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ABSTRACT

This publication discusses the legal responsibilities of school principals and school board members in regard to student publications, with particular attention to the recent federal district court decision in Gambino v. Fairfax County School Board. In the Gambino case, the court ruled that the school board could not prohibit a school newspaper from publishing information on student use of contraceptives, even though the district's policy on sex education excluded any material on contraceptive methods. The author discusses the implications of the Gambino decision for school officials and argues that it severely hampers the ability of school board members and school administrators to respond to community educational standards. He argues that students should not have greater freedom of expression than teachers, administrators, or school board members, and that the courts should not sit as some kind of super school board. (JG)

A Legal Memorandum

NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS
1904 Association Drive
Reston, Va. 22091

April 1977

Concerning

STUDENT PUBLICATIONS

A REPORT AND A STATEMENT OF OPINION

A recent case in a federal district court has again raised the question of the extent to which public schools may control students' rights to publish their views in a newspaper distributed on school property.[1]

The case involved an attempt by an editor of the official school newspaper to print an article reporting the results of a poll of student views about sex and their sexual behavior. Acting under school board guidelines, the principal asked that part of the article dealing with student use of contraceptive devices be deleted. When the editor refused, the principal ordered the article not to be published; and the students--with the aid of a press freedom organization--went to court.

The major ground upon which the school board and the principal defended their action was a narrow one: that the district had an official policy governing sex education which excluded any material on contraceptive methods. Since the article closely approximated curricular matter, and to the extent that it contained material in conflict with school regulations, the board supported the principal's decision not to publish.

The court held that the student article was not a part of the school curriculum and could not, therefore, be found to be in violation of the school board rules on sex education. This resulted in the anomaly that students have broader latitude to communicate their views to their fellow students than do the teachers or administrators of the school. Indeed, since the board's regulations on sex education were prepared only after lengthy and well-attended public hearings in the community, it could also be said that the students, under this opinion, must be accorded greater freedom of expression in school than is possessed by the school board itself.

1. Gambino v. Fairfax County School Board, Civil Action No. 76-946-A

We do not defend the school board's rule in this case, nor the principal's specific application of it. It may well be, as the court indicated during the course of the trial itself, that the article in question was innocuous. What we wish to stress are the broader implications of this case which we as school administrators believe to be far more fundamental. Both legally and politically the public schools of this nation are clearly intended to be administered by local school boards, usually elected, in response to the will and desires of the local community.

The purpose of every school is to meet the educational needs of the students. In a public school, these needs are determined by the state, the school board, and its professional staff under the watchful eye of the community. If the staff, or even the board, refuses to meet those needs they may, and should expect to be, removed--even in this day of heavily protected job rights. In our legal and political system, there can be no other way.

None of this implies that students should have no say in any of these matters. Even if the Supreme Court of the United States had not determined that students do not leave their constitutional rights at the school house gates, we would recommend as a matter of good educational policy that students be given the opportunity to develop their minds as well as to improve their political skills by suggesting how their schools can improve.

We believe that the ultimate determination must rest with the school board and its staff; and that even the federal courts should not sit as some kind of super school board. We hope this will not be regarded as heresy or disrespect. The U. S. Supreme Court itself said as much in its last opinion on a student appeal. While maintaining that school board members can be held liable for interference with the constitutional rights of students, the Court said in *Wood v. Strickland*:

> It is not the role of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion.... The system of public education that has evolved in this nation relies necessarily upon the discretion and judgment of school administrators and school board members, and Section 1983 [a civil rights law] was not intended to be a vehicle for federal court correction of errors in the exercise of that discretion which do not rise to the level of violation of specific constitutional guarantees.

When is there such a violation of a specific constitutional guarantee? That, indeed, is the question a court must decide. But it should be no surprise to anyone that there are no clear-cut answers to such questions. Indeed, if

there were, we would not need wise judges to answer them. The fact is, of course, that constitutional rights and violations of them are what judges say they are.

In making these determinations, courts rely primarily upon precedents established by earlier decisions in similar and related cases. But these precedents tend to bend and move in response to the needs and social thought of the times. As the great professor and judge Roscoe Pound said in 1921: "The law of each age is ultimately what that age thinks should be the law."

Sometimes, however, it seems that clever lawyers backed by well-motivated but careless forces for change can blow the law off course. Following well-argued but narrow lines of precedent, courts can drift farther and farther from the public understanding and expectation. When that happens, great strains are placed upon our system.

We believe something like this is in danger of occurring if courts continue to interpret blindly the constitutional rights of students in total disregard of their age, of the educational context, and of the principals which govern public schools. Decisions on student publications seem to be the leading example at the present time. In reaching them courts take little or no account of whether the students involved are socially and intellectually mature enough to accept responsibility for their utterances; whether the publication purports to speak for and represent the school community; and to what extent the rights and expectations of other students and the community which provides the schools may be curtailed or defeated.

Not unexpectedly, the press often responds to cases of this kind in a less objective manner than it does to almost any other subject. But the fact is that many court decisions regarding the student press would now grant the youthful reporters and editors of school papers greater freedom than that available to adult employees of the commercial press. In the latter situation, after all, the publisher has the ultimate control; in the student press, the courts are saying that the publisher--because the school board is a branch of the state--cannot exercise such control.

What the court--and the public--must consider as they struggle to apply the Bill of Rights to the public schools is the overall effect of their efforts. Certainly, we must and should accord free exercise of first amendment rights to secondary and elementary school students, but that exercise must have reasonable limits. Indeed, no one's constitutional rights are unlimited. Even the rights of adults are evaluated in the context in which they occur. As Justice Holmes said in one of his most famous opinions, no one has the right to falsely shout "fire" in a crowded theater.

We would submit that an important factor in making the difficult determination of what is reasonable in the case of student speech must include consideration of what the local school community will accept. To ignore it will only result in the weakening, or even collapse, of the entire public school system. For if the public which pays for the schools withdraws either its funds or its children, the schools cannot stand. And if the courts continue to interpret student rights the way some of them are doing, such risks may not be mere rhetoric.

When litigation in the Hayfield case is concluded, the Legal Memorandum on student publications, originally published in 1971, will be revised. Until then, it is suggested that members may continue to be guided by the principles and suggestions contained in that Memorandum.

Additional guidance is provided by the articles on scholastic journalism in the February 1975 issue of the Bulletin.

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OWEN B. KIERNAN
Executive Director

TO: NASSP Members

April 1977

FROM: Owen B. Kiernan, Executive Director

In this special *Legal Memorandum*, NASSP enunciates those principles which we feel are basic to school publications. Increasingly in recent years the courts are rendering opinions which reflect extraordinarily shallow thinking and a lack of understanding of the effects of such decisions. The Hayfield case in the nation's capital area, which our General Counsel Ivan Gluckman discusses in this issue, is an unfortunate example. In effect, the judge does not distinguish between freedom and license--or rights and responsibilities--and accords the student editor authority far beyond that of the school board, the administration, faculty, other students, parents and the community as a whole. From his lofty judicial perspective he even ruled that a school newspaper is not a part of the curriculum!

It will be a tragic day for American education if first amendment rights are stretched and distorted to guarantee a total freedom of editorship to the students. Is a teenager sufficiently clairvoyant to decide unilaterally what is best for his community or the public taste? Would he add excerpts from *Hustler* magazine, advertise pornographic literature and publish the language of "Oh, Calcutta" because he can interpret social values much better than adults, including his parents? Former U.S. Education Commissioner Terrel Bell wisely observed that these same parents "...have a right to expect that the schools...will support the values and standards that their children are taught at home. And if the schools cannot support those values they must at least avoid deliberate destruction of them."

Our founding fathers supported a defensible balance of these societal issues and designed a system which has withstood the test of time. As overloaded as our courts may be, one would hope that jurists would occasionally find time to again read some of these remarkable documents. Most of the states enacted similar provisions and the following typical constitutional preamble underscores the schools' sacred trust:

"Wisdom and knowledge, *as well as virtue*...being necessary for the preservation of their [the people's] rights and liberties...it shall be the duty of legislatures to cherish the interests of literature and the sciences...to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings, sincerity, good humor, and all social affections [and] generous sentiments among the people."

The states' statutes are even more precise, mandating that "full and satisfactory evidence of their moral character" be required of those associating with children and youth in our schools. They further charge instructors to impress on the minds of these same children and youth the "...principles of piety and justice, a sacred regard for truth, love of country, human and universal benevolence, sobriety, industry, frugality, chastity, moderation and temperance, and other *virtues which are the ornament of human society* and the basis upon which a republican constitution is founded...."

On the question of public taste and community standards, are the judges suggesting that these constitutional and statutory mandates be ignored?

There can be little argument that many publications in the school and adult societies do contain questionable articles which run counter to existing law and American tradition, all in the name of keeping up with "the real world." If choices must be made, your Association will continue to support academic and press freedom but in the process it will insist upon acceptable moral and ethical standards. The Fairfax County (Virginia) School Board has similar feelings and fortunately it has appealed the Hayfield case. NASSP has every intention of standing with the Board and its administrators and plans to file an *amicus curiae* brief.