suit.

In the last few years, the Civil Rights Act of 1871 has been applied to the area of tort liability. The act states in part:

> Every person who, under color of any statute, ordinance, regulation, custom or usage of any State or Territory, subjects or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws shall be liable to the party injured in an action at law, suit in equity or other proper proceeding for redress.

On several occasions the act has been interpreted as meaning that an administrator cannot interfere with a teacher or student who is exercising his constitutional rights. If an administrator does interfere in such circumstances, he may be brought to court and held responsible for damages. The second court decision in chapter 3 on teachers is based on such an interpretation of the act.

Other than those based on the Civil Rights Act, most court cases involving torts raise questions of state law. These laws vary with respect to both substance and procedure. Since court cases are often decided on narrow grounds, the reader is cautioned against attempting to generalize about the individual cases presented here.

There are, however, some general principles that may guide administrators.

1. Administrators need to be vigilant in anticipating possible accidents.
2. Faulty conditions should be reported promptly and corrected immediately. Documentation of the reports and corrections should be made.
3. Conscientious supervision should be practiced in an attempt to prevent accidents.
4. An administrator should not assume that all persons are aware of or conscientious about their supervisory responsibilities.
5. High risk areas should be studied carefully.
6. An administrator must be knowledgeable about insurance laws and liability coverage.
7. School officials should keep in mind that not every accident

at school entails administrative negligence. The injured party may have contributed directly to his injury.

8. People must be warned about possible dangers and asked to exercise due care and caution.

9. When an accident occurs, one should act promptly in doing whatever is necessary under the circumstances. School personnel should not, however, attempt to provide medical attention to persons in need of it; rather, the injured person should be referred to a doctor.

The following cases illustrate some of the issues raised above while showing the types of substantive and procedural questions raised in tort suits.

INJURIES SUSTAINED EN ROUTE TO AND FROM SCHOOL

Caltavuturo v. City of Passaic, 307 A.2d 114 (N.J. 1973).

Question: Can a school board, a principal, and a city be held liable for injuries a pupil sustains on his way home from school for lunch?

Facts: Caltavuturo, a twelve-year-old student, was injured when he left the school grounds to go home for lunch. The action in negligence sought to recover damages sustained when the pupil stepped through a large hole in a chain link fence.

During lunch dismissal, it was customary for the principal, two gym teachers, and two vice-principals to station themselves at various points on the playground and supervise (for approximately 15 minutes) the children's exit from the school grounds.

On the day in question, shortly before noon, Caltavuturo and a friend, after completing duty as crossing guards, took a shortcut home. The boys reentered the playground and stepped through a six-by-eight-foot hole in the chain link fence that ran along one side of the playground. Caltavuturo cut his knee on a jagged edge. The leg became inflamed and, eventually, a bone infection developed.

At one time the site of the accident had been a city tennis court, but the school now routinely used the area as a playground. No natural dividing line indicated where city property ended and school property began. In fact, the school principal did not know whether the property in question belonged to the school district or to the city until after the accident.

A street foreman testified that, although Passaic's maintenance personnel constantly repaired the fence, children would almost immediately [illegible] new holes in it. The city took no action to discourage people from

walking through the holes, no signs were posted, and no other preventive measures were taken.

The principal admitted that he had been aware of the holes in the fence and that the problem of children using the holes had been discussed by the supervisory staff, however, he had taken no remedial action. Although he initially testified that he did not know who owned the fence, he later stated that he thought the city owned it.

The original suit was brought against the city of Passaic. Later, the plaintiffs served an amended complaint naming not only the city but also the school board and the principal as defendants.

The lower court dismissed the case. The school board and the principal were relieved of liability because, the court ruled, the accident did not happen on school grounds. The action against the city was dismissed on the basis that repair of the fence was a governmental function which protected the city from liability.

The plaintiffs appealed to the Superior Court of New Jersey.

Decision. The superior court reversed and remanded the decision of the lower court and found that the principal had been negligent in his duties and was therefore liable for the injuries to the pupil. The school board was obligated to pay the judgment against the principal. The court also found the city to be negligent in its repair and maintenance of public property and ruled that a municipality may be held liable for a defective condition on its property.

Commentary. The court felt that the principal was responsible for the safety of the students not only during the dismissal from school but also for a longer period of time. It is a generally accepted legal principle that the school is responsible for students not only while they are in school but also while they are on their way to and from school.

Further, the principal knew of the unsafe condition of the fence. Although he testified that he thought the playground was city property, he nonetheless had a duty to supervise the area because it was an integral part of the school grounds.

Until recently, most municipalities were immune from tort liability. That is, they were protected from actions against them due to governmental negligence. Recently, however, some court decisions (such as this one) have held that municipalities may and should be held liable for negligence on the part of governmental agencies.

This case suggests that administrators must be alert to hazardous conditions on property used by a school and on routes used by students on their way to and from school. If hazardous conditions are identified, appropriate steps should be taken to remedy them.

The administrator should be reminded that not all states have

abandoned the doctrine of governmental immunity of school districts. Such a status does not, however, relieve the principal of his responsibility for ensuring the safety of others.

INJURY IN PHYSICAL EDUCATION CLASS

Darrow v. West Genessee Central School District, 342 N.Y.S.2d 611 (1973).

Question: Can a physical education teacher be held responsible for an injury received by a student who was participating in a class activity?

Facts: The plaintiff was injured while participating in a regularly scheduled physical education class. In the activity in question, the instructor had members of the class form two opposing parallel lines. Each participant had a number that corresponded to the number assigned to a student in the opposing line. A soccer ball was placed in the middle of the two lines and a number was called. The two opposing participants were to attempt to reach the ball first and kick it through the opposing team's line.

The plaintiff was injured when he and another student collided during the exercise. He filed suit, claiming that the physical education teacher had not given proper instructions regarding the precautions students should take to avoid running into each other if they arrived at the ball at the same time.

Decision: The trial court dismissed the complaint. On appeal, the state supreme court ruled in favor of the plaintiff and ordered a new trial. The court based its decision on the testimony of experts who testified that it is the responsibility of the instructor to demonstrate and explain an exercise to students and to take all possible precautionary measures to guard against student injury. The teacher admitted that he did not properly instruct the students on how to avoid bodily contact when both students arrived at the ball at the same time.

Commentary: School officials must be sure that members of their physical education staff are careful to explicitly instruct students in the proper methods of protecting themselves from bodily damage while participating in physical education exercises.

If a physical education teacher fails to provide a student with proper instruction or fails to explain the dangers inherent in an exercise, he may be held liable by the courts for any injury a student receives while participating in the exercise.

The greater the possible risk of injury, the greater the care a teacher must take in ensuring that a student is not harmed. In high risk activities like physical education, precautionary measures are very important.

INJURY IN SCHOOL PLAY

Wesley v. Page, 514 S.W.2d 697 (C.A. Ky. 1974).

Question. Who is responsible for an accident in a school play?

Facts. In a high school play, one of the performers was injured when hit with a projectile shot by another performer. The shooting was a part of the script; the injury was not. The instrument was a bullet of wadded paper stuffed into an empty shell. A jury trial awarded the injured student and her mother damages of $16,070. They were assessed equally from the director of the play and the principal.

Decision. On appeal, the judgment against the teacher was upheld, but was overturned against the principal.

The teacher had failed to exercise any control or supervision over the use of the shotgun as well as the use of ammunition. The principal was not held liable, for he had delegated the direction of the play to the teacher. Although he had cautioned boys against bringing any kind of firearms to the school, he had not warned them in connection with this particular activity. He actually owed no care of duty to the plaintiffs.

Commentary. As in typical tort liability cases, the court looked at the specific factual circumstances of the case. It held that the teacher had been negligent in a number of ways: (1) she had not instructed the boys on the preparation of the ammunition, (2) she had not instructed the boys in the use of the ammunition, (3) she had not examined the guns in rehearsal or prior to the performance, and (4) she had given complete freedom to the boys in their executing this scene. This, the court saw, was not enough supervision in recognition of the fact that boys frequently will be adventuresome.

SAFE WORKING CONDITIONS FOR EMPLOYEES

Shelton v. Planet Insurance Company, 280 So. 2d 380 (La. 1973).

Question. Is a superintendent responsible for ensuring safe working conditions for a district's employees?

Facts. A teacher brought suit after the teacher suffered injuries while teaching on a school parking lot. Because of a shortage of classroom space, the teacher was conducting her class on the lot. Although the area was surfaced with asphalt, it contained loose gravel and many potholes. While demonstrating to her students how to run and turn, the teacher stepped on loose gravel, slid into one of the holes, and was injured. In subsequent litigation, the trial court dismissed the case, and teacher appealed.

Decision: The court disallowed the teacher's suit against the superintendent.

Commentary: The teacher was suing to recover damages she sustained because of her injury. In her suit, brought against the school's insurance company, she contended that the superintendent and other executive officers were negligent in not providing safe working conditions.

The court could find no "cause for action," since an affidavit filed by the superintendent revealed that requests for improvements on or repair of school property must come from the buildings and grounds committee of the school board. At no time is the superintendent involved in this procedure, since the power to authorize and initiate repairs rests with the board. The teacher was unable to show that the board had at any time delegated powers to improve buildings or other facilities to the superintendent or his subordinates.

The court further stated that the common law of the state establishes that the executive officer of an employer owes no duty as such to an employee to provide him with safe working conditions; his duty and obligation, in that regard, are due exclusively to the employer. Further, "The only duty which an executive officer of a corporation owes to a third person, whether he be an employee of the corporation or a complete stranger, is the same duty to exercise due care not to injure him which any person owes to another."

The court could find no allegation in the petition that the school district breached a legal duty owed to the teacher. Although it is not incumbent on a superintendent to provide employees with a safe environment in which to work, a school board must provide safe facilities in which students will attend instruction and other activities; it cannot, therefore, allow any school facilities to fall into disrepair and thereby cause a hazard.

COMPLIANCE WITH NEW BUILDING CODES

Maloney v. Union Free School District, 343 N.Y.S.2d 648 (1973).

Question: Can school officials be held negligent for not complying with building material specifications that are adopted after a building is constructed?

Facts: An elementary school student was injured when she pushed her hand through a plate glass door. Her parents filed claim, charging negligence on the part of school authorities for allowing a door to remain "in a broken and unsafe condition." During the course of the trial, they changed their complaint and charged that the plate glass window did not comply with state safety regulations and that school authorities

were negligent in not replacing the glass.

Decision. The parents were awarded a judgment in their favor, and the defendants appealed. The appellate division held that the school district was not liable, hence, the lower court's decision was reversed and a new trial was granted.

The court ruled that school authorities could not be required to replace the glass panel to meet regulations adopted after the school had been built. There was no evidence that the panels were defective.

Commentary. Although the decision was favorable to the defendants and a new trial was granted, it should not be assumed that school officials are not responsible for removing hazards that could result in an injury to a student. School officials must endeavor to be constantly aware of possible hazards to a child's safety and must seek to eliminate them when they are found.

This case suggests that school officials in New York are not required to constantly reconstruct portions of existing school buildings in order to keep up with changing building codes and safety rules and regulations.

GOVERNMENTAL IMMUNITY ABOLISHED

Cromley v. Lovalsock Township School District, 310 A.2d 330 (Pa. 1973).

Question: Is a school district immune from suit?

Facts. Cromley was injured on school grounds during class time. Allegedly, she was injured as a result of the "school district's failure to properly supervise other students, the school grounds, the activities of students thereon and the girl herself during class time."

The court of common pleas dismissed the complaint and held that the district was protected from suit by governmental immunity. This decision was appealed to the superior court.

Decision. The case was vacated and remanded. The court vacated the order dismissing the plaintiff's complaint and ordered that the lower court enter an appropriate order overruling the defendant's preliminary objections.

Commentary. In a recent decision the Pennsylvania Supreme Court abolished the doctrine of governmental immunity (*Ayala v. Philadelphia Board of Education*, 305 A.2d 877, 1973). *Cromley* relied on *Ayala* and is a logical extension of that recent holding.

GOVERNMENTAL IMMUNITY SUSTAINED

Shelev v. Board of Education for City of Savannah, 132 Ga. App. 314, 208 S.E.2d 126 (1974).

Question: Can a parent recover damages against a school district for a child's death on school property?

Facts: A child's body was found in a septic tank on school property. The cover to the tank had been removed by vandals, and a lighter cover had been installed until the regular one could be replaced by the maintenance personnel. The dead child was found in the septic tank with the temporary lid on it. The mother brought suit against the board of education alleging that it had been guilty of maintaining an attractive nuisance (an open tank) and of willful and wanton negligence.

Decision: The school district's claim of governmental immunity was upheld; the plaintiff had failed to state a claim on which relief could be granted.

Commentary: This decision reaffirmed the immunity to tort suits of school districts in Georgia. The court held that to do otherwise would be contrary to both the state constitution and statutes. Furthermore, school funds could be spent only for those purposes specifically provided for in the statutes. Should a judgment have been rendered against the district, damages could not be awarded.

The evidence was not conclusive with respect to the specific cause of the child's death. There was reasonable certainty that the child had not fallen into the tank but rather had been pushed into it since the lid was on the tank.

This case points out the uneven application of law. In another state the child's parents may well have collected damages. Here, the court very clearly reaffirmed the immunity of school districts. In doing so, it looked less to the nature and cause of the child's death and more to disallowing a tort suit.

LATE NOTICE OF CLAIM FOR INJURIES: I

Burlingame v. Ravena, 349 N.Y.S.2d 159 (1973).

Question: Can a student file a late claim for an injury?

Facts: On September 18, 1971, the plaintiff injured his left wrist in a high school football game. On September 20 he reported the injury to the coaching staff. He was not sent to a physician for an examination, nor were X-rays taken. On September 22, the plaintiff, at the coaches' direction, began to take part in contact drills and continued to play football until the close of the season in November. Before practices and games his wrist was taped.

In March 1972, a doctor diagnosed the plaintiff's injury as an ununited fracture of the left wrist. The wrist was operated on and repaired. On September 19, 1972, the plaintiff sought to file a claim to recover

the financial costs of his medical care. The defendants denied the plaintiff's claim on the ground the claim was made more than a year after the incident.

The plaintiff did not contend that the defendants were responsible for his injury, but he did contend that after he reported the injury to the coach on September 20, 1971, the proper precautions were not taken to avoid further injury to his wrist. Because his claim was based on incidents occurring after September 20 (the resumption of contact drills and play), the plaintiff maintained that his claim was filed before the one-year deadline was reached.

Decision: The court ruled in favor of the plaintiff. The court stated that a 17-year-old may not possess the maturity and insight to foresee the end results of the actions of adult supervisors and that this accounted for his delay in seeking proper medical care after the injury.

One of the judges wrote a dissenting opinion. He claimed that the law was clear in defining one year as the time limit for filing a claim.

Commentary. School administrators must be aware that in many cases the courts consider students as infants even though the students may be in high school. As an infant, the student cannot be expected to act as responsibly as a mature adult would under similar circumstances.

When the courts allow for the exercise of discretion, as was provided here, a case can be made for the late filing of a claim.

This case points out the need for athletic injuries to be checked by a physician. Those administering athletic programs should require a written statement from a physician indicating when and under what circumstances an injured student should be permitted to resume his athletic activities.

School administrators should establish clear policies regarding the handling of athletic injuries in an attempt to prevent the occurrence of incidents such as that described above.

LATE NOTICE OF CLAIM FOR INJURIES: II

Schiermeyer v. Averill Park Central School District, 345 N.Y.S.2d 210 (1973).

Question. Can a student file a late claim for an injury received at school?

Facts: On January 22, 1971, the plaintiff was injured at school, allegedly because of negligence. A notice of claim was not filed against the defendants until April 17, 1972. Under New York State law, the normal time limit for filing a claim is 90 days, however, if the plaintiff is a minor, the court, at its discretion, may grant the claimant leave to

serve notice until one year after the injury.

Decision: The court declared the plaintiff's claim a nullity because his notice of claim was not filed within the one-year period allotted by law.

Commentary. Contrary to *Burlingame v. Ravena,* in this case the court held steadfast to a strict interpretation of the New York State law that requires a late notice of claim to be filed within a year of the injury.

The difference between the decision in this case and that in *Burlingame* points out an apparent inconsistency in the court rulings. In both cases two important facts were established: a minor was injured in a school activity, and the notice for file of claim was made after the stated deadline. Given those two facts, the judges reached opposite rulings. The brief opinions do not reveal why this was so whether it was due, for instance, to the difference in the plaintiffs' preparation, to the nature and severity of the injuries, or to the different care that the school officials exercised. The explanation may hinge simply on the fact that, given discretion to waive a period in which an injured party may file claim, one court elected to apply a strict ruling; the other, a flexible one.

6

RELIGION

When the schools were operated by parents or churches, there was no controversy over the relationship between church and state. That conflict arose as the states took over the sponsorship of education. Litigation on the church state relationship has been increasing as citizens use the Fourteenth Amendment to challenge states on First Amendment grounds.

It is impossible to achieve a complete separation of government and religion and of schools and religion. There has always been an element of intermingling, for years the government has aided parochial schools in an indirect way. The question has been and remains: What is the standard to be used in maintaining the degree of separation between church and state insofar as the schools are concerned?

The criteria for judging this separation change from time to time. In the *Schempp* decision, [*Abington School District v. Schempp*, 374 U.S. 203, 83 S. Ct. 1560, 10 L. Ed. 2d 844 (1963)], Justice Clark determined that if a practice either advanced or inhibited religion, it exceeded what is allowable under the First Amendment. Later, Chief Justice Burger declared that the state must avoid "excessive entanglement" in religion.

Over the last 30 years the Supreme Court has rendered numerous decisions on the church state relationship. These decisions can be summarized in the following manner.

1. A state may not refuse to allow a parochial school to operate.

2. The school may not require students to salute the flag if they object on religious grounds.

3. Tax funds may be used to pay for the textbooks and transportation of children attending parochial schools.
4. The Bible may not be taught as religion in the public schools.
5. Bible reading and prayers may not be used as devotional exercises in the public schools.
6. Tax funds may not be used to pay the salaries of teachers and special services in parochial schools.

The religious diversity in this country increases the number of court actions seeking clarification of the relationship between church and state. Two broad areas require constant clarification, whether the state can require people to engage in activities that conflict with their religious beliefs, and whether the state can forbid people from engaging in activities that are based on religious beliefs.

RELIGIOUS OBJECTION TO VACCINATION

Maier v. Besser, 341 N.Y.S.2d 411 (1972).

Question: Can a student be exempted from a vaccination requirement because of a religious belief similar to but not the same as that of a recognized religious organization?

Facts: The plaintiff's three children were directed to leave school because they did not comply with the Public Health Law requiring that all students be vaccinated before they enter school. The plaintiff sought to have his children readmitted to school and based his case on a section of the statute that states:

> This section, 2168(8), shall not apply to children whose parent, parents, or guardian are bona fide members of a recognized religious organization whose teachings are contrary to the practices herein required, and no certificate shall be required as a prerequisite to such children being admitted or received into school or attending school.

The plaintiff admitted that he was not a member of a recognized religious organization. He maintained, however, that his religious beliefs were similar to those held by Christian Scientists. He charged that it was a violation of his right to freedom of religion to require him to join a recognized religious group in order to have his beliefs recognized. Although the state can require all students to receive certificates of immunization, it had not forced immunization on persons belonging to religious groups that hold strong beliefs against such practices.

Decision: The court ruled that the defendants were to permit the plaintiff's children to remain in school until the problem could be resolved by a trial in the courts.

The court explained that it is not the function of the court to decide what is a *bona fide* religious belief, nor is it the intention of the courts to force individuals to join recognized religious organizations in order to practice their beliefs.

The real question in this case is the plaintiff's sincerity in practicing his religion. The court ruled that the case should be re-tried at which time the trial judge could better decide the sincerity with which the plaintiff practiced his religious beliefs.

Commentary: In this case the state statute was clear. It stated specifically that an individual may have the vaccination requirement waived if he is a member of a recognized religious organization. The court, however, declined to define religion or what connotes membership in a recognized religious organization. This position is consistent with established court holdings.

The administrator confronted with an unresolved situation involving a student practicing his religious beliefs should contact the school district solicitor for advice and direction. In the meantime, the school and the administrator should refrain from doing anything that could be interpreted as promoting or inhibiting religion.

PRAYER, SILENT MEDITATION, AND PLEDGE OF ALLEGIANCE

Opinion of the Justices, 307 A.2d 558 (N.H. 1973)

Question: Would a statute to authorize the use of the Lord's Prayer, voluntary silent meditation, and the pledge of allegiance in the public schools be valid?

Facts: In considering a bill authorizing the use of such practices, the New Hampshire Senate submitted the above question to the justices of the state supreme court for their opinion of its validity.

Decision: The justices were of the opinion that authorizing and encouraging recitation of the Lord's Prayer would be unconstitutional. However, they authorized silent meditation and the pledge of allegiance.

Commentary: The justices agreed that recitation of the Lord's Prayer in public schools "sanctions and encourages a religious exercise to be conducted by teachers in the public schools and would therefore be in violation of the First Amendment."

They further agreed that voluntary silent meditation would not jeopardize religious liberties and advised that if the proposed amendment were to be enacted, "it should explicitly provide for a voluntary pledge of allegiance as well as a voluntary silent meditation exercise to avoid the possibility of conflict with the Constitution of the United States."

In testing the legality of such usage, Justice Clark's determination in the *Schempp* decision is again applicable: if it either advances or inhibits religion, it exceeds what is allowable under the First Amendment.

7

CONTRACTS

Concern with contracts makes up a large segment of school law. Contract law cuts across many different areas of school operation and often requires legal counsel to interpret the law as it relates to a specific issue. In view of this complexity, it is not surprising that a number of court cases arise concerning contracts.

Only three cases are reviewed in this section. *Pulaski* involves a fundamental principle of law regarding the ratification of a contract. *Hess* illustrates the principle that an understanding is not the same as a contract. The third case raises a question about the recent wage-price freeze.

There are five essential elements in all contracts: capacity of the parties to contract, mutual assent, valid consideration, definiteness, and lawful subject matter.

A school district, as such, has no inherent authority to contract. It can do only what the state requires and allows. Through the legislature, the state determines what its instrumentality, the school district, may contract for and with whom it may contract.

It is necessary that both parties come to an agreement about the terms of the contract. This may mean that the parties will agree to perform a certain function or to refrain from performing one. Once mutual assent has been reached, the parties are ready to effect the signing of the document.

Consideration implies that both parties give something. For instance, a teacher gives a service and is, in return, compensated for that service.

A definite contract does not leave provisions to the imagination; rather, it spells out responsibilities and obligations with particularity.

Thus, for example, a contract with a teacher should specify the duration of the agreement as well as the teacher's salary and duties. The law does not, however, require or expect all possible details to be written into a contract; some expectations for services are specified by implication. Although these expectations may be clear to one party, they may not be to another. This situation often produces a litigious issue.

A contract may be invalid if it contains subject matter outside the law and outside public policy. Beyond this, both parties may have considerable autonomy in effecting specific conditions of the agreement.

As the following cases indicate, litigation in contract law cases usually centers around these five elements or around closely related issues.

RATIFICATION OF CONTRACT

Responsive Environment Corporation v. Pulaski County Special School District, 366 F. Supp. 243 (1973).

Question: Is a contract between a school district and a contractor binding if it is signed by the superintendent and not ratified by the board of education?

Facts: A book distributor brought action to gain payment for books that the district purchased under a lease-purchase agreement. Although the contract had been signed by the superintendent, it had not been ratified by the school board.

Decision: The court found that even though no legal contract had been signed, the district had benefited from the use of the books and that the book distribution company should either receive payment or receive its books back from the school district.

Commentary: The court determined that neither party was blameless in its actions. The company was subject to criticism because its salesman, in an attempt to get the district to sign the contract, had untruthfully indicated that the books were suitable for purchase with federal funds. The district was subject to criticism because it had not instituted payment when requested to do so by members of the distribution company prior to the institution of the suit, and because it was willing to purchase the books only on the condition that Title II and not school district funds were to be used.

The court found that the conduct of the two parties was such that a contract was implied. The school district was required to pay under the theory of *quantum meruit*, which holds that, although there was no legal contract, one was intended and goods had been received. The

court gave the company the option of taking its books back at its own cost or accepting a reduced amount as full payment.

In this case, no one won. Because both parties erred, the court sought a resolution of the problem rather than a strict application of contract law. It is, however, requisite that school district officers fully understand the school code provisions that deal with the district's relations with vendors and that the officers abide by those provisions.

IMPLIED UNDERSTANDING

Hess v. Board of Education of Central School District No. 1, 341 N.Y.S.2d 536 (1973).

Question. Can an employee receive pay for his accumulated vacation time if there is no school board resolution to that effect?

Facts. The superintendent of a New York State school district resigned. During the five years (1963-1968) he had been superintendent, Hess had accumulated a number of unused vacation days. His letter of resignation contained the statement "subject to my vacation pay." It was implied that the plaintiff had an "understanding" with certain board members that, on resigning, he would receive financial reimbursement for his unused vacation time.

The school board refused to pay the superintendent. He subsequently filed the case before the state supreme court. The court decided in favor of the school board. The plaintiff subsequently appealed the case to the state supreme court, appellate division.

Decision. The appellate division rendered the following decision:

> The school board could not make payment for accumulated vacation time to employees who resigned where board had not passed resolution which would permit it to make such payment, although board accepted resignation tendered in letter containing phrase "subject to my vacation pay" and there was allegedly prior plan of such payments.

Commentary. The court ruled that neither the board as a whole nor individual members of the board could legally commit the district to an action unless the board passed a resolution authorizing that action. The New York State Constitution states that "expenditure of public funds is constitutionally prohibited in the absence of express statutory provision to the contrary."

The inclusion of the phrase "subject to my vacation pay" in the resignation letter and the subsequent acceptance of the letter by the board did not commit the board to reimburse the superintendent for unused vacation days.

Employees of a school district who find themselves in simila

circumstances should not rely on the word of individual board members but should insist on a board approved resolution covering the specific understanding that has been reached between the employee and the board. It is doubtful that any court will uphold an implied promise.

SALARY FREEZES

School Committee of the City of Providence v. Board of Regents for Education, 308 A.2d 788 (R.I. 1973).

Question. Can a school board freeze the salaries of administrators if the administrators' contracts are for an indeterminate time and then salaries are based on a stated ratio of the teachers' maximum basic salary?

Facts. From 1959 until 1971, the district consistently paid administrators according to a set ratio of the teachers' maximum basic salary. In 1971 the committee passed three resolutions:

1. April 15. All salaries, except those established by existing contracts, were frozen.
2. October 28. This resolution superseded the above April resolution, and all salaries of department personnel were frozen at their 1970-71 level except those set by collective bargaining units.
3. November 18. A collective bargaining agreement with the teachers' union that increased the teachers' maximum basic salary and other benefits was ratified.

Following the adoption of these resolutions, the committee decided to continue the 1970-71 freeze on administrator salaries.

The administrators appealed to the state commissioner of education. He ruled in their favor, holding that they were entitled to have their compensation for the 1971-72 school year set in relation to the new teacher contract according to the ratio that had been in effect since 1959. The school committee appealed to the board of regents, which affirmed the commissioner's decision. The committee then appealed to the Supreme Court of Rhode Island.

Decision. The supreme court sent the case back to be reviewed by the board of regents and ordered the board to reconsider its actions and to make further findings and orders. The court declared that if, after such action, any party was dissatisfied, then a motion might be filed to bring the matter before the court for further consideration.

Commentary. The nature of the contracts under which the administrators worked was a central issue in this case. The contracts were oral

and stated the services to be performed as well as the rate of compensation, but they failed to state the period that each contract was to be in effect. There is an accepted rule of law that a promise to render personal services to another for an indefinite period of time is terminable at any time at the will of either party; therefore, it creates no executory obligations. The court was unable to determine what was intended regarding the term of employment of each of the 75 administrators. Because of the discrepancies in the interpretations of the term of employment, the court found it impossible to offer a definitive opinion about this case.

This case points out the need to specify the terms of employment between school administrators and their employers. In entering contracts, it is prudent for all parties involved to set forth in contractual form not only the duties and responsibilities attached to a given position but also the agreed-upon compensation for the services rendered and the duration of the contract.

TABLE OF CASES