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ABSTRACT

This chapter of "Principles of School Business Management" discusses the implications of several court cases for legal issues affecting the role of the school business official. The issues addressed include civil rights, negligence, contracts, criminal liability, tuition and fees, and student records. The chapter opens with a brief overview of trends in litigation during the 1960s, 70s, and 80s. The broad topic of torts is addressed next. Particular attention is paid to individual rights and the extent of the personal or institutional liability of those who violate these rights; court interpretations of negligence in cases involving schools are also examined carefully, appropriate defenses are noted, and malpractice issues are considered. The chapter then looks at contracts, reviewing the five elements necessary for contract validity. Criminal liability is touched on briefly before the chapter turns to a treatment of the handling of public funds, including assessing and collecting fees and authorizing expenditures. The final topic is the handling of student records, covering factors requiring or limiting the distribution of specific types of information. Endnotes provide 115 citations to the court cases discussed. (PGD)

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Legal Liabilities of Administrators

Julie Underwood

A common trend in every field of education is increased litigation. The phrase "legalization of education" is commonly used. Many educators seem to believe that attorneys instead of educators are in control of the schools. Although this might have been true in the 1960s and 1970s, it does not appear to be the trend for the 1980s.

Education law during the late 1960s and early 1970s primarily involved philosophical issues. The courts were asked to address certain social issues; they accepted this task and discussed the concepts of equality and liberty, and officially recognized the constitutional rights of students. During this period, individuals asked the courts to solve perceived social injustices. Education law was focused in the courts and involved litigation between and among teachers, students, administrators and parents.

The next phase of education law was played out in a different arena. Throughout the 1970s education experienced a wave of impact mainly from the U.S. Congress. Before this time, federal involvement in education had been relatively minimal. But the same hand that started granting funds began issuing regulations. During this time, public school administrators encountered the Lau regulations, the Buckley Amendment, Title IX, Public Law 94-142 as well as more general type of regulations, such as OSHA. The legislation was primarily enacted to ensure the rights which had been defined earlier by the courts.

During the first two eras under discussion, there were many important decisions made by non-educators. In the 1960s, the courts made many major policy decisions and in the 1970s Congress and federal administrative agencies made as many implementation decisions. Now, in the 1980s it appears the major substance of education law will be internal issues involving policies and the educational process: personnel management, civil rights, negligence and interpretation and application of school rules.

The cases of this era indicate an increased willingness to allow the local school districts autonomy on these issues unless there is a constitutional or statutory violation. This chapter presents legal issues which are not discussed in other chapters of this text. It covers areas which would most likely interest school business administrators. It is in no way exhaustive of issues in education law. Topics such as corporal punishment are not discussed as the direct import on school business administrators is minimal. The issues within the chapter include: civil rights, negligence, contracts, criminal liability, tuition and fees and students' records.

Torts

Civil Rights Liability

Recovery for a violation of a person's federal constitutional or statutory rights is possible under the Civil Rights Act of 1871.[1] The basic concept extends personal liability to public officials who violate the federal statutory or constitutional rights of an individual, such as a student or teacher. It reads:

> 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, set in equity, or other proper proceeding for redress.[2]

The word "person" in Section 1983 has been interpreted to include local governments or institutions,[3] including school districts.[4] A school board is not immune from liability under the Eleventh Amendment which protects states as governmental entities from suit in federal courts.[5] Thus, the person who has been damaged by policies or practices which violate federally protected rights can sue the individuals and the institution involved in a Section 1983 action.

Immunity. The *Wood v. Strickland*[6] decision helped to clarify the reach of Section 1983 with respect to school board members and their liability. The Court's holding made it possible for students to sue school board members for a violation of federal rights. For the first time, the Supreme Court addressed the degree of protection that local school board members have under Section 1983 as well as the conditions under which they may lose their immunity. *Wood* enunciated a new standard of immunity: qualified good faith immunity. This limited immunity provides some degree of security. Under *Wood* a board member can be held liable only for violation of constitutional rights for:

- Knowingly violating a student's constitutional rights. Board members are legally bound to make decisions consistent with current law; they cannot disregard what is recognized as settled law.
- Unknowingly violating a student's constitutional rights. That is no excuse if a school board member should have known what the law was on a given subject. Ignorance of settled constitutional law is no more excuse than intentional violation of what is settled law. There is a burden on school board members to know what current law is.
- Acting on the basis of malice. A board member will lose any immunity he might otherwise have had if he sets out intentionally to harm a student, acts out of vindictiveness or decides an issue on a spiteful motive.[7]

This good faith immunity exemption can be generalized to school administrators acting in their official capacity. "Although the *Wood* holding is limited to the specific context of school discipline, the court has read *Wood* as equally applicable to officials where actions affect the constitutional rights of teachers and other school personnel."[8]

Remedies. Section 1983 clearly provides that a litigant may bring suit under the Act for compensatory damages as well as for equitable relief. Generally, actual damages and attorneys fees are awarded to a prevailing party in a Section 1983 action.

To receive any award some damages must be shown. In *Carey v. Piphus*[9] the U.S. Supreme Court dealt with an issue of nominal actual damages. The case involved two students who were suspended from school for allegedly smoking marijuana on the school grounds. The trial court ruled that the students were denied procedural due process. The court stated the plaintiffs were technically entitled to damages yet it dismissed the claim as none were shown to exist. On appeal the Seventh Circuit Court of Appeals reversed, stating that the plaintiffs were entitled to substantial nonpunitive damages without proof of actual injury, because the suspensions were irrelevant. The Supreme Court ruled that in absence of proof concerning actual damages the students were entitled only to nominal damages, which the Court set at one dollar. Consistently, court decisions concerning Section 1983 have also allowed for the compensation of mental stress and emotional anguish, when proof of actual damages is also shown.

In addition to damages, attorneys' fees are normally awarded to the prevailing party in a Section 1983 action.[10] There is no definite scale to set attorneys' fees in these actions. The amount of the award is left to the discretion of the court, which makes a reasonable award for time spent on the litigation. Generally, such factors as time, complexity, size of the award and expertise of the attorney are taken into consideration.[11] In *Hensley v. Eckerhart*[12] the U.S. Supreme Court found that a court could determine reasonable attorneys' fees by multiplying the number of hours reasonably expended on the litigation by a reasonable hourly rate. Thus, the actual awards vary from case to case.

What may be considered work on the litigation may vary from case to case also. The question usually presents itself in terms of how much work the attorney be compensated for before the case was actually filed in court. In *Webb v. County Board of Education* the U.S. Supreme Court ruled that Section 1983 generally does not permit a court to award fees to a prevailing party for costs incurred for legal services in an optional state administrative proceeding.[13] However, in *New York Gaslight v. Carey*[14] the Supreme Court held that attorney's fees for state administrative hearings under Title VII could be awarded under Section 1983. The difference between the two situations is that in the latter the administrative hearing process is mandatory and is part of the Section 1983 litigation. In the former, the 1983 action could have been initiated without going through the administrative process; therefore, the administrative process is not considered part of the litigation.

Summary. Civil rights actions are probably the fastest growing category of litigation in education law today. The *1979 Yearbook of School Law*[15] reported a 1,000 percent increase for the previous fifty years in civil rights litigation. These actions are used to vindicate the infringement of an individual's federal constitutional or statutory rights. School officials, however, must realize that if they are acting in good faith they cannot be held liable even if later it is found that the individual's civil rights were violated. The decision whether to pursue actions into litigation may be colored by the knowledge that if the opposing party wins, the school district may be faced with paying its attorney's fees. Thus, it may be wise for administrators to settle out of court those situations where they think it is likely that they

would not prevail. What the district may win is offset by the risk that it will also have to pay the opponent's attorney's fees. The best defense against Civil Rights actions is to be knowledgeable of the current state of the law and make decisions consistent with it.

Negligence

The most common tort action against teachers and school administrators is negligence. Negligence is conduct falling below a legally established standard of care, resulting in injury to another person. It is failure to exercise due care when subjecting another to a risk or danger which causes harm. There are four elements of negligence, all of which must be present before liability can be found: 1) duty, 2) breach of duty, 3) proximate cause and 4) actual injuries.[16]

Duty. Before a person can be held liable for another's injury, it must be proven that he or she had responsibility for or duty to the injured person. A duty can arise from statutes, contracts or common sense. The courts have identified three areas of duties for educators: adequate supervision, proper instruction and maintenance of a safe environment. A distinct duty must be found to hold each individual liable for a negligence action. Thus, for each party sued some duty or connection between the injured party and the person being sued must be found. For example, the administrative duty to maintain safe equipment would include a duty to purchase appropriate and safe equipment.

Probably the most common negligence action against school personnel involves a student who is injured and claims the injury was caused by the school's or an individual's failure to adequately supervise students. Clearly, when students are in school the school personnel have a duty to supervise them. The element of negligence is rarely in dispute when students are on school grounds during school hours, but often comes into play when students are off school grounds or on school grounds before or after school hours.

In *Foster v. Houston General Ins.*[17] a teenage, educable, mentally retarded child was one of a group of boys who played on the school's special olympics basketball team. The team practiced at a nearby school facility, requiring the students to walk three blocks in heavy traffic. One teacher was supervising the first trip between the schools. One student dashed into the street against the light and was killed. The teacher and the school were sued for negligently supervising the students. The court found that the school had a duty to provide an adequate number of supervisors to accompany the team on their way to practice and to choose the safest possible route. However, in *Plesnicar v. Kovach*[18] no liability was found when a student was struck and killed by a car after participating in extracurricular activities. The court found that the school had no duty to provide a crossing guard or bus service for students following extracurricular activities.

Breach. Once a duty has been established or undertaken, it must be exercised reasonably. This is one of the most commonly disputed elements in a negligence action. To be liable for the injury the complaining party must show that the duty was not carried out reasonably, that a person breached the duty. This standard of reasonableness varies from circumstance to circumstance; what may be negligence in one situation may be a reasonable exercise of one's duty in another. This reasonableness standard has been personified by the "reasonable person." The reasonable person is a fictitious person who is prudent and uses ordinary care and skill under the same or similar circumstances.[19] The reasonable person also has the

same superior skill or knowledge as an actor has or makes others believe he has. Educators hold themselves out to the public as possessing superior skills and understanding of educational processes. The professional's required conduct is that of a prudent professional under the same or similar circumstances. School business administrators are specially trained professionals; they are held to a standard of a professional in the field of business when carrying out their duties. In sum, to determine if the duty has been breached, one asks, what would the reasonable person do under the same or similar circumstances? If the actions of the actor fall short of this, the duty has been breached.

A school board in Louisiana was held liable for a $70,000 damage award in *Lawrence v. Granty Parish School Bd.*[20] A student was injured by a power saw which was stored in the back of the class and was used without authority by the injured student when the teacher was absent from the room. The court found the school district liable for unreasonably allowing the machine to be stored in the back of the classroom; and found the teacher negligent for not properly supervising the classroom. In *Farcisse v. Continental Ins.*[21] a heavy metal door was shut on an elementary child's thumb. There the court found no liability on the part of the teacher or school district. It found no evidence that even though the supervision afforded the child was not constant, it was reasonable.

Causation. Next, one must determine that the negligent act actually caused the injury. Thus, if the injury came about for reasons other than the defendant's actions there is no liability. Courts require that the negligence of the defendant be the substantial cause of the harm to the plaintiff, substantial enough to conclude that act was indeed a cause of the injury. There must be an unbroken chain of events between the act and the resulting injury. If the negligence is not a substantial factor in producing the harm there is no liability.

A defendant can sometimes be held liable for injuries even if the most immediate cause was not his or her action. Acts which occur between the negligence and the injury are called intervening acts. If the intervening act or acts were forseeable, or the resultant injury was forseeable, the defendent's negligence will be held to be the legal cause of the injury.

In some situations teachers have been able to refute negligence charges by establishing that other students' intervening acts were the real cause of the incident. In *Hammond v. Scott*[22] a student was injured by another student who threw a nail during a woodshop class. The court found that the teacher had provided adequate supervision and instruction and emphasized that the teacher should not be held responsible for the injuries resulting from a student disobeying the rules. In another case, a high school student was injured in class when she fell after another student had knocked the stool out from underneath her. The court found neither the teacher nor the school liable, primarily because the teacher could not have foreseen that one student would do this to another.[23]

Injury. The defendant in a negligence action is liable only if his or her negligence has caused some actual injury. Even nominal damages cannot be obtained where no actual loss can be shown. Usually a physical injury to the plaintiff is required before damages can be awarded. In addition to awards for physical damages—medical bills, loss of prospective earnings—courts can also make award for accompanying non-physical injuries, e.g., emotional distress, pain and suffering. In *Smith v. Archbishop of St. Louis*[24] an award of $1,250,000 was upheld which in-

cluded damages for the child's physical pain and emotional trauma after being severely burned.

Defenses to negligence actions. There are several defenses which school districts and school administrators may use in rebutting negligence charges. In any negligence action a common line of defense is contributory or comparative negligence. Historically, the most often used defense for governmental bodies is immunity. More recently school personnel have been able to take advantage of provisions enacted by some state legislatures. A brief description of these common defenses follow.

Both comparative and contributory negligence involve some fault or negligence on the part of the injured person. To successfully use this defense the defendant must show that the plaintiff, the injured party, in some way through his or her own negligent, actions contributed to his or her own injuries. In determining whether the plaintiff is negligent the same rules of reasonable care and causation, as discussed previously, apply.

Under the doctrine of contributory negligence, negligence on the part of the plaintiff operates as a total bar to recovery. That is, once negligence on the part of the plaintiff is shown, the plaintiff cannot recover for any part of the injuries. In older cases, courts prevented a plaintiff's recovery if any amount of negligence was shown to have caused the injuries, no matter how slight. This doctrine has drastic results when a plaintiff's injuries are great and his or her own negligence is slight. Recognizing this in more modern cases, courts have denied plaintiffs' recovery if their negligence has been a substantial factor in their own injuries.

In response to the drastic results sometimes caused by the doctrine of contributory negligence most states have converted to the doctrine of comparative negligence. Most states have some form of comparative negligence. In comparative negligence the amount of negligence and causation of each party is compared to determine a degree of fault; recovery is based on the relative degree of fault. If the plaintiff's negligence has caused only ten percent of the injuries suffered, under comparative negligence the plaintiff is allowed to recover ninety percent of the damages; under contributory negligence no damages would be allowed. The specific provisions of comparative negligence vary from state to state but the concept of comparative negligence is generally the same.[25]

Sovereign immunity is a common law precedent which protects a state from liability. It originates from the sixteenth-century concept that "the King can do no wrong."[26] This concept was transported across the Atlantic in the early 1800s and became American precedent.[27] Less than thirty years ago negligence actions against governmental entities were virtually nonexistent because most states enjoyed the benefits of sovereign immunity. The doctrine is generally justified because it limits the flow of public money to private citizens in damage awards; liability payments deplete governmental treasuries and thus detract from other functions of the governmental body. This concept is applicable to schools since they are arms of the state and governmental entities in their own right.

Many states, recognizing the widespread availability of insurance and the injustices which can sometimes accompany a finding of sovereign immunity have done away with this defense to liability either judicially or by legislation. The trend is to limit sovereign immunity. Only Maryland and Mississippi have retained total sovereign immunity. Eight states[28] have set up administrative agencies to hear claims; usu... schemes have a short statute of limitations and a maximum level of

possible damages. Nine states[29] have abrogated sovereign immunity in certain classes of cases. Typically this abrogation involves motor vehicle suits and actions in which insurance has been obtained.

The remaining thirty-one states and the District of Columbia have abrogated sovereign immunity, leaving only governmental immunity. Governmental immunity offers protection for governmental conduct which involves discretionary functions or duties; it does not protect against proprietary actions.[30] Traditionally, state subdivisions, municipalities and school districts have generally only enjoyed governmental immunity.[31] The reform in sovereign immunity has had little impact on governmental immunity. In all of the states governmental immunity still exists. "In both the states that have generally abolished immunity and the states that generally retain it subject to exceptions, it is agreed that the discretionary functions or basic policy immunity remains as a shield against governmental liability."[32]

Thus, school districts both in states which have abrogated immunity and those which have not are not liable for actions made in their governmental functions. Therefore, a finding that the activity out of which the claim arose was a governmental function will result in a finding of no liability for the schools. For example: a student was struck and killed by a car while enroute to catch a school bus at the bus stop. The school district was sued for negligence in locating the stop and failing to post signs warning the passing motorists of the bus stop. The court found the district immune since the decision to place the bus stop and warning signs involved policy making, planning and/or governmental judgment.[33]

This distinction between governmental and proprietary actions is often difficult to apply and frequently is the cause of conflicting outcomes on similar facts. One of the most profound illustrations of this is shown by *Sawaya v. Tuscon High School District No. 1*[34] and *Kellam v. School Bd. of Norfolk.*[35] In both cases the schools had leased a football stadium to a third party. In both a spectator was injured and sued each district for negligence in maintaining unsafe conditions. The courts reached opposite decisions on whether the districts should be given immunity, differing on whether the leasing was a governmental function.

In some states, the legislatures have abolished immunity and enacted "save harmless" statutes. Currently these states include Florida, Connecticut, Iowa, Massachusetts, New Jersey, Oregon, New York and Wyoming.[36] These statutes are tantamount to liability insurance policies against personal liability of teachers, administrators and other school officials when they are acting within the scope of their employment. Most of these statutes require the school district generally to be the insurer for these employees up to a specified dollar amount for liability. Typical wording can be found in the New York statute:

> [I]t should be the duty of each board of education, trustee or trustees . . . to save harmless and protect all teachers, practice or cadet teachers, and members of supervisory and administrative staff or employees from financial loss arising out of any claim, demand, suit, or judgment by reason of alleged negligence or other act resulting in accidental bodily injury to any person within or without the school building, provided such teacher, practice or cadet teacher, or member of the supervisory or administrative staff or employee, at the time of the accident or injury was acting in the discharge of his duties within the scope of his employment.[37]

Malpractice. In the 1970s, it was feared that educational malpractice claims would become quite common. Educators have been carefully avoiding any situation which might result in an action for educational malpractice brought against them. In spite of these concerns there has not yet been an award of damages for educational malpractice or failure to provide an education upheld by an appellate court.

The seminal case in educational malpractice is *Peter W. v. San Francisco Unified School District.*[38] Peter W. received a high school diploma from the San Francisco schools. Contrary to the California statute requiring graduates to be able to read over the eighth-grade level,[39] Peter W. was illiterate. Peter W. sued the district for negligence in not teaching him these skills and allowing him to graduate without them. The lower court's dismissal of the action was upheld by the California Court of Appeals. The court discussed at length the "duty" requirement as it exists in negligence law and found no legal duty on which to base an action. Second, the court concluded there was no workable standard of care for teaching against which the defendants' actions could be judged.

> 'Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught, and any layman might—and commonly does—have his own emphatic view on the subject.[40]

In addition, the court noted that the degree of certainty that the plaintiff had suffered an injury, the extent of the injury and the establishment of a causal link between defendants' conduct and plaintiffs' injuries were all highly problematic. The primary motive, apparently, for the court's reluctance in examining these problems was the public policy involved. The court found a public policy against allowing such suits because of the burdensome litigation which would be generated.

> Few of our institutions, if any, have aroused the controversies, or incurred the public dissatisfaction, which have attended the operation of the public schools during the last few decades. Rightly or wrongly, but widely, they are charged with outright failure in the achievement of their educational objectives; according to some critics, they bear responsibility for many of the social and moral problems of our society at large. Their public plight in these respects is attested in the daily media, in bitter governing board elections, in wholesale rejections of school bond proposals, and in survey upon survey. To hold them to an actionable "duty of care," in the discharge of their academic functions, would expose them to the tort claims—real or imagined—of disaffected students and parents in countless numbers. They are already beset by social and financial problems which have gone to major litigation, but for which no permanent solution has yet appeared. The ultimate consequences, in terms of public time and money, would burden them—and society—beyond calculation.[41]

The New York court of Appeals struck a similar action in *Donohue v. Copiague Union Free School District.*[42]

This decision was based equally on public policy concerns. The court expressed concern that recognition of this cause of action would require the courts to make judgments on the validity of broad educational policies and might eventually require their hand in review of day-to-day implementation of these policies. This would contravene the judicial policy of not becoming involved in educational questions.[43] Additionally, the court noted that the public has available administrative avenues for review through the Commissioner of Education. The court concluded: "Recognition in the courts of this cause of action would constitute blatant interference with the responsibility for the administration of the public school system lodged by Constitution and statute in school administrative agencies."[44]

In sum, the courts' denials of educational malpractice claims have primarily been based on the following arguments.

- The lack of an appropriate standard of care against which to measure conduct,
- The fear that recognition of the cause of action will cause a flood of litigation which would over-burden the courts,
- The award of monetary damages would be uncertain and inappropriate, and
- Litigation of such claim would lead to judicial interference in educational policy making.

Contracts

The general principles of contract law apply to contracts entered into by a school district. The necessary elements for a valid contract are: 1) offer and acceptance, 2) competent parties, 3) legal consideration, 4) legal subject matter and 5) proper form.

Both parties must have the legal capacity to enter into a contract before it can be valid. The school board is recognized as a legally competent entity to enter into a contract.[45] Most state statutes give the power to make contracts to the board, not to administrators. However, this does not always prevent "that authority from being exercised by and through the superintendent."[46] In *Smith v. Fort Madison Community School District* the court found that the superintendent had the authority to modify a board contract. Nonetheless, the board generally must extend the original offer or ratify an original contract.

In *Community Projects v. Wilder*[47] the court found that under the statute empowering the board to enter into contracts the board had exclusive authority to enter into contracts. The court therefore invalidated an agreement to purchase goods to be used in a fund-raising activity purchased by a principal. However, in *Hebert v. Livingston Parish School Board,*[48] the opposite result was reached. The court found that since the board assigned the responsibility to principals to supervise extracurricular activities that lead to contracts, the board assumed the ultimate financial responsibility for those contracts. Thus, the principal had implied authority to enter into a contract on behalf of the board for the expenses of a school

prom. The difference in results in these cases can be justified by differences in the state statutes empowering the school board. To be certain of the extent of authority of administrators one should consult controlling state statutes and interpretations.

When an unauthorized employee enters into an agreement in the name of the school district the district is not bound. The contract can be voided by the court.[49] In such situations the person who is dealing with the employee has the burden of determining the extent of his or her authority.[50]

Contracts made by school districts must be for legal subject matter; they cannot be beyond the scope of the school districts' legal authority. As a legislatively created entity a school district only has the powers conferred on it expressly or by necessary implication by the legislature.[51] Thus, the school district cannot contract for goods or services outside of the scope of its authority. In addition, a board cannot contract away its governmental functions. In *Coalition v. School District Kansas City,*[52] the board had entered into a contract with a neighborhood association agreeing to open an experimental school for three years. The court found this contract invalid because it removed the board's discretion to close the school, thus depriving them of a governmental function.

Finally, contracts must be made in the proper form to be valid. The required form is dependent on state statutes. The requirements for school districts may be more specific or extensive than for other contracting parties in the state. When these requirements are not met the contract is invalid.[53] Generally, state provisions for a Statute of Frauds requires a written form when the subject matter is real property, when the subject matter exceeds the sum of $500, or when the contract possibly spans more than one year.[54] In addition to these requirements statutes often require a school district to undertake a bidding procedure which must also be followed before there is valid contract.[55] Once again, the requirements will vary from state to state. Thus the statutes should be consulted before action is taken.

Criminal Liability

School business administrators may be subject to criminal liability within the scope of their position. Although criminal statutes differ from state to state, the most common crimes would involve misuse of school funds: larceny, theft and embezzlement. It is possible to be subject to criminal sanctions as well as disciplinary actions for this type of activity.

This activity occurs but there is very little written in the literature or reported in decisions. However, there is a reported case in New York,[56] in which the defendant was the school business administrator and purchasing agent for the City School District of Oswego. He was arrested and convicted on a charge of grand larceny arising from the theft of property from the school district. The defendant was incarcerated on the criminal charges and suspended from his position without pay for six months on disciplinary charges.

Handling Public Funds

Fees

In light of current economic conditions in the United States the practice of charging fees for various school services is increasing. The cases on this subject vary, since the challenges are based on state constitutional provisions for "free," "thorough" or "uniform" schools, and each provision is subject to its own state court interpretations. There are twenty-nine states[57] which have "free" in their constitutional provisions establishing schools, and of these, sixteen have had some legal ruling on the constitutionality of fee assessments in public schools.[58] Nine of these sixteen have basically the same wording, "free public system," in their provisions but have had different conclusions reached as to what that wording means. Following is a description of two typical cases dealing with the subject. Many other cases exist involving other school services, e.g., fees for transcripts,[59] textbook fees[60] and lunchroom supervisory fees.[61]

A recent case comes from California; *Hartzell v. Connell*[62] involved the propriety of charging a fee for extracurricular activities. This policy was undertaken after a $1.1 million budget cut as an alternative to drastically cutting extracurricular activities. All of the programs for which a fee was required were non-credit; but most were connected to a credit course: varsity football players play in noncredit, fee-generating interscholastic competition and practice in a credited, non-fee-generating varsity football course. The district provided fee waivers for students who could not financially afford the fees; a total of seventy-three waivers were granted. The California Constitution requires the legislature to "provide for a system of common schools by which a free school shall be kept up and supported in each district."[63] The California Supreme Court recognized that extracurricular activities today are "an integral component of public education."[64] Accordingly, the court found that "all educational activities—curricular or 'extracurricular'—offered to students by school districts fall within the free school guarantee of Article IX, Section 5."[65]

The Montana Supreme Court reached a different conclusion. The Montana Constitution requires the Legislature "to establish and maintain a general, uniform and thorough system of public, free, common schools."[66] In *Granger v. Cascade Co. School Dist., 159,*[67] the court found that provision prohibited schools from charging tuition for courses and activities which are "reasonably related to a recognized academic and educational goal of the particular school system."[68] As interpreted, the courses and activities which must remain free are those assigned credit for graduation. Thus, the school districts are able to charge fees for many extracurricular activities and "frills" courses.

Two approaches to determine if a fee can constitutionally be levied have emerged in the courts. The first approach was adopted by the Michigan Supreme Court.[69] Here the court examines the plain, ordinary meaning of the constitutional language without resorting to extrinsic evidence. The second approach was adopted by the Illinois Supreme Court[70] and analyses the educational practices at the time the constitutional provision was adopted. This historical approach defines the education provision by ascertaining the intent of those who framed and adopted the state constitution.

The first approach uses a two-step process. The first step is interpreting the constitution to determine if the language allows any fees. If the court interprets

"free" to mean without cost, then it usually holds that the state constitution prohibits fees for any activities or items considered educational. However, because some items and activities in schools may not be educational, the court takes a second step and determines whether the item or activity for which a fee is charged constitutes education. It is in this step that courts have developed such tests as: whether the activity is a necessary element of the school program;[71] whether the activity is an integral part of elementary and secondary education;[72] or whether the activity is reasonably related to a recognized academic or educational goal of the school system.[73]

Under the second historical approach the courts assume the framers meant "free" to include only those educational items and activities offered without charge by schools at the time of the provision's adoption.[74] If the item was not provided free of charge the courts hold that a fee assessment for the activity is constitutional.

Since the legal authority among the states which have fee questions varies so widely in the interpretation of the meaning of constitutional provisions on education, it is impossible to make projections for states that have not yet encountered this question. It is best to check a state's constitution, cases and attorney general's opinions on the subject before embarking on any fee program.

Expenditures

School districts are generally given wide latitude in determining how educational funds can be spent. The attitude of the courts has been that a school district, being charged with the responsibility of operating the schools, should have as much freedom as possible to determine how and when the funds will be spent. The primary restraint is that the courts require educational funds be spent only on educational purposes.

A North Carolina case involved the authority of a public school to support a program for latch-key children.[75] The program operated after the close of school and provided a supervised program in which children could do homework, study or participate in athletic or artistic activities. Tuition was charged to the parents to defray the cost of the program. The North Carolina Court of Appeals held that the board was free to permit the expenditures of tax money for the purposes since the purpose of the program was to further the educational achievement of the students.

Courts have also restricted the use of school funds. The Louisiana Court of Appeals held that school personnel are prohibited from using tax money for advertising, polling and other promotional activities in support of a political cause. Clearly the activities in question were not educational.[76]

In addition, schools cannot spend funds in contradiction of court orders, or for purposes other than for which they were specifically allocated. A school district must spend funds for the purpose for which they were collected. If a statute requires fund accounting for special tax money, the school board must establish and deposit the money in such a fund. Funds which were raised by bonds or levy for a particular purpose cannot be delivered to an account with another purpose. There are many examples of these basic rules; two follow.

In *Hoots v. Commonwealth of Pennsylvania*[77] two school districts were prohibted by the court from issuing a rebate to the taxpayers. The court found that the school [illegible] were attempting the rebate to prevent surplus funds from going to a newly

consolidated school district formed by the two defendant districts under a desegregation order. The court found this to be in violation of the consolidation order.

From 1966 to 1973, the annual meeting of the Monrow School District voted to levy a tax to construct a swimming pool. In 1974, the meeting appropriated the accumulated sum to a sinking fund dedicated to the construction of the pool. From 1974 to 1979, taxes were continued to be levied and appropriated to the sinking fund. In 1979 and 1980, the proposal for issuing bonds to raise the additional funds necessary to construct the pool was defeated. In 1980 the voters also defeated a referendum allowing the board to use the funds accumulated in the sinking fund for other purposes. The board next sought to have the sum declared part of "funds on hand" so it could be used for other educational purposes. The Wisconsin Court of Appeals determined that since the funds were specifically dedicated they could not be diverted into general funds, nor could they be used for other purposes without voter approval.[78]

Handling Student Records

Because of widespread dissatisfaction with educators' handling of students' records, the U.S. Congress passed the Family Educational Rights and Privacy Act in 1974, better known as the Buckley Amendment.[79] Final regulations, which contain the essence of the procedures were passed in 1976. The Buckley Amendment stipulates that federal funds may be withdrawn from any educational agency or institution which has a practice of failing to provide parents and eligible students access to their educational records, or which disseminates information to unauthorized third parties. In addition, parents and eligible students must be given a hearing to challenge the contents of records which they believe to be inaccurate. The Education for All Handicapped Children Act, P.L. 94-142, also dictates the confidentiality of records.

Those Eligible for Access

A student acquires rights to access his or her records under the Buckley Amendment when he or she becomes eighteen years old and when enrolled in a postsecondary educational institution.[80] A student under the age of eighteen may gain access to his or her records if the school chooses to permit it,[81] or if the parents grant access as an authorized third party.

Until students have acquired rights under the Buckley Amendment, parents and guardians of the student have all rights guaranteed by the Buckley Amendment. A district may assume that both parents have the right to access unless a court ruling, state law or other legal authority provides to the contrary.[82] Under this provision the school must receive notice that the parent is not to be allowed access, not just that the parent does not have custodial rights. As stated by one court: "the regulations implementing the Act allow inspection by either parent, without regard to custody, unless such access is barred by state law, court order or legally binding instrument."[83]

A parent or an eligible student may consent to third-party access to the student's educational records. The consent must be in writing, signed and dated and must specify which records are to be disclosed, the purpose of the disclosure and the

person(s) to whom disclosure is to be made.[84] The following situations do not require parental consent before disclosing records.

Records may be released to school officials in a district to which the student intends to transfer after the parent has had a chance to inspect the records.[85] In *Klipa v. Bd. of Education*,[86] the school administrators were found not liable for invasion of privacy where they had inadvertently caused a student's psychological and medical records to be transferred to her new school after the parents had requested only her academic records be sent. The court held that there was no liability because "the consent of the parents was not necessary in order to permit the transfer of all the child's records to the new school."[87] In addition, records may be released to school officials in the same district who have been determined to have a legitimate educational interest in the records.[88]

Records may be released to various state and national educational agencies when enforcing federal laws.[89] Records may be released to student financial aid officials, but only to the extent necessary to determine eligibility.[90] Records may be released to accrediting agencies for the purposes of accreditation.[91]

Records may be released in compliance with a court order after the school has made a reasonable effort to notify the parent or eligible student of the order prior to compliance.[92] In *Rios v. Read*,[93] a class action suit, several hundred files were subpoenaed. The court found that even when a number of records are subpoenaed the school still had the duty to make reasonable efforts to contact the parents and eligible students involved, although notice by publication or mail would be sufficient. The court gave additional guidance in this area:

> (I)t would seem sensible to require in the disclosure order that the recipients of the student records avoid revealing the litigation and destroy the data when it is no longer needed. But it is neither required or necessary that the defendants redact the names of the students from the records and substitute neutral identifying information.[94]

Public directory information may be released to the general public. A list of names and addresses of parents of students falls within the definition of directory information, and thus can be released without prior consent.[95] The school, however, must notify parents and eligible students each year concerning what information will be made available as directory information. Parents or eligible students may request that the school not include their names on the list.[96]

Information which is not personally identifiable may be released. In *Dryston v. Bd. of Education*,[97] the Court required access to standardized test scores after they were placed in a random order and the name of individual students had been removed.

Finally, records may be released to appropriate persons in an emergency where such information is necessary to protect the health or safety of the student or other individuals.[98]

Educational Records

The provisions of the Buckley Amendment extend to all information directly related to the student, recorded in any form and maintained by the school with the primary exceptions of:

1. notes made by a teacher in a teacher's log which are not disclosed to others,[99] and
2. physician's or psychologist's notes which are used for treatment and are not disclosed to others.[100]

Information concerning a student received from other sources is not the responsibility of the school district. Thus, where it appeared in a student newspaper that a student had been suspended and the information was received from sources independent of school officials, there was no violation of the Buckley Amendment.[101] In addition, the school is not responsible for the release of information concerning students and student activities which are not maintained by the school, such as information kept by independent athletic associations.[102]

Access Procedures. The provisions of the Buckley Amendment require a school to prepare annually a list of procedures and policies governing access to student records. This policy must also include notification to parents and eligible students of their rights under the Act.[103] The general rules on inspection of records are:

1. A school must respond to a written or oral request to inspect within a reasonable time, not to exceed 45 days.[104]
2. Authorized persons are entitled to physically inspect all records regardless of their location. They may request access to all their records without having to specify particular records in which they are interested. A parent or eligible student may bring another person with him although a written consent form for the person may be required by the school.[105]
3. A school must provide copies of the records on a parent's or student's request whenever records are transferred to another school,[106] whenever information is released to a third party,[107] or whenever denial of copies would effectively deny the right of access.[108] A school may charge a reasonable fee for copying but may not charge for the labor expended in searching for or retrieving records.[109]
4. A school may condition receipt of transcripts on payment of all fees[110] and loans.[111]

Challenging Contents. A parent or eligible student may request that the school amend or delete information they believe to be inaccurate or misleading or which violates privacy rights.[112]

If the school refuses, the parent or eligible student may request a hearing on the issue.[113] The hearing must be scheduled within a reasonable time. Notice must be given to the participants before the hearing with sufficient time to afford them an opportunity to prepare, and the hearing must be conducted before an unbiased hearing officer. The parent or eligible student has the right to be represented, present evidence and receive a reasonably prompt decision.[114] If the hearing officer denies the request, the parent or eligible student may place a statement of explanation in the record.

Enforcement. The remedy for a violation of the Buckley Amendment is the withdrawal of federal funds.[115] The courts have determined that no alternate private remedy exists under the statute.

Summary

In the early years after the Buckley Amendment was passed many schools reacted by purging all student files and not allowing any negative comments to be

placed in those files. The Buckley Amendment does not mean that negative notations should be taken out of a student's educational record; if they are factual and related to the student's education they are legitimate. The Buckley Amendment was written in response to the concern of many parents that they were not allowed access to their children's record when many other people were allowed access to the same record. It was intended only to protect the privacy rights students and parents have in students' educational records.

Conclusion

In the 1980s, it seems the major substance of education law will be internal issues involving policies and the educational process: personnel management, negligence, civil rights actions, handicapped students and interpretation/application of school rules. The cases of this era thus far indicate an increased willingness to allow school districts autonomy on these issues unless there is a constitutional or statutory violation. The ramification for local school administrators is that they will have more discretion; however, they should exercise this discretion wisely. The following cautions can be gleaned from current court opinions:

1. Be aware of individuals' rights and consider them before acting.
2. Review policies with current constitutional and statutory standards in mind.
3. If policies apply, follow them.
4. Anticipate problems or questions as much as possible and work through them before they occur.
5. Be aware of rights and laws, but don't let fear of a lawsuit dictate educational policy.

Notes

1. 42 U.S.C.A. 1983, see also, R. Craig Wood, "Liability of School Business Administrators," *Planning and Changing*, V. 14, No. 4, 245-256 for a discussion of various positions of this chapter.
2. Ibid.
3. *Monell v. New York City Dept. of Sccial Services*, 436 U.S. 658, 98 S.Ct. 2018 (1978).
4. *Wood v. Strickland*, 420 U.S. 308 (1975).
5. *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977).
6. 420 U.S. 308 (1975).
7. Vacca and Hudgins, *Liability of School Officials and Administrators for Civil Rights Torts*, Charlottesville, Va.: Michie Co., 1982, pp. 47-48.
8. *Pence v. Rosenquist*, 573 F.2d 395, 398 (7th Cir. 1978).
9. 435 U.S. 247 (1978).
10. 42 U.S.C.A. (1985).
11. Vacca and Hudgins at 21.
12. 461 U.S. 424 (1983).
13. 53 U.S.L.W. 4473 (1985).
14. 447 U.S. 54 (1980).
15. Topeka, Kansas: National Organization On Legal Problems of Education, 1979.
16. W. Prosser, *Handbook on the Law of Torts*, 4th Ed., at 143.

17. 407 So. 2d 759 (La. Ct. App. 1982).
18. 430 N.E.2d 648 (Ill. App. Ct. 1981).
19. Prosser at 124.
20. 409 So. 2d 1316 (La. Ct. App. 1982).
21. 419 So. 2d 436 (La. Ct. App. 1982).
22. 232 S.E.2d 336 (S.C. 1977).
23. *Boyer v. Jablonski, 435 N.E.2d 436 (Ohio Ct. App. 1980).*
24. *632 S.E.2d 516 (Mo. Ct. App. 1982).*
25. *See Prosser at p. 274.*
26. *Russell v. The Men Dwelling in the County of Devon*, 100 Eng. Rep. 359 (1788).
27. *Mower v. The Inhabitants of Leicester*, 9 Mass. 237 (1812).
28. Alabama, Arkansas, Georgia, Kentucky, North Carolina, Tennessee, West Virginia and Wisconsin.
29. Connecticut, Delaware, Kansas, New Hampshire, North Dakota, Oklahoma, South Carolina, South Dakota and Texas.
30. Prosser and Keaton, *Handbook on the Law of Torts*, 5th ed., 1043-46.
31. *Russell v. Men of Devon*, 2 Term Rep. 667, 100 Eng. Rep. 359 (1798).
32. Prosser and Keaton at 1052.
33. *Harrison v. Escambia City Sch. Bd.*, 419 So. 2d 640 (Fla Dist. Ct. 1982).
34. 78 Ariz. 389, 281 P.2d 105 (1955).
35. 202 Va. 252, 117 S.E.2d 96 (1960).
36. Kern Alexander and M. David Alexander, *The Law of Schools, Students and Teachers in a Nutshell*, (St. Paul 1: West Pub. Co.), 230.
37. Ibid.
38. 60 C.A.3d 814, 131 Cal. Rptr. 854, (1976).
39. Cal. Educ. Code 8573.
40. Peter W., 131 Cal. Rptr. at 860.
41. Ibid. at 861.
42. 47 N.Y.2d 440, 418 N.Y.W.2d 375, 391 N.E.2d 1352 (1979).
43. See *Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 98 S.Ct. 948 (1978).
44. Ibid. at 1354.
45. See, *NEA - Wichita v. Unified Sch. Dist. No. 259*, Sedgwick County, 234 Kan. 512, 674 P.2d 478 (1983); *Allen v. Town of Sterling*, 329 N.E. 2d 756 (Mass. 1975).
46. Smith v. Fort Madison Comm. Sch. Dist. 3334 N.W.2d 701, 703 (Iowa 1983).
47. 298 S.E.2d 434 (N.C. App. 1982).
48. 438 So. 2d 1141.
49. *Cado Business Systems of Ohio, Inc. v. Bd. of Educ. of Cleveland City Sch. Dist.*, 8 Ohio App.3d 385, 457 N.E.2d 939 (1983).
50. *Robert W. Anderson Housewrecking and Excavating, Inc. v. Bd. of Trustee, Sch. Dist., No. 25*, Fremont County, 681 P.2d 1326 (Wyo. 1984).
51. *NEA - Wichita*, 234 Kan. 512, 674 P.2d 478 (1983).
52. 649 S.W.2d 533.
53. *Minor v. Sully Buttes Sch. Dist. No. 58-2*, 345 N.W. 2d 48 (S.D. 1984).
54. See *School Bd. of Amherst County v. Burley*, 302 S.E.2d 53.
55. *E.G. Willett Motor Coach Co. v. Bd. of Educ. of Chicago*, 59 Ill. Dec. 433, 431 N.E.2d 1190, cert. den'd. sub. nom. 103 S.Ct. 258 (1981).
56. *Kelly v. Allen*, 440 N.Y.S.2d 424, 443 N.Y.S.2d 183 (1981).

57. Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Maryland, Michigan, Mississippi, Montana, Nevada, New Jersey, New Mexico, New York, North Carolina, North Dakota, Oklahoma, South Carolina, Tennessee, Texas, Utah, Virginia, West Virginia, Wisconsin and Wyoming.

58. Arizona, *Carpio*, 111 Ariz. 127, 524 P.2d 948 (1974); Arkansas, *Dowell v. School Dist. No. 1*, 220 Ark. 828, 250 S.W.2d 127 (1952); California, *Hartzell v. Connell*, 201 Cal Rptr. 601 (1984); Colorado, *Marshall v. School Dist. No. 3*, 553 P.2d 784 (Colo. 1976); Georgia, *Smith v. Crim*, 240 Ga. 390, 240 S.E.2d 884 (1977), Idaho, *Paulson v. Minidoka Cty Sch. Dist. No. 331*, 93 Idaho 469, 463 P.2d 935 (1970); Illinois, *Hamer v. Bd. of Educ. of Sch. Dist. No. 109*, 9 Ill. App.3d 663, 292 N.E.2d 569 (1973); Michigan, *Bond v. Pub. Sch. of Ann Arbor*, 33 Mich. 693, 178 N.W.2d 484 (1970); Montana, *Granger v. Cascade County Sch. Dist. No. 1*, 159 Mont. 516, 499, P.2d 790 (172); New Mexico, *Norton v. Bd. of Educ. of Sch. Dist. No. 16*, 89 N.M. 470, 553 P.2d 1277 (1976); North Carolina, *Sneed v. Greensboro City Bd. of Educ.*, 299 N.C. 609, 264 S.E.2d 106 (1980); NOrth Dakota, *Cardiff v. Bismarck Pub. Sch. Dist.*, 263 N.W.2d. 105 (N.D. 1978); Oklahoma, 76 Op. Atty. Gen. 322 (1977); South Carolina, 4082 Op Atty. Gen. 156 (1975); West Virginia, *Vandevender v. Cassell*, 208 S.E.2d 436 (W.Va. 1974); *Wisconsin, Bd. of Educ. v. Sinclair*, 65 Wisc. 2d 179, 222 N.W.2d 143 (1974).

59. *Paulson*, 93 Idaho 469, 463 P.2d 935 (1970).

60. *Bd. of Educ. v. Sinclair*, 65 Wis.2d 179, 222 N.W.2d 143 (1974).

61. 427 N.E.2d 1027 (Ill. App. 1982).

62. 201 Cal.Rptr.601, 679 P.2d 35 (1984).

63. Cal. Const., Art. IX, Sec. 5.

64. 679 P.2d at 42.

65. Ibid. at 43.

66. Art. X. Sec. I (3).

67. 499 P.2d 780 (1972).

68. Ibid. at 780.

69. *Bond v. Pub. Sch. of Ann Arbor*, 383 Mich. 693, 178 N.W.2d 484 (1970).

70. *Hamer*, 9 Ill. App. 3d 663, 265 N.E.2d 569 (1973).

71. *Paulson*, 93 Idaho 469, 463 P.2d 935 (1970).

72. *Bond*, 178 N.W.2d 484.

73. *Granger*, 159 Mont. 516, 499 P.2d 780 (1972).

74. J. Kendall, "Public School Fees in Illinois: a Re-examination of Constitutional and Policy Question" *U. of Ill. L. Rev.* (1984) at 104.

75. *Kiddie Korner Day Schools, Inc. v. Charlotte-Mecklenburg Bd. of Educ.*, 285 S.E.2d 110 (N.C. Ct. App. 1...

76. 372 So. 2d 1060.

77. 535 F.Supp. 1194 (W.D. Pa.1982).

78. *Barth v. Bd. of Educ., Sch. Dist. of Monroe*, 108 Wis.2d 511 322 N.W.2d 694 (1982).

79. 20 U.S.C.A. 1232g.

80. 34 C.F.R. 99.3.

81. 34 C.F.R. 99.4 (c).

82. 34 C.F.R. 99.3, 99.11(c).

83. *Page v. Rotterdam*, 441 N.Y.S. 2d 323, 325 (1981).

84. 34 C.F.R. 99.30.

85. 34 C.F.R. 99.31 (a) (2).

86. 460 A.2d 601 (Md. App. 1983).

87. Ibid. at 608.

88. 34 C.F.R. 99.31 (a) (1).

89. 34 C.F.R. 99.31 (a) (3).

90. 34 C.F.R. 99.31 (a) (4).

91. 34 C.F.R. 99.31 (a) (7).

92. 34 C.F.R. 99.31 (a) (9); Lattic T. v. Johnston, 74 F.R.D. 498 (D.C. Miss. 1977).

93. 73 F.R.D. 589 (D.C. N.Y. 1977).

94. Ibid. at 602.

95. *Hathaway v. Joint Sch. Dist. No. 1*, 110 Wis. 2d 254, 329 N.W. 2d 217 (1982); *Kestenbaum v. Michigan State Univ.*, 294 N.W. 2d 228 (Mich. App. 1980).

96. 34 C.F.R. 99.31 (a) (10).

97. 430 N.Y.S. 2d 688 (1980).

98. 34 C.F.R. 99.3, 99.37.

99. 34 C.F.R. 99.3.

100. Ibid.

101. *Frasca v. Andrews*, 463 F.Supp. 1043 (E.D. N.Y. 1979).

102. *Arkansas Gazette Co. v. Southern State Coll.*, 620 S.W.2d 258 (Ark. 1981).

103. 34 C.F.R. 99.5, 99.6.

104. 34 C.F.R. 99.11 (a).

105. Ibid.

106. 34 C.F.R. 99.34 (a) (2).

107. 34 C.F.R. 99.30 (d).

108. 34 C.F.R. 99.11 (b) (2).

109. 34 C.F.R. 99.8 (a) (b).

110. *Spas v. Wharton*, 106 Misc. 2d 180, 431 N.Y.S.2d 638 (1980).

111. *Girardier v. Webster Coll.*, 563 F.2d 1267 (8th Cir. 1977).

112. 34 C.F.R. 99.20 (a).

113. 34 C.F.R. 99.20 (c).

114. 34 C.F.R. 99.21 (c) (d).

115. 20 U.S.C.A. 1232g (a) (1) (A) (1976).