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Encyclopedia of EDUCATION LAW

Charles J. Russo, J.D.
Editor

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Encyclopedia of EDUCATION LAW

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About the Editor

Charles J. Russo, JD, EdD, is the Joseph Panzer Chair in Education in the School of Education and Allied Professions and adjunct professor in the School of Law at the University of Dayton. The 1998–1999 president of the Education Law Association and 2002 recipient of its McGhehey (Achievement) Award, Dr. Russo has authored or coauthored almost 200 articles in peer-reviewed journals; has authored, coauthored, edited, or coedited 30 books; and has well in excess of 650 publications. He also speaks extensively on issues in education law in the United States and other nations. Between April 1997 and March 2005, Dr. Russo made 14 trips to Sarajevo, Bosnia, and Herzegovina, where he worked with the government-sponsored office of the Ombudsman on Civil Rights and Religious Freedom as well as with the Faculty of Education on improving schooling in Bosnia. In the Balkans, he also worked with officials at South East European University in Tetovo, Macedonia. He has spoken in 21 nations on 6 continents, has taught summer courses in England and Spain, and has served as a visiting professor overseas at Queensland University of Technology in Brisbane, Australia; the University of Newcastle in Newcastle, Australia; the University of Sarajevo, Bosnia, and Herzegovina; South East European University, Tetovo, Macedonia; the Potchefstroom Campus of Northwest University in Potchefstroom, South Africa; and the University of Malaya in Kuala Lumpur, Malaysia.

Before joining the faculty at the University of Dayton as professor and chair of the Department of Educational Administration in 1996, Dr. Russo taught at the University of Kentucky in Lexington from 1992 to 1996 and at Fordham University in his native New York City from 1989 to 1992. He taught high school for eight and one-half years, both prior to and after graduation from law school. He received a bachelor of arts degree (classical civilization, 1972), a juris doctor degree (1983), and a doctor of education degree (educational administration, and supervision, 1989) from St. John's University in New York City. He received a master of divinity degree from the Seminary of the Immaculate Conception in Huntington, New York (1978). In 2004, he was awarded a PhD *honoris causa* from Potchefstroom University, now the Potchefstroom Campus of Northwest University, in Potchefstroom, South Africa, for his contributions to the field of education law.

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Foreword

A foreword is commonly assumed to be a brief introductory essay, usually written by someone other than the book's author or authors. As such, the intent of this foreword is to provide background information to help readers to better understand the nature of the *Encyclopedia of Education Law* and its content. Thus, additional definitions follow: An *encyclopedia* is a comprehensive reference work of one or more volumes that provides a concise description of each of the different aspects of a given field of knowledge. In this instance, the field is *education law,* which consists of the statutes and cases pertaining to educational institutions and the personnel associated with these institutions. The encyclopedia also includes a wide array of entries on key topics in the field of education law. *Statutes* are defined broadly as including not only legislative enactments but also constitutions, treaties, ordinances, court rules, and administrative regulations. While the term *cases* includes the decisions of the courts, opinions of attorney generals, and rulings of administrative agencies, those summarized in the encyclopedia focus primarily, but not exclusively, on judgments of the U.S. Supreme Court.

Education law grew and evolved slowly from its early beginning in the colonial period in Massachusetts. An enactment in 1642 ordered that all children be taught to read, and in 1647, a law commonly known as "Ye Ole Deluder Satan Act" provided for the appointment of teachers and the establishment of schools. There was little development in the field during the remaining half of the 17th and through most of the 18th century in this country, which remained predominately rural and sparsely populated. However, with the birth of the nation, the states, through constitutional provisions and legislation, began providing for the education of the children of their citizens, and legal problems related to education occasionally reached the courts. It was not until the 20th century that education law began to receive some recognition as a separate field of study, and a body of literature began to emerge.

During the early 20th century, there was an obvious dearth of published information. Academics needed instructional materials that covered the legal aspects of school operation; attorneys who represented educational institutions and personnel also needed frequently updated reference sources to stay current in this rapidly developing field. The responses to these demands came quickly during the next few years. Two textbooks, Harry R. Trusler's *Essentials of School Law* and Frank R. Stephenson's *Handbook of School Law,* were published in the late 1920s. Another, J. F Weltsin's *Legal Authority of the American Public School,* was added in 1931. The following year, M. M. Chambers launched *The Yearbook of School Law,* and in 1934, Lee O. Garber authored a monograph titled *Education as a Function of the State.* The first education law book printed by a university press or major publisher was *The Courts and Public School Property* by Harold H. Punke in 1936. During the next decade, with the nation's interest and efforts focused on the war, the creation of new sources of education law information slowed to a halt.

The 1950s might well be described as a decade of phenomenal development. This growth was due to factors including the Supreme Court's 1954 landmark decision in *Brown v. Board of Education of Topeka* and later cases affecting all public educational institutions of this country; the formation of an association of educators and attorneys, the National Organization

on Legal Problems of Education, now the Education Law Association (ELA), which under the direction of M. A. McGhehey became the leading information source; and the individual efforts of some of the most outstanding scholars in education and law. During this time, there was an unprecedented expansion of the knowledge base and a heightened demand for print materials in the field.

In 1950, Lee O. Garber initiated the second series of the *Yearbook of School Law.* Writers, including attorneys as well as educators, produced textbooks that were widely adopted for use in major university education law classes. Among these were *Law of Public School Administration* by Madeline K. Remmlein (1953), *The Courts and the Public Schools* by Newton Edwards (1956), and *The Law and Public Education* by Robert R. Hamilton and Paul E. Mort (1959). (The next textbook of this stature was Kern and David Alexander's *Public School Law,* not published until 1969.) Other books focused on specific aspects of the educational program and consisted of chapters written by different authors selected by an editor; e.g., *The Law and the School Business Manager* (1955) edited by Lee O. Garber and *Law and the School Superintendent* (1958) edited by Robert L. Drury. Chapter authors include recognized authorities in the field such as Newton Edwards, E. C. Bolmeier, Lloyd E. McCann, Edgar Morphet, and Stephen Roach. Periodical literature in the field also blossomed at this time. Articles on education law by the authorities mentioned appeared in professional journals such as *Nation's Schools,* the *Bulletin of Secondary School Principals Association,* and the *Journal of Elementary Education,* and Robert R. Hamilton began publishing *The National School Law Reporter.*

Today's education law literature is similar in form to those listed. In fact, the *Yearbook,* now known as *The Yearbook of Education Law,* is published annually by the Education Law Association. The present series has had two long-term editors, Stephen Thomas and its current editor, Charles J. Russo. *The Law of Public Education* is still published with the original authors being replaced in subsequent editions by E. Edmund Reutter and now Charles J. Russo. Publications founded more recently were *The Journal of Law and Education,* published by the University of South Carolina School of Law; *The Education Law Reporter,* edited by Clifford Hooker for West Publishing Company; and the *Brigham Young University Education and Law Journal,* published jointly between the university's schools of education and law.

The background data appear to support the premise that the *Encyclopedia of Education Law* does not duplicate but fills a definite void in the literature. The coverage is comprehensive, with topics ranging from "ability grouping" to "*Zorach v. Clauson.*" Lastly, the editor, Charles J. Russo, and the contributing authors, some of whom were students of the "pioneers" cited, are eminently qualified by education and experience for the tasks performed.

Floyd G. Delon
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Introduction

Brown v. Board of Education of Topeka (1954) is the most important education-related case in the history of the United States, perhaps the most important decision of all time, regardless of the subject matter. With *Brown* providing a major impetus, the United States has undergone a myriad of educational, legal, and social transformations. By striking down racial segregation in public schools, *Brown* augured the start of an era that was destined to provide equal educational opportunities to all. This landmark decision signaled the birth of the field known as education law or school law.

Prior to *Brown,* the U.S. Supreme Court had addressed only a handful of education-related cases. However, the Court now resolves at least one school-related case almost every year. In fact, since the Court first addressed a dispute under the Establishment Clause in 1947, upholding the constitutionality of the states providing transportation to children who attend nonpublic schools in *Everson v. Board of Education of Ewing Township* (1947), it has decided more than 40 cases in each of the two controversial areas of school religion and desegregation, although the Court has since the late 1970s displayed much less interest in the latter while its rate of involvement in the former continues unabated.

The *Encyclopedia of Education Law* is intended to be a comprehensive source on education law for undergraduate and graduate students, educators, legal practitioners, and general readers concerned with this central area of public life. The primary focus is on developments since *Brown v. Board of Education of Topeka.* At the same time, because education law is a component in a much larger legal system, the encyclopedia includes entries on the historical development of the laws that impact education. This broadened perspective thus places education law within the American legal system as a whole.

Although the overwhelming majority of entries in the encyclopedia address education law in the United States, the encyclopedia does take into account the expansion education law has experienced around the globe. While comprehensive, worldwide coverage of the many varieties and contexts of education law in the world is beyond the scope of this project, it does contain entries on such important topics as the United Nations Convention on the Rights of the Child and the Universal Declaration of Human Rights that help place developments in the United States within a broader context. In addition, the encyclopedia includes a limited number of entries on the international developments of this field.

Overview of the Content

In light of the importance of its subject matter for both students and practitioners (whether educators or attorneys), the *Encyclopedia of Education Law* offers a compendium of information drawn from the various dimensions of education law that tells its story from a variety of perspectives. While the entries are arranged alphabetically, a Reader's Guide appears in the front of each volume immediately following the List of Entries. This guide organizes the headwords into the 17 subject areas listed below, with each entry listed in at least one thematic area.

- Biographies
- Collective Bargaining
- Concepts, Theories, and Legal Principles
- Constitutional Rights and Issues
- Curricular and Instructional Issues
- Educational Equity
- Governance Issues
- Litigation

- Organizations
- Parental Rights
- Primary Sources: Excerpted U.S. Supreme Court Landmark Cases
- Religion in Public Schools
- Special Education and Rights of Disabled Persons
- Statutes and Treaties
- Student Rights and Student Welfare Issues
- Teacher Rights
- Technology

The entries in the encyclopedia include a number of anchor essays, written by leading experts in education law, that provide a broad and detailed examination of selected subjects. The topics of these essays include an analysis of *Brown v. Board of Education of Topeka* and the history of equal educational opportunity, an overview of key Supreme Court cases in education law, and discussions of free speech in public schools, religion in public schools, the Due Process Clause, and the Equal Protection Clause. Along with the anchor essays and other longer entries, the encyclopedia includes shorter, more focused pieces of varying lengths that are appropriate for its purpose as a general work.

Excerpts From U.S. Supreme Court Cases on Education Law

In addition, excerpts are included from 35 key cases that can serve as primary sources for research on public policy aspects of education law. Among the cases included are such far-reaching decisions as *Brown v. Board of Education of Topeka, I* and *II,* the cornerstone of the development of the Supreme Court's push for equal educational opportunities; *Lemon v. Kurtzman,* the Supreme Court's most important case on religion; *Tinker v. Des Monies Independent Community School District,* wherein the justices recognized the free speech rights of students; *Pickering v. Board of Education of Township High School District 205, Will County,* in which the Court upheld the rights of teachers to speak out on matters of public concern; and *Franklin v. Gwinnett County Public Schools,* wherein, for the first time, the Court applied Title IX in the battle to end sexual harassment in schools.

These case excerpts are preceded by brief summaries and have been edited to allow readers to focus on the key issue or issues addressed in the rulings. In keeping with the standard practice in law texts, all of the cases have been edited to remove the Supreme Court's internal citations. Most have been edited also for length; the presence of ellipses, either within the body of texts or on a separate line, indicates that material has been deleted. These edited excerpts, which are preceded by a one- or two-sentence summaries, enable the reader to identify basic information on the cases. The excerpts can also serve as a starting point for researchers who can then seek out the full texts for further information.

The case excerpts appear in alphabetical order among the other entries. The case titles are reproduced here as they appear in the *United States Reports,* which are the official records of the Supreme Court.

The Study of Education Law

When one first grapples with education law, it is worth keeping in mind that systematic inquiry in the law is a form of historical-legal research that is neither qualitative nor quantitative. In other words, education law is a systematic investigation involving the interpretation and explanation of the law in school settings. Moreover, legal disputes can begin with a single issue that has far-reaching implications. Perhaps the best example of how a legal controversy with massive social overtones has affected American life is the Supreme Court's 1954 decision in *Brown v. Board of Education of Topeka,* striking down segregation in American public schools.

Aimed to dismantle de jure segregation in public education, it can be argued that *Brown* was not resolved on the basis of the law alone, for the Court relied on research data from the social sciences in addressing the plight of the African American children who had been subject to segregation. Consequently, *Brown* served as the impetus for many systemic social changes in American society in a way that the parties may not have been able to anticipate. Perhaps the two most notable changes that *Brown* engendered in helping to ensure equity were the adoption of Title IX of the Educational Amendments of 1972 and of federal laws on the rights of the disabled.

Title IX not only led to equal opportunities for males and females in the arena of sports but also required

equal opportunities in other areas of education. The courts initially interpreted Title IX as protecting students from harassment based on gender and later expanded its scope to forbid harassment based on sexual orientation or preference. The impact of Title IX has been experienced in myriad ways in the world of K–12 schools and beyond. For example, in K–12 education, increasing numbers of women are assuming leadership roles in public school systems as principals and superintendents, and increasing numbers of women are contributing to scholarship about education generally and education law in particular, as reflected in the authorship of entries in this volume. Moreover, women not only make up a majority of undergraduate students on college and university campuses but have also seen their ranks increase dramatically in faculty and administrative roles in higher education.

Further, the enactment of three laws in particular—Section 504 of the Rehabilitation Act of 1973, the Education for All Handicapped Children Act (now the Individuals with Disabilities Education Act) and the Americans with Disabilities Act—have ensured greater participation by the disabled in all spheres of American life.

In attempting to make sense of the evolving reality known as the law, students of the law, however broadly defined—whether undergraduates, graduate students, K–12 teachers and administrators, faculty members, attorneys, or other interested parties—must learn to employ a timeline that looks to the past, present, and future for a variety of purposes. As reflected by many of the entries in this encyclopedia, the editor and contributors have sought to place legal issues in perspective, so that students of education law can not only hope to inform policymakers and practitioners about the meaning and status of the law but also seek to raise questions for future research in seeking to improve the quality of schooling for all. While the task of students varies from that of attorneys, who typically engage in legal research as a means of arriving at a deeper understanding of the issues confronting them so as to better represent the interests of their clients, because educators qua students often must serve as advocates for their own students, faculty, and staff, there is a common bond between all of those who employ education law for the betterment of the educational process.

Rooted in the historical nature of the law and its reliance on precedent, the study of education law requires students to look to the past to locate the authority governing the disposition of questions under investigation, whether drug testing, religion, or gender equity. This is so because the Anglo-American legal system is grounded in the principle of precedent or stare decisis, the notion that an authoritative ruling of the highest court in a given jurisdiction is binding on lower courts within its purview. Moreover, because the law, by its very nature, tends to be a reactive rather than proactive force, one that is shaped by past events that can help lead to stability in its application, its students need to learn to "think outside of the box" in applying the law to emerging issues such as the impact that technology is having on the educational process—both for good (such as virtual learning and access to information) and for ill (such as with regard to cyberbullying and stalking).

In light of the more or less reactive nature of law, when attorneys challenge adverse rulings or when researchers study emerging questions, they each look to see how past authoritative decisions have dealt with the same issue. If there is a case supportive of their respective points of view, then regardless of the role that individuals find themselves in, whether academicians, attorneys, or students, they can argue that it should be followed. However, if precedent is contrary to their positions, then its students will seek to distinguish their case by attempting to show that it is sufficiently different and inapplicable to the facts at hand, particularly when developing policies for new and evolving issues that impact the world of education. To this end, all students of the law, from undergraduates to senior professors and attorneys, must learn that because the law is an ever-changing reality, they must constantly be prepared to engage in research on new and emerging topics that will undoubtedly reshape schooling in ways that we cannot yet conceive.

Education Law and Sound Educational Policy

The centrality of education law as a tool for educational leaders, teachers, students, and attorneys as well as others interested in schooling is reflected in a

comprehensive, if somewhat dated, study conducted on behalf of the University Council for Educational Administration (UCEA), a consortium of leading doctoral degree–granting institutions in educational leadership. The survey revealed that with 87.5% of UCEA's members offering courses in education law (Pohland & Carlson, 1993), it is the second most commonly taught subject in the wide array of leadership programs. Moreover, as many universities offer a variety of graduate and undergraduate classes in education law (Gullatt & Tollett, 1997), it is likely to remain a crucial element in the curriculum, clearly indicating that as an applied rather than purely theoretical discipline, it is essential for educators at all levels.

The UCEA study and other indicators mean that those who are engaged in the study of education law must help clarify the meaning of the law so that it remains the valuable tool that it is. In particular, faculty members who teach education law can help by instructing students to focus on such basic concepts as due process and equity, essential elements in the development of sound policies. Put another way, as important as abstract legal principles or theories are, faculty members who specialize in education law must concentrate on ways to help students and practitioners to apply these concepts broadly rather than having them memorize case holdings apart from their applications in day-to-day, real-life situations. At the same time, students need to understand the law as a practical discipline that has genuine significance in their daily professional activities as educational practitioners.

The significance of education law presents a unique intellectual challenge to prepare practicing educators, whether they are board members, superintendents, principals, teachers, or students preparing to become teachers, to be more proactive. Those who work in the field of education law need to move beyond the reactive nature of the discipline and to use it proactively, as a tool to help ensure that schools meet the needs of all of their constituents, ranging from students and parents to faculty, staff, and the local community. Yet, the goal of making the law proactive is complicated, because most changes generated by education law typically occur only after a real case or controversy has been litigated or a legislative body has responded to a need that had yet to be addressed or resolved. In fact, *Brown* is a typical example of how the law can be seen as reactive insofar as there would not have been a need for *Brown* if the schools in Topeka had been meeting the needs of the African American students there.

Along with balancing the tension present between the proactive and reactive dimensions of education law, law classes for educators should not become "Law School 101." Rather than trying to turn educators into lawyers equipped to deal with such technical questions as jurisdiction and the service of process, their courses in education law should provide a broad understanding of the law that will allow them to accomplish two important goals as follows:

First, classes in education law must teach educators how to rely upon their substantive knowledge of the law and where to look to update their sources of information, so they can develop sound policies to enhance the day-to-day operations of schools.

Second, classes in education law should provide educators with enough awareness of the legal dimensions of given situations to enable them to better frame questions for their attorneys to answer. To this end, educators must recognize the great value in making their attorneys equal partners not only in problem solving after the fact but also in developing responsive policies before difficulties can arise. Such a proactive approach is consistent with the notion of preventative law, wherein knowledgeable educators can identify potential problems in advance and in concert with an attorney can work to ensure they do not develop into crises. Further, when board members and educators select attorneys for their boards, they would be wise to hire individuals who have specialized practices in education law, thus avoiding potential lapses in critical knowledge and ensuring their advice has the most up-to-date perspectives on legal matters.

Education Law in the Future

Education law is a dynamic, invigorating, and intellectually stimulating discipline that is constantly evolving to meet the needs of today's schools. In light of the impact that the Supreme Court's judgments are

likely to have on educators at all levels, one can only wonder what the justices will do with emerging topics such as student free speech in cyberspace, whether involving the use of Web cams or posting messages and videos on online sites including Facebook and YouTube, because the law cannot seem to keep pace with evolving technology. Given the legal and educational concerns that these issues will raise, all those interested in education law are charged with the task of developing and implementing policies to enhance the school environment for students, faculty, and staff.

In sum, as noted above, perhaps the only constant in education law is that as it evolves to meet the demands of a constantly changing world, it is likely to remain of utmost importance for all of those who are interested in schooling. In fact, the seemingly endless supply of new statutes, regulations, and cases speaks of the need to be ever vigilant of how legal developments impact the law. Insofar as the challenge for all educators is to harness their knowledge of this ever-growing field so that they can make the schools better places for all children, the contributors to the *Encyclopedia of Education Law* hope it will be of service to those who are seeking solutions not only for ongoing quests for educational equity but also to be prepared to address new and evolving issues as they emerge in coming years.

Postscript on Legal Citations

When reading case names, it is important to keep in mind that the party that files suit in a trial court is the *plaintiff* while the responding party is the *defendant.* However, as a case makes its way through the legal system, the names often change places. In other words, the party that loses at trial, and seeks further review, is listed first and is known as the *appellant* as the dispute makes its way up the judicial ladder. The responding party, regardless of whether the plaintiff or defendant at trial, is known as the *appellee* or *respondent,* and appears second. In addition, since case names can be lengthy, they are often abbreviated. *Illinois ex rel McCollum v. Board of Education of School District No. 71, Champaign County* is often listed as *Illinois ex rel McCollum v. Board of Education,* and further shortened to *McCollum* for convenience after the full title has appeared in a text. Locations (like "Topeka, Shawnee County, Kansas") and articles (the, an, etc.) are often omitted to shorten a name.

Once readers become accustomed to their varying appearances, legal citations are actually fairly easy to read:

- The first number in a citation indicates the volume number where the case, statute, or regulation can be located.
- The abbreviation that follows refers to the book or series in which the material may be found.
- The second number refers to the page on which a case begins or the section number of a statute or regulation.
- The last part of a citation typically includes the name of the court, and the year in which a dispute was resolved.

Supreme Court cases, which occupy a central place in the encyclopedia, can be located in a variety of sources. The official version of Supreme Court cases is the United States Reports (U.S.). The same opinions appear in two unofficial versions, West's Supreme Court Reporter (S. Ct.) and the Lawyer's Edition, now in its second series (L. Ed.2d). The advantage of the unofficial versions of cases (and statutes, described below) is that, in addition to reproducing the entire text of the Court's opinions, publishers provide valuable research tools and assistance. In order to avoid unnecessary confusion, the encyclopedia refers to unofficial versions only when U.S. Reports citations are unavailable.

Consider the citation for *Brown v. Board of Education of Topeka* as an example: 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954). The first number indicates that it is published in volume 347 of the United States Reports starting at page 483. *Brown* is also be located in volume 74 of West's Supreme Court Reporter, beginning on page 686, and volume 98 of the Lawyer's Edition, published by Lawyers Cooperative Publishing Company, starting on page 873. Of course, *Brown* was decided in 1954, as noted in parentheses.

Lower-level federal appellate cases are published in the Federal Reporter, now in its third series (F.3d). Cases that are not chosen for publication in F.3d are printed in the Federal Appendix (Fed. Appx.); these cases are of limited precedential value. Federal trial court rulings are in the Federal Supplement, now in its second series (F. Supp. 2d).

State cases are published in a variety of publications, most notably in West's National Reporter system. An abbreviated version of the court name appears with the date in parentheses for all but U.S. Supreme Court cases.

The official version of federal statutes is the United States Code (U.S.C.). Along with Supreme Court cases, West publishes an unofficial, annotated version of federal statutes, the United States Code Annotated (U.S.C.A.). The final version of federal regulations can be found in the Code of Federal Regulations. For example, the Individuals with Disabilities Education Act (IDEA)—20 U.S.C. §§ 1400 *et seq.*—can be found in Title 20 of the United States Code, beginning at section 1400. Further, the IDEA's regulations are located at 300 C.F.R. §§ 300.1 *et seq.,* meaning that they are in Title 300 of the Code of Federal Regulations, starting at section 300.1. State statutes and regulations follow a similar pattern. As with cases, state statutes and regulations are published in a variety of sources.

Before they appear in bound volumes, most cases are available as slip opinions from a variety of looseleaf services and electronic sources. Statutes and regulations are available in similar formats. State laws and regulations are also generally available online from each state. Legal materials are also available online from a variety of sources, a selection of which is listed here.

- Subscription Databases:
  WestLaw
  LexisNexis
- Legal Search Engines:
  http://washlaw.edu
  http://www.findlaw.com
- U.S. Supreme Court, Federal Courts, and Federal Government Sites:
  http://supct.law.cornell.edu/supct (decisions of the U.S. Supreme Court)
  http://www.supremecourtus.gov (official Web site of the U.S. Supreme Court)
  http://www.uscourts.gov (U.S. Federal Judiciary)
  http://www.whitehouse.gov (The White House)
  http://www.senate.gov (U.S. Senate)
  http://www.ed.gov (U.S. Department of Education)
  http://thomas.loc.gov/home/bills_res.html (Library of Congress, Bills and Resolutions)

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Charles J. Russo

Ability Grouping

Ability grouping refers to the organizing of elementary and secondary students into classrooms or courses for instruction according to actual or purported ability. This entry briefly reviews the history of ability grouping in American public education and how the law has treated challenges to this practice in various types of settings, primarily when such grouping results in significant levels of segregation or discrimination based on race. Legal constraints on ability grouping based on language, disability, and gender are also identified. The entry concludes with a review of policy features that may help predict the legal vulnerability of ability grouping practices and of factors that school officials may find important to consider as they contemplate grouping students to foster excellence without sacrificing equity in the current era of accountability fostered by the No Child Left Behind Act (2001).

Historical Perspective

Grouping students by ability for purposes of instruction has been a source of debate in American public education almost since the inception of the practice in the late 1860s. Over the past 140 years, ability grouping has experienced various levels of support and adoption. In the first quarter of the 20th century, for instance, ability grouping experienced a rise in popularity that coincided with the universal schooling movement and the introduction of intelligence testing and scientific management strategies into public education. This period of growth was followed by a decline in popularity during the 1930s and 1940s, as the progressive education movement questioned not only the effectiveness of grouping but also its appropriateness in a democratic society. However, by the late 1950s, ability grouping experienced a resurgence in the post-*Sputnik* era as the nation rallied to match the technological accomplishments of the Russians.

It was during this same period, of course, that *Brown v. Board of Education of Topeka* (1954) triggered a revolution in race and schooling policy in America, a revolution that was intended to bring White and Black students together in common educational settings, notwithstanding the grossly different educational opportunities each group had been afforded historically and the widely held stereotypes regarding their relative academic abilities. Ability grouping expanded dramatically through the 1960s, coming to represent a means of circumventing desegregation by substituting within-school segregation for what had existed between schools at the time of *Brown.* From at least this historical juncture, race and grouping practices have been inescapably intertwined. Research findings during the post-*Brown* period, including Jeannie Oakes's influential study, *Keeping Track,* have confirmed not only that ability grouping tends to segregate students along racial and socioeconomic lines but also that those channeled into lower classes are frequently provided a substantially different

curriculum and set of learning experiences—thereby locking in lifelong inequality. Like many other educational controversies over the past half century, the issue of student grouping has been almost as likely to be tested in the courtroom as in the classroom.

Legal Challenges and Parameters

Tracking, an extreme form of ability grouping, first gained legal attention in a case challenging the practice in the District of Columbia Schools, where students were assigned to one of four tracks from college prep to basic education and completed virtually all their course work within such a differentiated curriculum. Black students disproportionately were relegated to the lowest of these tracks. Evidence also indicated that once assigned to a track, students were not re-evaluated on a regular basis and rarely enjoyed mobility to a higher track, even though the school district justified the use of tracking as a means of remedying student deficiencies. In *Hobson v. Hansen,* affirmed under the name *Smuck v. Hobson* (1969), the Court of Appeals for the D.C. Circuit ruled that ability grouping as it was practiced in the D.C. Schools violated the due process clause of the Fifth Amendment.

The *Hobson* court was clear that ability grouping is not unlawful per se. It is a policy option available to many school districts, as long as officials can justify such grouping as reasonably related to a legitimate school or educational objective. On the other hand, where its adoption or method of implementation can be characterized as arbitrary, capricious, or discriminatory, as was found to be the case in *Hobson,* ability grouping is unlawful and may be prohibited.

Much of the ability grouping litigation has involved districts with a history of unlawful segregation that consequently were under an affirmative duty to desegregate at the time ability grouping was introduced or expanded. In the late 1950s and early 1960s, federal courts presiding over such districts tended to examine the use of ability grouping on a case-by-case basis to determine if its adoption was motivated by a segregative purpose. By the mid-1970s, however, the Fifth Circuit ruled in *McNeal v. Tate* (1976) that school districts under a Fourteenth Amendment legal obligation to desegregate may not employ ability grouping that results in significant levels of building, classroom, or course segregation until the district has been declared unitary or it can demonstrate either that the assignments do not reflect the present results of past segregation or that they will remedy such results through better educational opportunities.

By contrast, in districts without such an affirmative duty to remedy unconstitutional segregation, the courts place the burden on the plaintiffs proceeding under the equal protection clause of the Fourteenth Amendment to demonstrate not only that ability grouping resulted in significant segregation but that grouping was adopted in part to achieve that end, as illustrated in *People Who Care v. Rockford Board of Education* (1997).

Although equal protection principles have been relied on heavily, ability grouping has also been challenged under Title VI of the 1964 Civil Rights Act, a general antidiscrimination law that bars discrimination on the basis of race and national origin in programs and services operated by recipients of federal financial assistance. Under Title VI, where ability grouping results in significant levels of classroom segregation, the district may find itself in noncompliance, unless it can demonstrate that it has selected the least segregative instructional approach from among equally effective educational alternatives.

While ability grouping litigation has most often involved contentions of racial segregation and discrimination, questionable grouping practices on the basis of national origin or language may also be challenged under Title VI. Ability grouping policies or processes that operate to discriminate on the basis of student gender or student disability are also prohibited by Title IX of the Educational Amendments (1972) and Section 504 of the Rehabilitation Act (1973) respectively. Such claims may arise when ability grouping contributes to substantially disproportionate enrollment of certain populations of students in a particular classroom or course or when selection criteria or procedures contribute to the erroneous classification or placement of such students.

Examples of discriminatory grouping policies or practices have included assigning Black or limited-English-proficient students to special education classes and programs based on the use of an IQ test normed on an exclusively White population, or when the test is

administered in a language other than one the students can understand. Such practices have been held to violate both Title VI and Section 504 of the Rehabilitation Act of 1973. Similarly, a federal appeals court has invalidated, on the basis of Title IX, a selective high school's admissions policy where different cutoff scores were used for male and female student applicants in order to balance the gender of the student body. Since 1975, the Education for All Handicapped Children Act (1975), now known as the Individuals with Disabilities Education Improvement Act (2004), have limited ability grouping by requiring students with disabilities to be educated in the least restrictive environment, presumed to be the regular classroom with supplemental aids and services, unless their education cannot be satisfactorily achieved in such a setting.

Features That Affect Case Outcomes

The outcomes of cases involving ability grouping have varied, frequently turning on consideration of not only the district's historic context or intentions of the school officials but also particular features of the grouping policies and practices being employed. To minimize the potential for a successful challenge, schools must carefully craft policies and procedures governing the grouping of students for instruction. This may be especially important as the No Child Left Behind Act (2002) compels examination of subgroup performance and remedial measures targeted specifically to those not making adequate yearly progress.

These significant factors include the nature and scope of the grouping; the criteria used in assigning students to groups, including the appropriate use of testing; the manner and consistency with which grouping is implemented; the extent of its segregative impact on protected populations; the provisions for and frequency of re-evaluations; the quality and effectiveness of remedial services in obtaining desirable educational outcomes; and the degree of actual student mobility that results. Relying on these types of considerations, the law has demonstrated its willingness, albeit reluctantly, to intervene in instructional grouping controversies, at least where certain conditions and factors are present. While courts seldom order the outright abolition of grouping based on actual ability, they occasionally have precluded its utilization for a limited period of time. More commonly, however, courts have required changes be made to the criteria or procedures used to group students so as to ensure they are placed on the basis of actual rather than perceived ability.

Charles B. Vergon

See also *Brown v. Board of Education of Topeka; Hobson v. Hansen;* No Child Left Behind Act

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Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.
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Abington Township School District v. Schempp and *Murray v. Curlett*

At issue in the consolidated cases of *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963) was whether the Establishment Clause in the First Amendment of the U.S. Constitution permitted public schools to begin the day with prayer or Bible reading. The Supreme Court, in a landmark judgment, held that public schools may not engage in officially sanctioned prayer or Bible reading, because to do so would have been unconstitutional. This entry describes the background of the case and the ruling.

Facts of the Case

During the colonial period, most schooling was in private, usually religious, hands. Schools often started the day with prayer or Bible reading. These activities continued when education gradually shifted from private to public schooling. By the turn of the 20th century, states began to codify such practices. Although prayer and Bible reading were generally accepted, they did not occur without controversy, particularly in large cities with religiously diverse immigrant populations.

In the first case, the Schempp family, who were Unitarians, filed a suit in which they claimed that Bible readings in the public schools, required by Pennsylvania law, violated their child's constitutional rights. While students could be excused from Bible readings if parents requested it, the Schempps believed this measure was insufficient to satisfy the requirements of the Constitution. The second case originated from Baltimore, Maryland, where state law required that the school day begin with a Bible reading, including passages such as the Lord's Prayer. As with the Pennsylvania statute, parents could ask that their children be excused from the readings. The Murrays, atheists whose children attended Baltimore public schools, objected to the compulsory Bible readings. The Supreme Court agreed to hear the appeals from the two cases, consolidating them into a single opinion.

The Court's Ruling

The Court began its analysis by acknowledging that religion has been closely identified with American history and government. However, the Court also observed that "religious freedom" is strongly imbedded in the nation's public and private life. In the Court's view, the Constitution requires that the government remain neutral in matters of religious observance.

The Court noted that the text of the Establishment Clause of the First Amendment prohibits Congress from "creating an establishment of religion." This Clause expressly applies to the federal government, but it also applies to state governments through the Constitution's Fourteenth Amendment. In the Court's view, the Establishment Clause did more than prohibit the federal government or states from creating or "establishing" official governmentally approved churches. According to the Court, the Establishment Clause is broader, because it also prohibits governments from enacting laws that "aid one religion, aid all religions, or prefer one religion over another." These principles, the Court noted, "have been long established, recognized and consistently reaffirmed."

The Establishment Clause, the Court observed, operates in an "interrelationship" with the Free Exercise Clause of the First Amendment, providing that Congress may not pass any law "prohibiting the Free Exercise" of religion. The Court went on to point out that the Free Exercise Clause means that the Constitution "does not deny the value or the necessity for religious teaching or observance." Reading the two clauses together, the Court decided, requires that "state power is no more to be used so as to handicap religions than it is to favor them."

First Amendment Test

The Court fashioned the following test to evaluate whether a particular state law is acceptable under the First Amendment:

> What are the purpose and primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. (p. 222)

This test foreshadowed the "*Lemon* test" for Establishment Clause violations that the Court articulated in *Lemon v. Kurtzman* (1971).

Applying these principles to the Pennsylvania and Maryland practices at issue, the Court found that such overtly religious actions violated the First Amendment's Establishment Clause. In explaining that laws requiring religious exercises and such exercises violated the rights of students, the Court rejected the states' arguments that the readings could be justified by secular purposes, because the religious character of the exercises was all too apparent. Moreover, the Court was of the opinion that the fact that the students could abstain from the Bible readings was not a defense to a claim of having violated the Establishment Clause.

Anticipating criticism, the Court quickly denied that it was establishing a "religion of secularism." The Court noted that states may not oppose or be hostile to religion. Further, the Court observed that the Bible "is worthy of study for its literary and historic qualities," but such study must be part of a "secular program of education." In contrast, compulsory Bible readings were clearly "religious exercises" that violated the concept of "strict neutrality."

A number of justices filed concurring opinions, in which they agreed with the Court's decision but voiced additional reasons why they believed the compulsory Bible readings were unconstitutional. Only one justice, Potter Stewart, dissented. In his view, the record before the Court was insufficiently developed to allow it to conclude that the students were coerced into participating in the exercises in violation of the Establishment Clause.

Impact of Ruling

Insofar as *Abington* was controversial, it was widely denounced by politicians and by many religious leaders. In fact, a few school systems engaged in civil disobedience, ignoring for a time the Court's order. Other schools reacted by replacing the mandated Bible readings with a period of silent meditation. Still others hailed the decision as a victory for the Constitution and the rights of religious minorities.

The exact role of religion in the public schools remains a matter of intense debate. As the Court's opinion in *Abington* makes clear, there is an inherent tension between vindicating the free exercise of majority religious rights while simultaneously protecting a minority viewpoint through the Establishment Clause. Given the historically religious nature of American society, drawing the legal line between these competing imperatives will continue to present challenges to courts and legislatures.

Stephen R. McCullough

See also Establishment Clause; *Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Public Schools

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Lemon v. Kurtzman, 403 U.S. 602 (1971).

Abington Township School District v. Schempp and *Murray v. Curlett* (Excerpts)

In the companion cases of Abington Township School District v. Schempp *and* Murray v. Curlett, *the Supreme Court struck down prayer and Bible reading in public schools. At the same time, the Court laid the foundation for the so-called Lemon test by creating its first two parts, requiring interactions between religion and government to have a secular legislative purpose and a primary effect that neither advances nor inhibits religion.*

Supreme Court of the United States

SCHOOL DISTRICT OF ABINGTON TOWNSHIP, PENNSYLVANIA

v.

SCHEMPP

MURRAY III

v.

CURLETT

374 U.S. 203

Argued Feb. 27 and 28, 1963.

Decided June 17, 1963.

Mr. Justice CLARK delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . .' These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible. While raising the basic questions under slightly different factual situations, the cases permit of joint treatment. In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment.

I

The Facts in Each Case. The Commonwealth of Pennsylvania by law . . . requires that 'At least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day. Any child shall be excused from such Bible reading, or attending such Bible reading, upon the written request of his parent or guardian.' The Schempp family, husband and wife and two of their three children, brought suit to enjoin enforcement of the statute, contending that their rights under the Fourteenth Amendment to the Constitution of the United States are, have been, and will continue to be violated unless this statute be declared unconstitutional as violative of these provisions of the First Amendment. They sought to enjoin the appellant school district, wherein the Schempp children attend school, and its officers and the Superintendent of Public Instruction of the Commonwealth from continuing to conduct such readings and recitation of the Lord's Prayer in the public schools of the district pursuant to the statute. A three-judge statutory District Court for the Eastern District of Pennsylvania held that the statute is violative of the Establishment Clause of the First Amendment as applied to the States by the Due Process Clause of the Fourteenth Amendment and directed that appropriate injunctive relief issue. On appeal by the District, its officials and the Superintendent, . . . we noted probable jurisdiction.

The appellees Edward Lewis Schempp, his wife Sidney, and their children, Roger and Donna, are of the Unitarian faith and are members of the Unitarian Church in Germantown, Philadelphia, Pennsylvania, where they, as well as another son, Ellory, regularly attend religious services. The latter was originally a party but having graduated from the school system pendente lite was voluntarily dismissed from the action. The other children attend the Abington Senior High School, which is a public school operated by appellant district.

On each school day at the Abington Senior High School between 8:15 and 8:30 a.m., while the pupils are attending their home rooms or advisory sections, opening exercises are conducted pursuant to the statute. The exercises are broadcast into each room in the school building through an intercommunications system and are conducted under the supervision of a teacher by students attending the school's radio and television workshop. Selected students from this course gather each morning in the school's workshop studio for the exercises, which include readings by one of the students of 10 verses of the Holy Bible, broadcast to each room in the building. This is followed by the recitation of the Lord's Prayer, likewise over the intercommunications system, but also by the students in the various classrooms, who are asked to stand and join in repeating the prayer in unison. The exercises are closed with the flag salute and such pertinent announcements as are of interest to the students. Participation in the opening exercises, as directed by the statute, is voluntary. The student reading the verses from the Bible may select the passages and read from any version he chooses, although the only copies furnished by the school are the King James version, copies of which were circulated to each teacher by the school district. During the period in which the exercises have been conducted the King James, the Douay and the Revised Standard versions of the Bible have been used, as well as the Jewish Holy Scriptures. There are no prefatory statements, no questions asked or solicited, no comments or explanations made and no interpretations given at or during the exercises. The students and parents are advised that the student may absent himself from the classroom or, should he elect to remain, not participate in the exercises.

It appears from the record that in schools not having an intercommunications system the Bible reading and the recitation of the Lord's Prayer were conducted

by the home-room teacher, who chose the text of the verses and read them herself or had students read them in rotation or by volunteers. This was followed by a standing recitation of the Lord's Prayer, together with the Pledge of Allegiance to the Flag by the class in unison and a closing announcement of routine school items of interest.

At the first trial Edward Schempp and the children testified as to specific religious doctrines purveyed by a literal reading of the Bible 'which were contrary to the religious beliefs which they held and to their familial teaching.' The children testified that all of the doctrines to which they referred were read to them at various times as part of the exercises. Edward Schempp testified at the second trial that he had considered having Roger and Donna excused from attendance at the exercises but decided against it for several reasons, including his belief that the children's relationships with their teachers and classmates would be adversely affected.

. . . .

The trial court, in striking down the practices and the statute requiring them, made specific findings of fact that the children's attendance at Abington Senior High School is compulsory and that the practice of reading 10 verses from the Bible is also compelled by law.

. . . .

In 1905 the Board of School Commissioners of Baltimore City adopted a rule pursuant to Art. 77, s 202 of the Annotated Code of Maryland. The rule provided for the holding of opening exercises in the schools of the city, consisting primarily of the 'reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord's Prayer.' The petitioners, Mrs. Madalyn Murray and her son, William J. Murray III, are both professed atheists. Following unsuccessful attempts to have the respondent school board rescind the rule, this suit was filed for mandamus to compel its rescission and cancellation. It was alleged that William was a student in a public school of the city and Mrs. Murray, his mother, was a taxpayer therein; that it was the practice under the rule to have a reading on each school morning from the King James version of the Bible; that at petitioners' insistence the rule was amended to permit children to be excused from the exercise on request of the parent and that William had been excused pursuant thereto; that nevertheless the rule as amended was in violation of the petitioners' rights 'to freedom of religion under the First and Fourteenth Amendments' and in violation of 'the principle of separation between church and state, contained therein. . . . The petition particularized the petitioners' atheistic beliefs and stated that the rule, as practiced, violated their rights 'in that it threatens their religious liberty by placing a premium on belief as against nonbelief and subjects their freedom of conscience to the rule of the majority; it pronounces belief in God as the source of all moral and spiritual values, equating these values with religious values, and thereby renders sinister, alien and suspect the beliefs and ideals of your Petitioners, promoting doubt and question of their morality, good citizenship and good faith.'

The respondents demurred and the trial court, recognizing that the demurrer admitted all facts well pleaded, sustained it without leave to amend. The Maryland Court of Appeals affirmed, the majority of four justices holding the exercise not in violation of the First and Fourteenth Amendments, with three justices dissenting. We granted certiorari.

II

It is true that religion has been closely identified with our history and government. As we said in Engel v. Vitale, 'The history of man is inseparable from the history of religion. And . . . since the beginning of that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.'' In Zorach v. Clauson, we gave specific recognition to the proposition that '(w)e are a religious people whose institutions presuppose a Supreme Being.' The fact that the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself. This background is evidenced today in our public life through the continuance in our oaths of office from the Presidency to the Alderman of the final supplication, 'So help me God.' Likewise each House of the Congress provides through its Chaplain an opening prayer, and the sessions of this Court are declared open by the crier in a short ceremony, the final phrase of which invokes the grace of God. Again, there are such manifestations in our military forces, where those of our citizens who are under the restrictions of military service wish to engage in voluntary worship. Indeed, only last year an official survey of

the country indicated that 64% of our people have church membership, while less than 3% profess no religion whatever. . . .

This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups.

III

. . . .

First, this Court has decisively settled that the First Amendment's mandate that 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof' has been made wholly applicable to the States by the Fourteenth Amendment. Twenty-three years ago in Cantwell v. Connecticut, this Court, through Mr. Justice Roberts, said: 'The fundamental concept of liberty embodied in that (Fourteenth) Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. . . . In a series of cases since *Cantwell* the Court has repeatedly reaffirmed that doctrine, and we do so now.

Second, this Court has rejected unequivocally the contention that the Establishment Clause forbids only governmental preference of one religion over another. Almost 20 years ago in *Everson,* the Court said that '(n)either a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another.' And Mr. Justice Jackson, dissenting, agreed: . . .

. . . .

The same conclusion has been firmly maintained ever since that time and we reaffirm it now.

While none of the parties to either of these cases has questioned these basic conclusions of the Court, both of which have been long established, recognized and consistently reaffirmed, others continue to question their history, logic and efficacy. Such contentions, in the light of the consistent interpretation in cases of this Court, seem entirely untenable and of value only as academic exercises.

IV

The interrelationship of the Establishment and the Free Exercise Clauses was first touched upon by Mr. Justice Roberts for the Court in *Cantwell v. Connecticut,* where it was said that their 'inhibition of legislation' had 'a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.'

A half dozen years later in *Everson v. Board of Education,* this Court, through Mr. Justice BLACK, stated that the 'scope of the First Amendment . . . was designed forever to suppress' the establishment of religion or the prohibition of the free exercise thereof. In short, the Court held that the Amendment 'requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.'

. . . .

Only one year later the Court was asked to reconsider and repudiate the doctrine of these cases in *McCollum v. Board of Education.* It was argued that 'historically the First Amendment was intended to forbid only, government preference of one religion over another. . . .'

In 1952 in *Zorach v. Clauson,* Mr. Justice DOUGLAS for the Court reiterated:

'There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'ESTABLISHMENT' OF RELIGION ARE CONCERNED, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter.'

. . . .

. . . . in *Engel v. Vitale,* only last year, these principles were so universally recognized that the Court, without the citation of a single case and over the sole dissent of Mr. Justice STEWART, reaffirmed them. The Court found the 22-word prayer used in 'New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer . . . (to be) a religious activity.' It held that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.' . . .

V

The wholesome 'neutrality' of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson.* The trial court in No. 142 *Abington v. Schempp* has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause.

There is no such specific finding as to the religious character of the exercises in No. 119, *Murray v. Curlett* and the State contends (as does the State in No. 142) that the program is an effort to extend its benefits to all public school children without regard to their religious belief. Included within its secular purposes, it says, are the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature. The case came up on demurrer, of course, to

a petition which alleged that the uniform practice under the rule had been to read from the King James version of the Bible and that the exercise was sectarian. The short answer, therefore, is that the religious character of the exercise was admitted by the State. But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible. Surely the place of the Bible as an instrument of religion cannot be gainsaid, and the State's recognition of the pervading religious character of the ceremony is evident from the rule's specific permission of the alternative use of the Catholic Douay version as well as the recent amendment permitting nonattendance at the exercises. None of these factors is consistent with the contention that the Bible is here used either as an instrument for nonreligious moral inspiration or as a reference for the teaching of secular subjects.

The conclusion follows that in both cases the laws require religious exercises and such exercises are being conducted in direct violation of the rights of the appellees and petitioners. Nor are these required exercises mitigated by the fact that individual students may absent themselves upon parental request, for that fact furnishes no defense to a claim of unconstitutionality under the Establishment Clause. Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and, in the words of Madison, 'it is proper to take alarm at the first experiment on our liberties.'

It is insisted that unless these religious exercises are permitted a 'religion of secularism' is established in the schools. We agree of course that the State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.' We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs. Such a contention was effectively answered by Mr. Justice Jackson for the Court in *West Virginia Board of Education v. Barnette.* 'The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to . . . freedom of worship . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.'

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment. Applying that rule to the facts of these cases, we affirm the judgment in No. 142. In No. 119, the judgment is reversed and the cause remanded to the Maryland Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

Judgment in No. 142 affirmed; judgment in No. 119 reversed and cause remanded with directions.

Citation: *Abington Township School District v. Schempp* and *Murray v. Curlett,* 374 U.S. 203 (1963).

Abood v. Detroit Board of Education

The legal issue addressed in the 1977 Supreme Court case *Abood v. Detroit Board of Education* was whether agency shop clauses violate the constitutional rights of government employees, including public school teachers, who do not believe the public sector should be unionized or who disagree with certain activities funded by their union through dues or service charges. The court found that such clauses cannot be used to force members to conform to particular ideologies if they disagree.

Facts of the Case

Agency shop clauses are those sections of collective bargaining agreements between employers and unions that compel employees to pay union dues, even if they are not union members. Agency shop clauses are usually included in collective bargaining agreements, because they help protect against a problem known as "free-riding," a situation in which employees who are not union members benefit from union representation without contributing to the costs associated with union representation.

In a prior Supreme Court case, *Railway Employes'* [sic] *Department v. Hanson,* the Court upheld the prevention of free-riding as a valid rationale for the inclusion of agency shop clauses in collective bargaining agreements. *Abood* was the first case in which the Supreme Court specifically addressed the issue of whether unions could use dues or service fee charges collected from nonunion employees to support ideological causes opposed by some employees.

In *Abood,* the collective bargaining agreement between the teachers' union and the school board contained an agency shop clause that required every teacher in the school district to pay a service fee equivalent to union dues. Certain teachers objected to the union's use of the service fees to support economic, religious, political, and other activities and programs of which they disapproved. According to the teachers, these particular activities and programs were outside the scope of collective bargaining, which specifically refers to issues surrounding the negotiation and administration of the collective bargaining agreement between the school district and the union. The teachers claimed that the union's use of service fees for such activities and programs was a violation of both their First and Fourteenth Amendment rights to freedom of association.

The Court's Ruling

The U.S. Supreme Court ruled that agency shop clauses do not violate the First and Fourteenth Amendments if the service fees are exclusively used to fund collective bargaining or activities and programs outside of collective bargaining to which nonunion employees do not object. Based on *Abood,* agency shop clauses cannot be sanctioned as a vehicle for unions to compel ideological conformity through the payment of service fees by public employees. The ideology in question need not be political but could be social, ethical, economic, or of some other type. Employees are legally permitted to disagree with their union's ideology.

It is important to keep in mind that *Abood* is not a blanket prohibition of a union's use of service fees for ideological causes. Rather, for example, following *Abood,* it is permissible for employees to oppose a union's use of service fee contributions for one ideological cause while supporting union uses of their fees for other ideological causes that they do support.

As a direct result of *Abood,* public schools cannot condition the employment of teachers based on their support of union activities and programs outside the scope of collective bargaining. If public school teachers, for instance, refuse to endorse certain political candidates or tax cut plans, they can neither be compelled to contribute financially to the candidate or tax cut plan nor can they lose their jobs based on their lack of support for either the political candidate, tax plan, or both.

When teachers legally dispute a union's use of service fees or union dues for ideological causes that are unrelated to collective bargaining, the challenge is usually based on the First and Fourteenth Amendments. Following *Abood,* when fashioning legal remedies, courts attempt to guard against

compulsory subsidization of the ideological causes that parties object to while simultaneously ensuring that a union can require all teachers to pay the costs associated with the collective bargaining process.

Joseph Oluwole

See also Agency Shop; Collective Bargaining; *Davenport v. Washington Education Association;* Unions

Legal Citations

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).
Railway Employes' [sic] *Department v. Hanson,* 351 U.S. 225 (1956), *reh'g denied,* 352 U.S. 859 (1956).

Academic Freedom

The concept of *academic freedom,* based on First Amendment freedom of speech, applies generally to all levels of education. As the Fifth Circuit wrote in *Edwards v. Aguillard* (1985), a case that eventually made its way to the Supreme Court on the issue of creation science, academic freedom is "the principle that individual instructors are at liberty to teach that which they deem to be appropriate in the exercise of their professional judgment (p. 1257)."

Disputes over classroom content and methodology typically pit a teacher's claim of academic freedom against an educational institution's clearly established, though not absolute, authority to prescribe the curriculum in its schools. Such struggles to determine what will be taught, and in what manner it will be presented, turn school districts, colleges, and universities into battlegrounds between competing viewpoints and agendas.

Educators imagine that academic freedom provides greater protection of their classroom actions than case law supports. Courts consistently, but not unanimously, side with school boards, colleges, and universities when educators refuse to follow curriculum and reasonable administrative commands, teach with unapproved or administratively rejected materials, and in public schools use or allow objectionable language in the classroom, as discussed in this entry. Particularly in light of the ongoing attempts by individual educators and various interest groups to use educational institutions as forums to promote their ideological positions, one can anticipate claims of academic freedom will continue as educators and their schools battle over the right to determine school curriculum.

Elementary and Secondary Public Education

Initial litigation involving claims of academic freedom at the public school level saw several teachers prevail in the first half of the 1970s, when they refused to recite the Pledge of Allegiance, used a particular teaching method of which some educators disapproved, and made controversial statements and discussed sensitive topics in civics classes. Since then, courts have generally supported school officials in disputes over curricular content and instructional methods. Most case law falls into two categories: teachers using or permitting profane and offensive language in the classroom, sometimes allegedly within the context of the curricular lesson; and teachers designing classroom curriculum and using materials and methods to which their administrators and school boards are opposed.

Objectionable Language

Courts consistently side with school boards that discipline educators for using or allowing profane or objectionable language in their classrooms, even if allegedly as part of instructional techniques. For example, one case from New York, *In re Bernstein* (2001), rejected the academic freedom claim of an English teacher who used explicit, although not profane, terms to describe human sexual organs within a curricular lesson on literary technique. Similarly, the Eighth Circuit, in *Lacks v. Ferguson Reorganized School District R-2* (1998), found that academic freedom did not shield an English teacher who allowed students to use profanity and sexually and racially derogatory language in performing student-written plays in a junior English class. Nor did a federal trial court in *Erskine v. Board of Education* (2002) recognize a First Amendment right of teachers to use terminology of their own preference in curricular disputes over language (the use of the word "Negro" in a lesson on the Spanish words for colors).

Controversial Curriculum

Disputes over curricular content and instructional methodology, compared to conflicts involving offensive language, might appear to present classroom educators with a stronger claim of academic freedom. With few exceptions, courts have upheld the authority of school boards to set curricular standards while disciplining educators who refuse to comply with curricular policies and administrative directives, even when the teachers claim a right of academic freedom to design curricular activities in their classrooms. Examples include the prohibiting of an educator's use of a classroom management technique, the dismissal of teachers who showed R-rated movies to their high school students, and the censuring of a board member who, as a volunteer lecturer, showed a film clip of two bare-breasted women.

Other educators lost legal battles with school boards when they attempted to have acting students perform a play of controversial content in an annual statewide competition, persisted in teaching politics in an economics class, tried to use supplemental reading materials without prior approval as required by board regulations, disagreed with a principal's directive to remove a banned book pamphlet posted on the classroom door, and challenged the board's cancellation of a Toleration Day program that would have included a gay speaker.

Rarely have educators prevailed in disputes over curriculum and instructional approaches. One 1972 federal trial court order, *Sterzing v. Fort Bend Independent School District,* found that a board violated the free speech rights of a civics teacher who was arbitrarily discharged for comments about sensitive political (antiwar) and social (interracial marriage) issues. More recently, the Sixth Circuit in *Cockrel v. Shelby County School District* (2001) remanded, for further consideration under the *Mt. Healthy* test, the dismissal of a fifth grade teacher in Kentucky who invited actor Woody Harrelson to discuss the environmental benefits of industrial hemp (an illegal substance in that state) and allowed hemp seeds to be passed around her classroom during Harrelson's presentation. (In *Mt. Healthy City Board of Education v. Doyle,* the Court explained that if a teacher who is subject to dismissal can demonstrate that protected conduct about a school matter was a substantial or motivating factor in a board's action, then officials must have the chance to show that they would have reached the same result even if the individual had not engaged in the protected free speech).

Criticism of Employers

Claims of academic freedom and freedom of speech often surface when school boards discipline outspoken educators. Educators who publicly oppose their boards and administrators on curricular issues and later find themselves facing discipline may claim protection of the First Amendment through the *Mt. Healthy* test. Employees must first establish that their expression was constitutionally protected because it dealt with a matter of public concern, did not excessively disrupt the operation and harmony of the school, and was a motivating factor in board decisions subjecting them to punishment. Boards then have the burden of showing that they would have disciplined the employee even if the protected expression had not occurred. If employees prevail under the *Mt. Healthy* test, the First Amendment shields the protected expression, regardless of how disturbing it may be to the administration and the board.

A recent example of an educator's allegation of reprisal for controversial but protected expression is found in the Tenth Circuit's judgment in *Greenshields v. Independent School District No. I-1016 of Payne County, Oklahoma* (2006). An elementary teacher repeatedly refused to follow her board's elementary science curriculum, because she felt the required learning modules were inferior to the traditional methods and materials she used. The court found that the board, rather than retaliating against the teacher for her criticism of the science curriculum, the public controversy she generated, and her litigation against the board, had refused to renew her contract because of willful neglect of duty, incompetence, and unsatisfactory teaching performance based on her refusal to follow its curriculum, policies, and administrative directives.

Higher Education

The concept of academic freedom, though not absolute, is more clearly established at the collegiate level than in public elementary and secondary education. While

the right of faculty members in higher education to determine the curricular content and instructional methods in their courses is generally recognized, courts disagree over whether the concept of academic freedom applies to situations involving profane or offensive language in the classroom.

Early court rulings involving academic freedom in higher education dealt with McCarthyist concerns of subversion and disloyalty in public positions after World War II. Mixed Supreme Court decisions resulted when states attempted to require faculty to sign loyalty oaths, disclose personal memberships in organizations, swear that they were not Communist Party members or advocates of overthrowing the government, and testify as to the content of classroom lectures.

Federal appellate courts more recently have divided over the issue of whether faculty members have a protected right to use or permit derogatory or profane language in their classrooms. The Sixth Circuit twice ruled in favor of educational institutions, once in *Dambrot v. Central Michigan University* (1995), where it held that academic freedom did not shield a basketball coach who used the word "nigger" in a locker room session, although allegedly in a positive, reinforcing manner (hard-nosed, tough, and fearless, according to the coach). The same court, in *Bonnell v. Lorenzo* (2001), again found no First Amendment protection for an English professor who used profane terms for sexual intercourse and female reproductive organs, despite his claim that he used such terms in class to demonstrate an academic point.

Yet, in other cases, the Sixth and Tenth Circuits sided with faculty members who used crude and offensive language. In *Hardy v. Jefferson Community College* (2001), the Sixth Circuit found that the First Amendment protected a faculty member's use of the terms "nigger" and "bitch" in an academic discussion, not gratuitously in an abusive manner, in a class partly devoted to interpersonal communication. Additionally, in an emerging free speech issue involving technology, the Fourth and Tenth Circuits refused to recognize faculty First Amendment rights to access or view, on state owned or leased computers, sexually explicit materials or news servers that carry such material.

Ralph Sharp

See also First Amendment; *Keyishian v. Board of Regents;* Loyalty Oaths; *Mt. Healthy City Board of Education v. Doyle;* Teacher Rights

Legal Citations

Aguillard v. Edwards, 765 F.2d 1251 (5th Cir. 1985).
Bonnell v. Lorenzo, 241 F.3d 800 (6th Cir. 2001).
Cockrel v. Shelby County School District, 270 F.3d 1036 (6th Cir. 2001).
Dambrot v. Central Michigan University, 55 F.3d 1177 (6th Cir. 1995).
Erskine v. Board of Education, 207 F. Supp. 2d 407 (D.Md. 2002), *aff'd,* 56 Fed. Appx. 615 (4th Cir. 2003).
Greenshields v. Independent School District I-1016 of Payne County, Oklahoma, 174 Fed. Appx. 426 (10th Cir. 2006).
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Academic Sanctions

Academic sanctions are penalties that school officials use to penalize students for poor academic performances. Legally, school officials have the right to use academic sanctions when students perform poorly academically. Some examples of academic sanctions are academic probation, retention, expulsion, denial of course credit, changes in ranking, modifying honors, or failing. Courts routinely uphold academic sanctions, even though they recognize that when officials implement academic sanctions, there may be negative consequences for students' futures: The sanctions may impact the students' academic records, affect their school standing, and/or limit their access to future military or government jobs. Legal actions related to academic sanctions are discussed in this entry.

Sanctions for Academic Performance

In the United States, pursuant to the Tenth Amendment, management and control of public education

are ultimately the responsibility of individual states. States have broad authority under their constitutions or under statutes or regulations that establish school systems and compulsory attendance laws to make and enforce rules pertaining to the daily operations of schools. As state actors, local school boards have the authority to define the offenses for which students may be disciplined or excluded from schools. Courts generally sustain the authority of school boards, through various officials, to impose academic sanctions, so long as they exercise their authority reasonably and their actions have a reasonable relation to some legitimate school purpose. State legislatures and courts have thus acknowledged academic sanctions as being within the educational management and control authority of states and local school boards.

The courts ordinarily uphold reasonable academic sanctions applied by school officials. These sanctions include the use of grades, placements, rankings, honors, or other forms of academic status to punish students for unacceptable behavior in violation of school rules. To this end, there is general agreement that grade reduction is acceptable as a form of discipline for poor academic performance. Other types of academic performance for which academic sanctions have been accepted include misbehaviors related to cheating and plagiarism. In fact, most school policies include statements of academic rules of conduct and the range of consequences for breaking these rules. Moreover, these policies are often incorporated into student handbooks provided to entire student bodies.

When school boards and their teachers use academic sanctions for poor academic performance, courts are reluctant to substitute their own judgments for those of educators in assessing student performance. The U.S. Supreme Court had declared that when judges review the substance of academic decisions, they should show great respect for the professional judgments of educators. Courts generally do not override school and faculty determinations unless they are such substantial departures from accepted academic norms that they constitute failures to exercise appropriate professional judgment. Consequently, school officials have broad discretionary powers in establishing academic standards, promulgating academic sanctions, and imposing these rules. Courts routinely uphold academic sanctions where they are reasonable insofar as they are rationally related to valid educational purposes or goals.

Sanctions for Nonacademic Reasons

There is some controversy related to the use of grade reductions and academic sanctions as discipline for nonacademic transgressions, such as significant absences. Insofar as student absences and truancy from school are growing concerns for school boards nationwide, many systems have promulgated policies including the use of grade reduction as a sanction for unapproved absences or truancies. The courts generally recognize the authority of local school boards to adopt uniform rules concerning attendance, as this is necessarily implied by state statutes defining the educational missions of schools.

Schools officials maintain that students cannot perform academic tasks satisfactorily if they are absent and that grades reflect not only class work but also class participation, which is affected by absences. As a result, many school systems have promulgated academic sanctions for excessive school absences; an example would be requiring grades to be lowered by one letter grade per class for unexcused absences.

As school officials continue to grapple with the serious problem of truancy, it is likely that boards will consider implementing academic sanctions related to serious absences. Courts have examined not only the constitutionality of these school rules but also the due process requirements related to their violation. In the case of absenteeism, courts typically look to whether sanctions are academic or disciplinary, often concluding that if sanctions are disciplinary in nature, educators must provide students with due process prior to imposing punishments. In all instances, schools must promulgate the academic sanctions in advance and notify students and their parents before implementing rules.

School boards have also applied academic sanctions for student misconduct. These sanctions often impact course credit, participation in after-school activities or sports, or participation in graduation ceremonies. Courts have reviewed school rules related to serious class disruptions, gross misbehavior, acting in unauthorized manners, or having unexcused absences.

In doing so, courts generally conclude that as long as school regulations are reasonable and serve legitimate educational purposes, and as long as students are notified of the rules in advance, the resulting academic sanctions may remain in place. If academic sanctions are unrelated to academic conduct, appear unreasonable, are arbitrary, or are excessively disproportionate to students' violation of school rules, courts generally do not uphold school sanctions.

In some cases, courts require school officials to apply due process prior to imposing academic sanctions. The courts have examined this notion on a case by case basis, routinely agreeing that school policies related to academic sanctions need to contain elements of due process associated with basic constitutional fairness. These due process requirements include fair and timely notice of the rules to students (and their parents) in advance, timely notice of charges against alleged offenders, an opportunity for the parties to prepare for hearings, hearings and decisions by a fair and impartial third party decision maker, the right to present evidence, and a limited right to confront witnesses and to challenge adverse evidence.

The concept of academic sanctions, which is applied in other contexts within schooling, is often incorporated into federal statutes related to education. By way of illustration, the No Child Left Behind Act (2001) mandates academic sanctions when school systems fail to comply with federal law. Under this law, if school boards are unable to demonstrate improvement over specified periods of time or fail to make adequate yearly progress, they may face academic sanctions delineated in the statute. State laws may impose similar sanctions on school systems.

Another arena where the concept of academic sanctions often applies is school athletics. Sports programs typically have academic standards that students must meet in order to be eligible to participate on sport teams. Should student athletes fail to meet those eligibility requirements, they or their teams may find they have incurred academic sanctions. In addition, when school teams compete in athletic events sponsored by or organized by athletic associations, there are often eligibility requirements. Eligibility requirements typically refer to minimum requirements for student-athletes' grades and graduation rates, with school systems being held accountable for the academic success of their players.

School cases concerning alcohol, drugs, or weapons often invoke school penalties, including academic sanctions. To the extent that school boards are legally required to protect students under their care, pursuant to their establishment of schools and compulsory attendance statutes, officials usually maintain and implement rules that incorporate harsh penalties for the use or possession of dangerous substances or devices. Courts generally uphold academic sanctions within these contexts.

Vivian Hopp Gordon

See also Compulsory Attendance; Due Process; *Goss v. Lopez;* Grading Practices

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Acceptable Use Policies

Acceptable use policies (AUPs) are sets of rules, regulations, rights, and responsibilities adopted by school officials (either in individual schools or at the board level), colleges, and universities designed to regulate and monitor the computer activity of students, staff, and visitors. AUPs are necessary to restrict the ability that students and staff have to access, store, and send sexual, violent, or otherwise unlawful material online.

AUPs generally apply both to the Internet and the general use of personal computers, computer networks, and other audiovisual communication equipment owned and controlled by school boards. This entry describes typical content and related legal issues.

Codes of Conduct

AUPs extend traditional codes of conduct to electronic media and serve to educate members of school communities about appropriate conduct in cyberspace. AUPs should not be enacted merely for disciplinary monitoring and punishment. The best AUPs are implemented with education in mind, allowing computer users to learn about technology generally and to understand their rights and responsibilities as well as the rights and responsibilities of others.

AUPs should offer sets of "do's" and "don'ts" for computer users. At a minimum, AUPs should prohibit use of the Internet for non–school-related activities and note, strongly, a prohibition of computer use for personal business that might be a professional conflict of interest for the user. In addition, AUPs should prohibit malice, recklessness, invasion of privacy, theft, harassment, bullying, copyright infringement, lewd and vulgar expression (in words, pictures, videos, or sound), and violation of other applicable laws, regulations, or institutional policies.

Like any code of conduct, AUPs face legal challenges from multiple perspectives: First Amendment freedom of expression, Fourteenth Amendment due process, Fourth Amendment privacy, other privacy claims, and copyright, as well as issues of harassment, bullying (including cyberbullying), and liability. For the most part, the law that applies to the face-to-face school community also applies to the cyberspace community, making the law related to AUPs not all that different, despite the significant difference in medium and forum.

Related Legal Cases

Not surprisingly, school officials retain authority over the electronic forums that they provide for students and staff. So, while students and staff do not "shed their constitutional rights to freedom of expression at the schoolhouse gate" (*Tinker v. Des Moines Independent Community School District,* 1969, p. 506), AUPs generally prohibit personal speech and other conduct that disrupts the rights of others or materially and substantially interferes with the work of the school. The most applicable First Amendment principles that apply to the enforcement of AUPs are those prohibiting lewd and vulgar expression, including that of a sexual nature (*Bethel School District No. 403 v. Fraser,* 1986) and those permitting school officials to exercise editorial control over the content and style of student and staff expression in school-sponsored activities such as school district Web sites or online newspapers (see *Hazelwood School District v. Kuhlmeier,* 1988). School officials are permitted and encouraged to install filtering software on their computers to prevent computer users from accessing unwanted material. Such software does not violate the free speech rights of students, staff, and visitors.

Due process is an important concern in the implementation of AUPs, just as it is for all codes of conduct. With respect to student discipline, for example, suspension and expulsion from school implicates both liberty and property rights under the Fourteenth Amendments. Any provision of an AUP that subjects violators to such punishment should be spelled out with great clarity in terms of the nature of the infraction and the nature of the punishment. Most often, computer use at school, particularly for students and visitors, is a privilege and not a recognized constitutional right. In such cases, the due process obligations on the part of the school are far less.

Privacy, bullying, and harassment matters in cyberspace are a huge concern today, in light of the prominence of such sites as MySpace and Facebook. Schools are encouraged to limit access to these and other similar sites on school computers. In addition to restricting access, AUPs ought to prohibit posting of items to Web sites, as well. Cyberspace bullying and online harassment carry with them the same legal, policy, and liability obligations as bullying and harassment in face-to-face encounters do. Therefore, it is important that school officials enforce antibullying and antiharassment policies online, as well. Failure to respond to known harassment and bullying, wherever it occurs, will subject schools to monetary damage liability. With respect to copyright infringement, schools—as Internet service providers for students and staff—can limit or eliminate their liability for the infringing activities of students and staff if they promulgate and enforce codes of conduct for computer use and offer education on copyright law to computer users.

Patrick D. Pauken

See also Children's Internet Protection Act; Copyright; Cyberbullying; Digital Millennium Copyright Act; Electronic Document Retention; Fourteenth Amendment; Free Speech and Expression Rights of Students; Internet Content Filtering; Plagiarism; Privacy Rights of Students; Privacy Rights of Teachers; Sexual Harassment, Peer-to-Peer; Technology and the Law; Title IX and Sexual Harassment; Virtual Schools

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Access to Programs and Facilities

When addressing the topic of access to educational programs and facilities, two concepts are extremely important: *equal access* and *viewpoint neutrality*. Equal access to educational programs and facilities means that if one individual or group is allowed access to an educational program and/or facility that operates a limited open forum, then all other individuals and groups must be allowed access under the same terms. Viewpoint neutrality forbids officials at state educational institutions from basing their decisions as to who should have access to facilities on the content of applicants' expression. This entry looks at the law related to both issues.

Equal Access

In 1984, Congress passed the Equal Access Act. Up to that point, the courts were split on the topic of whether student Bible study and prayer groups had a constitutional right to access educational facilities. The Equal Access Act was an attempt by the Congress to clarify those First Amendment rights, using the reasoning from the U.S. Supreme Court decision in *Widmar v. Vincent* (1981) and applying it to noncurricular high school activities, so that student prayer groups could have a presence at the school. In *Widmar,* the University of Missouri, concerned about running afoul of the Establishment Clause of the First Amendment, refused to allow a student religious group access to university facilities, although it allowed other nonreligious groups such access. In support of its holding, the Court explained that the refusal to allow access on equal grounds was a violation of the First Amendment freedom of speech rights of the religious student group.

According to the Equal Access Act, if officials in schools that receive federal funding allow noncurricular activities and student clubs to be recognized and meet in school facilities during noninstructional time, then they cannot deny the same access to student religious groups. This is because they have created something called a "limited open forum." Once school officials create this limited open forum, then they must grant access under equal terms to all student groups regardless of their religious, political, or philosophical beliefs. In *Board of Education of Westside Community Schools v. Mergens* (1990), the Supreme Court upheld the constitutionality of the Equal Access Act, defined *noncurricular* and gave specific guidance as to the handling of student religious groups so as to avoid a violation of the Establishment Clause of the First Amendment.

For a court that normally leaves the day-to-day operations of the public schools to the discretion of school administrators, the justices were very direct in defining what constitutes a noncurricular club, thereby creating a limited open forum. Under the Court's definition, if a school has clubs that conduct

activities that are not directly included in the school's curriculum—for example, a chess club but no chess class, a scuba diving club but no scuba diving unit in the physical education curriculum—then those clubs are "noncurricular." Under this definition, if school officials allow those clubs to meet on school property, then they have created a limited open forum.

Once this limited open forum has been created, then student religious groups must be allowed access as well, although because of the potential Establishment Clause violation, religious groups must meet two criteria that are not required of other noncurricular groups. First, the student religious group must be student initiated and student led. Second, if there is a faculty sponsor required for noncurricular groups, the faculty sponsor for the student religious group may not participate; he or she may be present solely as a chaperone to make sure that facilities are available and that no damage is done to school property.

Widmar and *Mergens* caused another type of analysis to develop when courts are reviewing issues of access to school facilities. This analysis is called the "forum analysis." Under this analysis, there are three types of possible forums in institutions of public education: public forums such as parks and sidewalks, where speech can only be restrained under a compelling state interest; limited public forums such as were defined in *Mergens;* and closed forums where the area is not open to the public and is under the strict control of a school board. School officials could create this third type of forum, the closed forum, by disbanding any noncurricular activity groups and making sure that all activities engaged in by students were included within the school curriculum.

Viewpoint Neutrality

The second concept, viewpoint neutrality, while imbedded in the rationales surrounding the Equal Access Act and limited open forums, is most often seen when religious groups wish to use school facilities after school hours. Again, due to fear of violating the Establishment Clause, many schools had policies that allowed other community groups to use school facilities after hours but barred community religious groups from doing the same.

In *Lamb's Chapel v. Center Moriches Union Free School District* (1995), the Supreme Court used a viewpoint neutrality analysis to evaluate whether the school board's denial of a religious group's request to use the district facilities after school hours to show a series of family-friendly films was a violation of the group's constitutional rights. In finding for the group, the Court unanimously ruled that by allowing other groups such as the Salvation Army Band, Center Moriches Quilting Bee, Center Moriches Drama Club, the Girl Scouts, and the Boy Scouts to use the facilities, the district had established a limited open forum. Therefore, the Court maintained that the board's refusal to allow the religious group the same access was unconstitutional. The Court essentially reaffirmed this rationale in 2001 in *Good News Club v. Milford Central School.* This case was another instance wherein school officials initially disallowed a community religious group to use facilities after hours, even though such access was allowed to other, nonreligious, community groups.

The rule of thumb which school boards should use when it comes to access of school programs and facilities is to treat all groups in a similar manner. School officials cannot pick and choose which individuals and groups may use its facilities based on the religious, political, and/or philosophical beliefs of the groups. Rather, educational officials should set basic guidelines for all who wish access to school facilities and programs based on criteria reasonably related to the mission of their schools; with minimal discretion to forbid access should those criteria be met so as to avoid claims of constitutional violations.

Elizabeth T. Lugg

See also *Board of Education of Westside Community Schools v. Mergens;* Equal Access Act; *Lamb's Chapel v. Center Moriches Union Free School District*

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Good News Club v. Milford Central School, 533 U.S. 98 (2001).
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1995).
Widmar v. Vincent, 454 U.S. 263 (1981).

Adequate Yearly Progress

Adequate Yearly Progress (AYP) is a measure established under the No Child Left Behind Act (NCLB, 2002) by which schools and districts must demonstrate that their students are improving annually in academic achievement. Specifically, to achieve Adequate Yearly Progress (AYP), public schools must demonstrate an increase in the percentage of students who meet or exceed the statewide annual achievement objectives. If schools or systems fail to meet their goals, they can be subject to three remedies of increasing severity. This entry describes the background of NCLB's AYP requirements and their accompanying penalties.

Background of the Law

For decades, researchers, educators, and policymakers have attempted to remedy the gross disparities in achievement between students of color and Whites. The realization that a large achievement gap persists, despite a half a century of efforts to improve educational opportunities, brought issues of access, equity, and student achievement to the fore. Stakeholders in education begin to re-evaluate the current education system in an effort to develop more effective educational reform measures.

As a result, NCLB, which amended the Elementary and Secondary Education Act of 1965, was signed into law January 8, 2002. The primary objective of this law was to address public concern regarding issues of access and equity in education. The founding principle of NCLB is the notion that educators should be held accountable for the academic performance of all students.

Under this law, schools, boards, and states are required to demonstrate that 100% of students have achieved grade-level proficiency in reading and mathematics by the year 2014. In order to ensure that school officials fulfill this mandate, NCLB requires educators to establish benchmarks for proficiency standards to evaluate whether individual schools and districts are making adequate yearly progress toward 100% student proficiency.

At the same time, in an effort to close the achievement gap, NCLB requires school systems to distinguish annual achievement gains with respect to the following subgroups of students: African American, Caucasian, Asian/Pacific Islander, Hispanic, American Indian/Native Alaskan, those who are economically disadvantaged, those with disabilities, and those with limited English proficiency. Under NCLB, entire schools can be classified as not making AYP if any subgroup of students fails to demonstrate an increase in annual achievement outcomes. NCLB's requirement that all students demonstrate progress is intended to reduce the current achievement gap in America's schools.

NCLB not only requires education officials to measure whether children are making AYP, it also requires school boards to issue annual report cards that detail their students' performance on statewide academic assessments in comparison to the performance of other students within a state. The student progress information located within the annual report card must disaggregate student achievement by race, gender, family income level (limited to whether students are living in poverty), English proficiency, and disability. The legislative intent behind this requirement is to keep parents abreast of student achievement outcomes within the schools of their children and to increase educational accountability for student success.

Remedies

In accordance with NCLB's dictates, schools failing to meet annual achievement objectives must follow mandatory school improvement efforts, which are categorized into three stages. During the first stage, schools failing to demonstrate AYP are issued warnings and required to develop school plans in consultation with school staff, parents, district staff, and external experts to address the poor academic performance of students. In addition, schools in the first stage are required to provide students with options to transfer to nonfailing schools.

Schools that fail to make AYP for two consecutive years move into Stage 2 the "corrective stage," and are identified as in need of improvement. Schools in the corrective stage must develop school improvement plans, continue to provide students with the option of transferring to nonfailing schools, and supply children with free supplemental education

services; these schools are entitled to receive technical assistance from their boards. Moreover, schools that are placed in the corrective stage are required to take at least one of the following actions: replace school staff relevant to the school's failure to make AYP; significantly increase management authority at the school level; appoint an outside expert to advise the school on its progress toward making AYP; extend the school year or school day; restructure the internal organization of the school; or implement a new, scientifically based curriculum and provide professional development for all relevant staff. Several of these actions constitute a partial reconstitution of the school and occur during the first and second stages of accountability as mandated by NCLB.

The third stage of accountability under NCLB is termed *reconstitution.* Reconstitution occurs after one full school year of corrective action if a school continues to fail to make AYP. This stage requires schools to prepare plans to restructure and to adopt alternative governance arrangements consistent with state law. Acceptable arrangements include the following: reopening the school as a public charter; replacing all or most of the staff, which may include the principal or any others viewed as relevant to the school's failure to make AYP; enter into a contract with an entity such as a private management company to operate the school as a public school; turn the operation of the school over to the state if permitted by state laws and agreed to by the state; or any other major restructuring of a school's governance arrangement consistent with the act's requirements. Further, schools in the reconstitution stage must continue to offer students public school choice options and supplemental education services.

As the year 2014 deadline for 100% student proficiency approaches, the effectiveness of NCLB's AYP requirement will be evident. In the meantime, schools throughout America will continue to strive toward making AYP to ensure that all students achieve educational excellence.

Laura R. McNeal

See also Limited English Proficiency; No Child Left Behind Act; Testing, High-Stakes

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Affirmative Action

Affirmative action began as a broad set of activities brought forth by the civil rights movement beginning in the 1930s. As such, the term *affirmative action* initially represented a composite of deliberate activities designed to create or restore the rights of African Americans in American society. The term has come to have both positive and negative connotations. In more recent decades, it has come to be viewed, on the one hand, as a set of programs or policies to level the playing field so as to counter discrimination against persons of color and women in employment and in education. On the other, detractors of affirmative action view such programs as preferential treatment of individuals on the basis of their membership in a minority group. This entry reviews the history of affirmative action and its applications in different arenas.

Historical Background

The concept that is now referred to as affirmative action originated in the Labor Management Relations Act or the Wagner Act signed into law by President Franklin D. Roosevelt in 1935. The U.S. Congress promulgated the original legislation to protect the rights of workers in the private sector so as to organize labor unions and to participate in collective bargaining (29 U.S.C. §§ 141 *et seq*., 2004). Contemporary affirmative action as we have come to know it, that is, fostering positive steps to increase the representation of underrepresented groups in areas where they have historically been excluded, was not given real life until the passage of the Civil Rights Act of 1964 (42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6, 1994).

The effort was further strengthened in 1965 with executive orders from President Lyndon Johnson in the area of employment; specifically Executive Order 11246 required the Office for Civil Rights to take "affirmative action" to ensure that federal contractors were not discriminating against minorities. The employment sector was likewise encouraged to reduce racial and gender discrimination with the passage of additional titles under the Civil Rights Act, notably Title VI (42 U.S.C. § 2000d (2004)) and Title VII (42 U.S.C. § 2000e (2004)), both of which forbid public and private entities, including state and local boards of education, from engaging in discriminatory activity. Armed with these legislative and executive tools, the courts and government administrative offices set forth criteria for compliance with the law or created remedies requiring compliance for those who did not or would not develop adequate affirmative action responses.

Affirmative Action in Employment

Title VII

Affirmative action requirements have at least part of their impetus in Title VII, a far-reaching federal statute under which government agencies or courts address actual intent by employers to discriminate. This federal statute has been the primary vehicle for congressional action concerning discrimination in employment. Title VII's prohibition reads as follows:

> It shall be an unlawful employment practice for an employer: (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [that person's] status as an employee, because of such individual's race, color, religion, sex or national origin. (42 U.S.C. § 2000e-2(a)(1–2)

Title VII's prohibitions inform school officials that they retain the authority to hire, terminate, or promote personnel, as long as such decisions are not predicated upon discrimination as to race, gender, religion, or national origin. This, however, does not mean that employers are not permitted to use gender, religion, national origin, *but not race,* as preferences in employment decisions.

Judicial involvement in Title VII and affirmative action at the level of the United States Supreme Court began in 1971 in *Griggs v. Duke Power Company* (1971). In *Griggs,* the Court struck down an employment screening device, because it excluded a disproportionate number of Black applicants. The company had required both a high school diploma and a certain score on an intelligence test if an employee desired a transfer or a promotion. The African American employees in the company all occupied low-level jobs and filed a class action complaint alleging racial discrimination. The Court ruled the company policy invalid, indicating that the criteria used for making employment decisions were unrelated to job performance.

The significance of *Griggs* is the Supreme Court's reliance on rules that have a disparate impact as opposed to a discriminatory intent. While the Duke policy, for example, was facially neutral, because it disproportionately affected Blacks who desired promotion or transfers, the Court found that the discriminatory result was the same. To this end, by applying *Griggs,* courts struck down facially neutral rules that had the effect of discrimination regardless of purpose or aim. This was an important platform for affirmative action; the legal message to employers, including school districts, was that employment practices had to be monitored for those that were exclusionary in effect as well as intent. Put another way, the courts sent the unmistakeable message that failure to eliminate either could result in a determination of employment discrimination.

A more recent Supreme Court case was based on the statute of limitations period surrounding Title VII as applied to a complaint of intentional discriminatory disparities. In *Ledbetter v. Goodyear Tire and Rubber Company* (2007), the Court had the occasion to remark upon the period of time to bring a complaint. In a case of alleged gender discrimination, a female employee claimed, after she had retired, that her male supervisors had in the past given her poor evaluations because

of her gender and not her work performance, that these decisions affected her pay throughout a significant portion of her employment, and that as a result of these intentionally discriminatory decisions, she had been paid unfairly compared to all of her male counterparts. The plaintiff filed a formal charge of discrimination with the Equal Employment Opportunity Commission (EEOC) in March of 1998; upon her retirement in November, 1998, she filed suit under Title VII of the Civil Rights Act (42 U.S.C. § 2000e-2(a)(1)).

The plaintiff in *Ledbetter* contended that the paychecks she received during the period of employment each violated Title VII and triggered a new EEOC charging period. On appeal, the Supreme Court ruled that the plaintiff's claim was untimely under Title VII standards, because the effects of past discrimination do not restart the clock for filing a charge with the EEOC. According to the Court, an individual wishing to bring a Title VII lawsuit must first file an EEOC charge within 180 days (relevant to this case) after the alleged unlawful employment practice occurred and was communicated. In *Ledbetter,* the plaintiff did not assert that intentionally discriminatory conduct happened during the claimed period or that discriminatory decisions that occurred before that period were not communicated to her. Instead, based on the Court analysis, the plaintiff argued that current discrimination kept alive the discrimination she had suffered previously.

The Court further reasoned that a new violation does not occur, and a new charging period does not commence, on the occurrence of subsequent nondiscriminatory acts that entail adverse effects resulting from the same past discrimination. The Court asserted that a plaintiff's allegations could only move forward if an employer engaged in a series of separately actionable intentionally discriminatory acts. *Ledbetter* establishes, under Title VII, that complaints alleging employment discrimination resulting from the same discriminatory activity, no matter how many, must be filed in a timely manner consistent with the actual wording of the statute.

The Equal Protection Clause

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution also prohibits discrimination based on race, national origin, and gender. State and local boards of education are subject to the dictates of this law as well as by virtue of being public entities. However, within an affirmative action claim, the complaint must be that the discrimination suffered is intentional, not the additional concept of discriminatory effect or impact prohibited under Title VII. This distinction was clarified in a case involving the hiring of police officers, *Washington v. Davis* (1976).

Not unlike the applicants of *Griggs,* applicants in *Davis* claimed disparate impact predicated upon the use of a minimum test score required for entry into the Washington, D.C., police academy. The applicants claimed an abridgement of their constitutional rights against employment discrimination; statistical evidence was brought demonstrating that an overwhelming number of African American applicants had failed the exam and an even greater number of Whites had passed it. Corollary claims were that as a result, the percentage of Blacks in the city population was not commensurate with the number of Black officers on the police force, and the test itself had never been validated as a predictor of performance.

In ruling against the applicants in *Davis,* the Supreme Court addressed the question of the standards of intent and impact under Title VII and the Fourteenth Amendment. Specifically, the Court held that the standards for the federal statute and for the U.S. Constitution are not identical:

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race. . . . But our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially discriminatory impact. (426 U.S. at 238–239)

Following *Davis,* federal courts have had occasion to address the question of the standard of judicial review in conflicts involving racial classifications under the Equal Protection Clause. Over time, three levels of judicial scrutiny have been applied to such challenges, and this was demonstrated in *Cleburne v.*

Cleburne Living Center (1985). Specifically, the Supreme Court wrote as follows:

> When the alleged discrimination is based on race, color, or national origin, strict scrutiny is required, and, to be constitutional, the law or classification in question must be narrowly tailored to serve a compelling government interest. In cases of gender discrimination or illegitimacy the challenged practice must pass an intermediate level of review; the government action must be substantially related to an important government interest. In cases . . . where there is no issue of classification based on race, gender, or other protected-class persons, governmental action need only be rationally related to a legitimate governmental interest.

The direct result of *Davis* is that plaintiffs who claim constitutional protection must exhibit facts that they are the victims of prior discrimination by the governmental unit. Based on *Cleburne,* courts will also apply strict scrutiny, emphasizing that only a compelling governmental interest could justify a racial classification and that the means selected to achieve that interest must be narrowly tailored. These positions, which represent a retreat from the affirmative action programs held constitutional in *Griggs,* was denoted by the Court in *Wygant v. Jackson Board of Education* (1989).

Wygant arose after a school board in Michigan, responding to prior desegregation litigation, entered into an agreement with the local collective bargaining unit whereby African American teachers were to receive greater protection from layoffs than their White counterparts. An area of contention on the part of the White plaintiffs in the case was that the percentage of Black personnel subject to layoff would not exceed their percentage in the work force; the White teachers brought suit under Title VII and the Equal Protection Clause.

A plurality opinion of the Supreme Court in *Wygant* ruled that societal discrimination was an insufficient predicate to justify the racial classification employed for layoffs. The Court asserted that racial classifications for remedial purposes could be approved only on some demonstration of prior discrimination against those to be protected. Hence, the layoff policy favoring persons of color was unconstitutional, unless the school district could prove it had a strong basis in evidence that the action was necessary to remedy some past discrimination in the school district against the identified Black school personnel.

City of Richmond v. J. A. Croson Company (1989) solidifies the foundation and articulates the considerations to be used in determining whether a state or local governmental entity has established an affirmative action program narrowly tailored to meet a compelling interest. Richmond, Virginia, argued for judicial approval of a race-based set-aside program for subcontractors involved in city projects. The plan required those awarded city contracts to subcontract at least 30% of the work to businesses owned or coowned by persons of color. White contractors brought a complaint under the Equal Protection Clause claiming there was no proof of discrimination against those who the city sought to protect.

On appeal in *Croson,* the Supreme Court found that there was no showing of past discrimination in the construction industry, because there was no evidence of past discrimination by the city itself. Applying the doctrine of strong basis in evidence used in the *Wygant* decision, the Court was of the opinion that societal discrimination that had occurred in the state or the nation was an inadequate reason to demonstrate bias in the city. The Court determined, instead, that local government had to articulate evidence of its own past discrimination and consideration of more narrowly tailored means to accomplish the same ends.

Croson serves as the foundation for affirmative action cases in education employment, to wit, to promote affirmative action programs, state or local education agencies must have engaged in some past racial discrimination that affects current employees. In addition, under *Croson,* remedial policies must satisfy a compelling government interest that is narrowly tailored and does not create in Whites the status of innocent victims.

Affirmative Action in Higher Education

Regents of the University of California v. Bakke

Affirmative action had its first application in education at the Supreme Court level in *Regents of the*

University of California v. Bakke (1978). *Bakke* was rendered within a climate of academic reflection on both public and private college campuses, which itself was fueled by a notable absence of non-White students, staff, and faculty. New initiatives were established so as to increase the presence of students of color based on special admissions programs.

The medical school at the University of California at Davis was one of the many institutions that created a dual-track special admissions program whereby 16 of its 100 slots available for admission were reserved for minority students. A White male student applicant, who was refused admission for two consecutive years, claimed that he was discriminated against on the basis of race, because the entrance procedures in place included an exclusive quota and because he was more qualified than the students of color who were admitted into the program. The disappointed applicant brought a complaint against the university claiming that its admissions program violated Title VI of the Civil Rights Act of 1964 and that he was denied equal protection under the Fourteenth Amendment of the United States Constitution. In other words, the plaintiff alleged a reverse discrimination claim and requested that the courts compel university officials to use a color-blind, race-neutral admissions policy.

In *Bakke,* four justices concluded that the admissions program violated Title VI, and they never reached the constitutional issue. A majority of justices agreed that there was a clear overlap between the dictates of Title VI and the Fourteenth Amendment, in that equal protection was the overriding factor. There was disagreement within this group, however, on the level of judicial scrutiny. Four justices embraced the standard of intermediate review and would have held that the special admissions program was an appropriate use of racial classifications to achieve important government objectives.

Justice Powell's now famous concurring opinion disagreed, explaining that any classification on the basis of race must be decided on strict scrutiny requiring a compelling government interest carried out on the narrowest of grounds. Justice Powell sided with four justices holding that the program was invalid, but he agreed with the other four that race could be taken into account as "a" factor as opposed to "the" factor in the admissions process. He agreed that the university had a compelling interest in fostering diversity so as to provide an educational atmosphere "conducive to speculation, experiment and creation"; in essence, the compelling reason of student diversity is legitimated by the university's protection under the doctrine of academic freedom.

As Justice Powell declared, "diversity is a compelling interest," in part because "universities must be accorded the right to select those students who will contribute the most to the robust exchange of ideas." Writing for the plurality, he stated that one of the reasons for which the goal of obtaining a diverse student body in higher education is permissible is to promote academic freedom. Quoting the president of Princeton University, Justice Powell reasoned that, because a great deal of learning in the higher education setting occurs when students are exposed to people of different races, sexes, religions, backgrounds, and interests, affirmative action at the higher education level is constitutional under the First Amendment following a theory of higher education institutional academic freedom.

Bakke established that diversity, supported by academic freedom, could be a compelling reason for academic decisions based on race. However, the Supreme Court overturned the program, because it was not narrowly tailored to affect the university's stated interest. Further, *Bakke* established for federal courts that affirmative action using race as a criterion falls under the doctrine of strict judicial scrutiny. While the employment cases cited above all found that a compelling government interest could only be based on past discrimination directed at those who sought a governmental remedy, Justice Powell announced that a compelling reason in education could also be found in diversity and could be held constitutional as long as the race of persons not directly benefited do not suffer reverse discrimination as a consequence of the governmentally sponsored policy.

The *Bakke* interpretation, which had existed for over a generation, began to be challenged in the mid-1990s. Federal courts of appeal in the Fourth, Fifth, and Eleventh circuits all found voluntary affirmative action programs troublesome with regard to admissions or scholarship support. In particular, the Fifth

Circuit ruled that the University of Texas could not justify its minority admissions program. The court brought into question the use of diversity as a compelling reason to pursue racial classifications and in the process flatly rejected the Powell rationale: "Justice Powell's argument in Bakke garnered only his own vote and has never represented the view of the majority of the Court in Bakke or any other case" (*Hopwood v. Texas,* 1996, p. 944).

The federal circuits were in conflict. In *Smith v. University of Washington Law School* (2000), the Ninth Circuit ruled that race could be used as a factor in admissions and, in deliberate opposition to the Fifth and Eleventh Circuits, allowed that diversity is a compelling interest in university admissions decisions. This opinion was followed a year later in a case decided in the Sixth Circuit endorsing Justice Powell's position and announcing that institutions of higher education have a compelling interest in achieving a diverse student body (*Grutter v. Bollinger,* 2002).

Gratz v. Bollinger *and* Grutter v. Bollinger

To assuage the disharmony at the lower federal levels, the Supreme Court granted certiorari in two aligned cases. *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003) considered the use of race in the University of Michigan's undergraduate admissions process and law school admissions process, respectively. In deciding both cases, the Court affirmed Justice Powell's view in *Bakke* that use of race in college admissions decisions is constitutional, so long as it is viewed as a "plus factor" and does not constitute a quota.

In *Gratz,* the Supreme Court found that the University of Michigan's undergraduate admissions policy, which awarded underrepresented minority applicants an additional 20 points and made race the deciding factor for nearly every borderline underrepresented minority applicant, was not narrowly tailored to meet the compelling interest of diversity. The Court's analysis focused on the dearth of individualization inhering in a policy of assigning a constant number of points to an applicant based solely upon his or her racial classification. *Gratz w*as a decision based on stare decisis inasmuch as similar admissions practices had been declared unconstitutional in *Bakke.* Therefore, the Court concluded that the program was unconstitutional under the equal protection clause.

In *Grutter,* the Court held that the University of Michigan law school's admissions program, which considered the race of underrepresented minority applicants as a "plus factor" to be considered among other factors, was narrowly tailored to meet the compelling interest of diversity. The opinion goes on to say that "narrow tailoring does not require exhaustion of every conceivable race-neutral alternative" (p. 339), though it does require "that a race-conscious admissions program not unduly harm members of any racial group" (p. 341). The Court laid out the following 5-factor test for narrow tailoring in *Grutter:* prohibition of quotas; flexible, individualized consideration; good faith consideration of workable race-neutral alternatives; not unduly burdensome to nonminority group members; and limited in time.

Justice Sandra Day O'Connor, in writing the opinion of the Court, examined Justice Powell's academic freedom rationale found in *Bakke.* After noting that lower courts had questioned the application of such reasoning to affirmative action cases (and hence, Justice Powell's reasoning), O'Connor concluded that it was no longer necessary to debate this, as "for the reasons set out below, today we endorse Justice Powell's view that student body diversity is a compelling state interest that can justify the use of race in university admissions." The opinion, in fact, advanced the theory of diversity as a targeted activity whereby substantial weight could be placed on "one particular type of diversity," to wit, "racial and ethnic diversity with special reference to the inclusion of students from groups which have been historically discriminated against."

Affirmative Action in K–12 Education

Affirmative action has become an important issue for primary and secondary schools adopting voluntary race-conscious student assignment plans as a remedial measure to achieve the goal of a diverse student body. A "student assignment plan" is what K–12 school systems with more than one school at each level use to decide which students are to attend which school. Student assignment plans incorporate a variety of

factors, including distance between a student's home and school, where a student's siblings attend school, and, in the case of two districts currently before the Court, how a particular student's enrollment would affect a school's racial balance.

A question remains as to whether school boards are constitutionally permitted to consider how student admissions impact a school's racial balance as part of a student assignment plan. If so, courts are likely to apply the same criteria as were used by the Supreme Court in the higher education cases of *Gratz* and *Grutter,* namely whether racial diversity is a compelling interest under the equal protection clause, and if so, whether the student assignment plans of these schools are narrowly tailored to meet this compelling interest. Such questions have been addressed by lower courts, and more recently, the Supreme Court.

Lower Court Student Assignment Plan Cases

In recent years, four circuit courts (the First, Fifth, Sixth, and Ninth) have decided cases regarding the constitutionality of student assignment plans. In *Cavalier v. Caddo Parish School Board* (2005), the Fifth Circuit decided that a race-based student assignment was unconstitutional. In *Cavalier,* a White applicant was denied admission to a magnet middle school when his achievement test score would have been high enough to garner admission had he been Black. When the magnet school's applicant pool contained more qualified applicants than spaces available, preference was given to qualified students with siblings in attendance and to qualified Black students who would otherwise attend a school with greater than 90% Black enrollment. After this, preference was given to other students based on a combination of their test scores and the desired racial balance of 50% White and 50% Black, + 15 percentage points.

The school board argued that this admissions policy was constitutional under the equal protection clause, declaring that it met strict scrutiny with a compelling interest of remedying past discrimination, an interest found in the district's 1981 consent decree. The court disagreed, noting that this admissions policy was "essentially a racial balancing quota" and that it met neither the compelling interest nor the narrow tailoring prong of the strict scrutiny test. Furthermore, the court stated *in dicta* that "While student body diversity has been held a compelling state interest in the context of a law school [in *Grutter*] . . . it is by no means clear that it could be such at or below the high school level (*Cavalier,* p. 259)."

In *Comfort v. Lynn School Committee* (2005), the First Circuit maintained that a school committee, as school boards are known in Massachusetts, had a compelling interest in achieving the benefits of racial diversity and that the student assignment plan it enacted was narrowly tailored to meet this interest. In *Comfort,* the student assignment plan was used with students who did not wish to attend their neighborhood school and applied to transfer to another school in the district. Under the plan, schools were classified as racially balanced (reflecting a variance from the district's student population of no more than 10% to 15%), racially isolated (more White students than there should be), or racially imbalanced (more non-White students than there should be). Students were permitted to transfer from a racially balanced school to another racially balanced school or make a "desegregative" transfer, but they could not make a "segregative" transfer (defined as one that would exacerbate the racial imbalance of either the sending or receiving school or both).

Noting that the Supreme Court had not decided a K–12 student assignment plan case, the circuit court judges reasoned that *Gutter* and *Gratz* provided some guidance for a narrow tailoring inquiry into the use of race to obtain the educational benefits of diversity. The judges believed these cases still applied even though a comparison of different age and education levels was at stake and that the decided cases involved competitive admissions. Under *Grutter,* the plan would not be narrowly tailored if the compelling interest could be resolved through race-neutral means. In keeping with the *Grutte*r reasoning, the First Circuit found that the goal of actual diversity to promote tolerance and encourage cross-cultural relationships could only be accomplished if race was used as one of the qualities for the placement of students.

In *McFarland v. Jefferson County Public Schools* (2005), the Sixth Circuit affirmed an order of a

federal trial court in Kentucky that held that the student assignment plan of the Jefferson County Schools met a compelling governmental interest and was narrowly tailored in most respects, as "its broad racial guidelines do not constitute a quota . . . the Board avoids the use of race in predominant and unnecessary ways that unduly harm members of a particular racial group . . . [and] the Board also uses other race-neutral means, such as geographic boundaries, special programs and student choice, to achieve racial integration" (p. 514). In addition to the compelling interest of diversity similar to that discussed in *Grutter,* the court was satisfied that the school board had described other compelling interests and benefits of integrated schools, such as improved student education and better community support for public schools, that were not relevant in the law school context but are relevant to public elementary and secondary schools.

The student assignment plan at issue in *McFarland* was enacted with a purpose of maintaining a system of fully integrated countywide schools. The assignment plan stated that in order for the schools to accomplish their objectives of providing substantially uniform resources to all students and teaching basic and critical thinking skills in a racially integrated environment, each school should seek a Black student enrollment of between 15% and 50%.

In *Parents Involved in Community Schools v. Seattle School District* No. 1 (2005), the Ninth Circuit held that diversity was a compelling state interest and that the district's student assignment plan was narrowly tailored to meet the interest. In 1977 Seattle became the first major city to adopt a voluntary desegregation plan to combat the de facto segregation caused by housing patterns within the district. Under the version of the plan challenged in the case at hand, students were admitted to oversubscribed high schools based on a series of tiebreakers: first whether the student had a sibling at the school and second by considering the child's race in the case of a racially imbalanced school (defined as a school with a racial makeup varying from that of the district as a whole by more than 15%). The school board articulated two compelling interests for promoting diversity: the affirmative educational and social benefits that flow from diversity and the avoidance of harm resulting from racially concentrated or isolated schools.

The Supreme Court, Diversity, and Student Assignment Plans

Based on the important issue at hand, the Supreme Court agreed to hear a consolidated appeal in both *Parents* (2005) and *McFarland,* appealed as *Meredith.*

In *Parents* (2005), the Court highlighted the facts that the City of Seattle had never established a legally segregated school system and that a consent decree ordering desegregation in the Jefferson County, Kentucky, schools had been dissolved in the year 2000 after a finding that the district had eliminated, to the greatest extent possible, the vestiges of prior segregation. The Court reasoned that, as such, neither school district could use previous intentional discrimination as a compelling interest under the strict scrutiny doctrine. However, the record reflected that both school districts had decided to promote voluntary race-conscious student assignment plans characterized as a promotion of a diverse student body. According to the Court, Seattle classified students as White or non-White and used racial classifications as a tiebreaker. Jefferson County continued some of the plans it developed during the desegregation decree and classified students as Black or other for its elementary school assignment plans and school transfers.

In overturning both decisions at the circuit court level, the justices, in a plurality decision, ruled that the school boards had not demonstrated a compelling interest or a sufficiently narrowly tailored approach in their student assignment plans. The Supreme Court first announced that *Grutter* did not apply for two reasons. First, the Court pointed out that *Grutter* was a higher education case in which diversity was promoted as a compelling state interest within the confines of academic freedom. The Court stated that academic freedom was not a constitutional protection bestowed equally at the K–12 level. Moreover, the *Grutte*r Court ruled that only race-neutral means were found to be constitutional. Specifically, the Court indicated that compelling interest was not focused on race but encompassed an infinite number of factors, including having "overcome personal adversity and family

hardship." In other words, the Court was of the view that if race could be used at all, it must be seen, on the one hand, as a substantially diluted construct, or, on the other, as a proxy for socioeconomic status. The use of race-conscious programs was thus reviewed, not as an important element, but as the element or approach that was declared unconstitutional in both *Bakke* and *Gratz*.

Second, the plurality of justices announced that the school boards did not use the narrowest means possible to effect their objectives. Based on its interpretation of past case law, the Supreme Court declared that any use of race is extreme. The majority observed that this had greater application in the instant cases, because each school district testified that its voluntary integration plans had minimal impact on all student classifications. The Court determined that even the minimal impact of the classifications used in Seattle and Jefferson County could not be supported, because no evidence was presented that other means of classification were considered absent the use of race.

In a concurring opinion, Justice Anthony Kennedy agreed that the student assignment plans were not narrowly tailored to achieve the compelling goal of diversity, but he stated also that the plurality opinion was too dismissive of the school district's legitimate interest of providing an equal educational opportunity; according to Kennedy, one important aspect of encouraging student diversity could be attention to racial composition. Kennedy allowed that if school officials are concerned that their schools' racial compositions interfere with equal educational opportunity, they may devise race-conscious measures that address the problem in a general way. Such measures may include strategic site selection for new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performances, and other statistics by race.

Conclusion

The courts have proclaimed that the appropriate level of judicial review for voluntary affirmative action programs is strict scrutiny: demonstrating a compelling government interest with activity that is narrowly tailored to meet that interest. Employment plans based on hiring, promotion, or retention must be carefully analyzed to ensure that race or national origin purposes are narrowly tailored so as not to unnecessarily trammel the rights of White employees.

While the use of race-conscious means for distributing students among schools has been ruled in the past to be an appropriate compelling government interest, this doctrine has been brought into question by the most recent decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007). A plurality opinion determined that a compelling interest may be found in a race-neutral policy, although there remains much uncertainty about programs that are race-conscious. The concurring opinion in *Parents* (2007) counters such a position with the provision that the use of race may still survive constitutional consideration. The difference of opinion awaits further judicial outcome.

Yet, in the meantime, educational leaders and lawyers in schools and districts with voluntary affirmative action policies should examine them under the stricter demands as outlined in this essay. In any case existing affirmative action plans should be considered as provisional and declared no longer necessary once a school board has achieved its stated objective.

Philip T. K. Daniel

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; *Parents Involved in Community Schools v. Seattle School District No. 1;* Title VII

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Age Discrimination

American society is "graying" as health care improves and the baby boom generation approaches retirement age. According to the U.S. Census Bureau, the median age of the population rose from 30.0 in 1980 to 35.2 in 2005. With the aging of the American population have come increased efforts to combat age discrimination in employment and education.

Older Americans have many legal options to contest age-based discrimination. At the federal level, the Equal Protection Clause presents a general remedy for all plaintiffs charging age-based discrimination, regardless of their age. Two federal statutes, the Age Discrimination in Employment Act (for people over 40 years old) and the Age Discrimination Act provide more specific defenses earmarked for the workplace and educational programs receiving federal financial assistance. Some states also offer protection against age bias in constitutional and statutory provisions, sometimes more extensively than the federal measures. These options and education-related cases are reviewed in this entry.

Federal Protection

The Equal Protection Clause of the Fourteenth Amendment guarantees to all persons equal treatment under the law. For individuals and settings not covered by the Age Discrimination in Employment Act and the Age Discrimination Act, the general applicability of the Equal Protection Clause provides the only federal basis for challenging age-based discrimination. As the Supreme Court explained in *Massachusetts Board of Retirement v. Murgia* (1976), courts apply the rational basis test in age claims brought under the Equal Protection Clause, because age is not a suspect classification, and there is no fundamental interest in governmental employment or federal fundamental right of participation in educational programs. Under the rational basis test, public educational institutions must show only that their actions reasonably further a legitimate state objective or interest.

A Fifth Circuit Court's review of a public university's housing policy offers an example of an equal protection claim against age discrimination. The institution required student on-campus residence but exempted all undergraduates aged 23 and above. Finding no rational basis for the arbitrary distinction in treatment between students aged 21 and 22 and those aged 23 and above (no claim was made for those under 21), the appellate court ruled that the housing policy was unconstitutional.

The Age Discrimination in Employment Act (ADEA) of 1967 is an effective federal remedy for older Americans who experience age discrimination in the workplace. The ADEA protects employees and prospective employees (applicants) aged 40 and over from age-based employment discrimination in hiring, dismissal, promotion, demotion, and transfer. The act also applies to compensation and conditions of employment, employee benefit plans, and employer attempts to retaliate against those who exercise their ADEA rights.

The ADEA covers both disparate treatment charges, when employers take less favorable action against employees because of their age, and disparate impact claims, where facially neutral employer policies impact disproportionately an ADEA-protected group. When confronted with disparate treatment or impact claims, the ability of officials to present non–age-based justifications for their policies or actions can be key to whether they prevail in the litigation. For example, in breaking with another federal appellate court, the Seventh Circuit Court found no ADEA violation in a school policy that hired less experienced, and therefore generally younger, applicants, because they are more affordable. Moreover, two other appellate courts upheld university policies that paid professors based on market value, even if it resulted in younger faculty being paid more than older colleagues. Courts have divided over early retirement incentive plans that offer benefits only to those educators who accept the option by a certain age.

The Age Discrimination Act of 1975 is a federal statute that shields both employees and, unlike the ADEA, students from age-based discrimination. Patterned after Title VI of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, and Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act states that "no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance" (42 U.S.C. § 6102 (1975)).

In light of the passage of the Civil Rights Restoration Act of 1987, the Age Discrimination Act applies to all aspects of educational institutions if any part of their operations receives federal funds. While used by plaintiffs infrequently, the Age Discrimination Act provides a statutory basis to bring age-based discrimination claims against schools in conflicts involving educational programs or employees under the age of 40.

State Protection

Plaintiffs may find additional protection against age discrimination in their state constitutions and antidiscrimination statutes. Some states, such as Florida (FLA. STAT. §§ 112.043–044 (2006)), have enacted statutes that prohibit age discrimination generally and do not limit coverage to those aged 40 and above. Others, including Iowa (IOWA CODE §§ 161–8.15, 216.6 (2006)), explicitly exceed ADEA coverage by protecting all persons 18 years of age and older from differential treatment based on age.

Plaintiffs in some instances resort to their state, rather than federal, provisions to challenge alleged age discrimination. For example, in 1978 the Supreme Court of Utah reviewed the rejection of a 51-year-old applicant for admission into a graduate educational psychology program exclusively because of her age. The court, while remanding the case to grant officials at the state university an opportunity to demonstrate that they relied on legitimate state purposes for their actions, found that denying admission solely on the basis of age violates state (and federal) equal protection.

As the American population grows older, one can expect continued challenges to age-based discrimination, particularly in the workplace.

Ralph Sharp

See also Age Discrimination in Employment Act; Disparate Impact; Equal Protection Analysis; Teacher Rights

Legal Citations

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Age Discrimination in Employment Act

American society has grown older as the baby boom generation approaches retirement and health care improves. The percentage of the population in the 40 to 64 age range increased from 24.8% in 1980 to 32.3% in 2005. Recognizing that Americans would continue to face age bias in the workplace, Congress

enacted the Age Discrimination in Employment Act (ADEA) of 1967 as part of its broad attack on employment discrimination in the 1960s. An amendment to the Fair Labor Standards Act of 1938, the ADEA adopted antidiscrimination provisions that were substantively almost identical to those of Title VII of the Civil Rights Act of 1964. In the interim, courts have dealt with many ADEA issues, ranging from hiring and dismissal to salaries and early retirement incentive plans.

General Provisions

The ADEA is the primary federal statutory remedy for victims of age discrimination in the workplace. It prohibits employers with 20 or more employees from discriminating against employees and prospective employees (applicants) because of their age in hiring, transfer, promotion demotion, and dismissal as well as in conditions of employment, including compensation and benefit plans. The ADEA also makes it illegal for employers to retaliate against those who oppose a practice made unlawful under the statute or who participate in an ADEA investigation, proceeding, or litigation. Exceptions to the ADEA's antidiscrimination provisions include bona fide employee benefit plans, such as voluntary early retirement incentive options, and situations where age is a bona fide occupational qualification (BFOQ). The Equal Employment Opportunity Commission administratively enforces the ADEA, which includes notice requirements before a plaintiff can file suit. Courts are authorized to award equitable relief to prevailing plaintiffs, such as reinstatement, back pay, damages, and attorney's fees.

Originally, the ADEA covered the ages of 40 to 65, later extended to 70; but 1986 amendments removed the upper age limit for all but a few categories that are rarely applicable in the education setting. Initially the ADEA did not apply to public school districts, colleges, and universities. In 1974 Congress amended the act to cover state and local governments (political subdivisions), and the Supreme Court upheld the constitutionality of this extension in the face of a Tenth Amendment immunity challenge in *EEOC v. Wyoming* (1983).

Application of the Law

Plaintiffs can present either direct or indirect evidence of unlawful age discrimination. In the absence of direct evidence, courts apply a variant of Title VII's *McDonnell Douglas-Burdine* allocation of evidence and shifting burdens of proof to ADEA litigation. Plaintiffs must first establish a prima facie case by establishing that they are members of the protected class (at least 40 years of age); were either qualified for the jobs (for which they were not hired) or met the employer's reasonable job expectations (in cases of dismissal, transfer, or demotion); suffered adverse employment actions; and were replaced by, or treated less favorably than, someone significantly younger, defined by most courts as approximately 10 or more years younger than the plaintiff. Once plaintiffs present prima facie cases, the burden shifts back to employers to produce legitimate, nondiscriminatory reasons for their adverse employment actions. At the final stage, plaintiffs have the opportunity to prove that their employers' legitimate reason was not true but was rather a pretext for age-based discrimination.

Plaintiffs may bring two types of claims under the ADEA. In disparate treatment cases, protected employees or prospective employees allege that educational institutions dealt with them less favorably based upon their age. For example, the Seventh Circuit in *Wickman v. Board of Trustees of Southern Illinois University* (1999) upheld a jury's finding that university officials willfully violated the ADEA in dismissing a 48-year-old managerial employee with glowing evaluations as part of a reduction-in-force plan for a program that ultimately was not eliminated. The program's accountant testified that the accounting was unreliable (accounting methods were allegedly changed to make apparent surpluses disappear), the deciding administrator stated in a meeting less than a month after the dismissal decision that "in a forest you have to cut down the old, big trees so the little trees underneath can grow" (p. 796), and the dismissed employee's duties were dispersed among other employees, most of whom were considerably younger than he.

In the other type of action, disparate impact claims challenge facially neutral employment policies or practices that on the surface appear nondiscriminatory

but nonetheless adversely affect disproportionately an ADEA-protected group. For example, breaking with another circuit, the Seventh Circuit upheld, as economically defensible and reasonable, a private school's policy of hiring less experienced, and therefore generally younger, teachers, because they were more affordable on the school's salary schedule linking wages to teaching experience. Further, in *Davidson v. Board of Governors of State Colleges and Universities for Western Illinois University* (1990) and *MacPherson v. University of Montevallo* (1991), two federal appellate courts upheld university compensation plans that based salaries for newly hired faculty and pay raises for current faculty on market value, thereby causing some older faculty to earn less than younger colleagues.

Early Retirement Incentive Programs

The ADEA, amended in 1990 by the Older Workers Benefit Protection Act, provides a safe harbor for universities to offer early retirement incentive plans (ERIPs) to tenured employees. An ERIP must be voluntary, made available to eligible employees for a reasonable period of time, and consistent with the ADEA's purpose of prohibiting arbitrary age discrimination in employment. Court rulings hinge upon specific details of the incentive plans, and some courts have rejected ERIPs that require educators to retire by a certain age or lose the incentive benefits completely.

In summary, the ADEA protects employees and prospective employees who are 40 and older from employment discrimination based upon age. The act applies to basic employment decisions, such as hiring and dismissal, along with benefit plans and employer attempts to retaliate against employees for opposing practices unlawful under the statute. Courts overturn employment decisions in hiring, dismissal, and demotion when plaintiffs establish that the actions were age-based, but appellate courts have split over the legality of ERIPs that cut off incentives if educators refuse to retire by a specified age. As the American population ages, one can anticipate that older workers will rely increasingly upon the ADEA to press claims of age-based discrimination in the workplace.

Ralph Sharp

See also Age Discrimination; Disparate Impact; Equal Employment Opportunity Commission; Teacher Rights

Legal Citations

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*

Auerbach v. Board of Education of the Harborfields Central School District of Greenlawn, 136 F.3d 104 (2d Cir. 1998).

Davidson v. Board of Governors of State Colleges and Universities for Western Illinois University, 920 F.2d 441 (7th Cir. 1990).

EEOC v. Wyoming, 460 U.S. 226 (1983).

MacPherson v. University of Montevallo, 922 F.2d 766 (11th Cir. 1991).

Older Workers Benefit Protection Act, 29 U.S.C. § 623(f)(2).

Wichmann v. Board of Trustees of Southern Illinois University, 180 F.3d 791 (7th Cir. 1999).

Agency Shop

An agency shop is defined as a place of employment where workers are required to pay union dues regardless of whether they are union members. In the school environment, a union and a school board enter into agency shop agreements when employees who decline union membership but are still part of collective bargaining units are required to pay union "service fees." The entry reviews court rulings on when such fees may be required and for what they may be used.

In the 1977 case of *Abood v. Detroit Board of Education,* the U.S. Supreme Court upheld the legal permissibility of agency shop service fees for nonunion employees. The Court held that agency shop fees did not violate the First Amendment rights of nonunion employees. In *Abood,* the Court ruled that a government employer and union may reach an agreement requiring employees to pay an agency service fee encompassing the costs of collective bargaining, contract administration, and grievance adjustment. However, *Abood* clarified that objecting nonunion employees have a constitutional right to withhold payment of any agency service fees that support political and ideological causes. In other words, the Court explained that objecting nonunion school employees can be compelled to

pay only those expenses directly related to collective bargaining. Mandatory agency service fees may not be used by unions to subsidize ideological or political causes or perspectives. Based on *Abood,* all public employees have a constitutional right to prevent a union from spending part or all of their required agency service fees on political contributions or costs associated with the advancement of political views that are unrelated to the union's duties as an exclusive bargaining representative.

School boards that negotiate contracts requiring employees to pay union representation fees are acting within their own discretion to force employees to join unions and are therefore legally liable for any failure to protect the rights of objecting employees. Under *Abood,* employees must be given the clear choice of joining the union and paying full dues or, as an alternative, paying only a service fee to cover the direct costs associated with collective bargaining. Contracts that fail to give school employees this choice violate the employees' constitutional rights.

In another U.S. Supreme Court case, *Chicago Teachers Union, Local No. 1 v. Hudson,* which was decided nine years after *Abood,* the justices held that specific and proper procedures must be in place to protect agency service fees from being improperly used by unions. Basically, *Hudson* reinforces *Abood.* In *Hudson,* the Court found further that unions must hold disputed agency service fee money in escrow while resolving worker disputes before an impartial decision maker. The Court considered it essential for unions to provide adequate information concerning the portion of financial cost charged specifically for collective bargaining to employees who object to agency service fee payments.

In yet a third U.S. Supreme Court case, *Lehnert v. Ferris Faculty Association,* the Court attempted to provide even greater clarity concerning union activities that may not be supported by agency service fees. In *Lehnert,* the Court discovered that up to 90% of the National Education Association (NEA) and local union fees were being charged to objecting nonunion faculty members and being spent on union activities unrelated to collective bargaining. *Lehnert* again upheld the legal principle that objecting nonunion school employees cannot be compelled to pay for a union's lobbying, organizing, public relations, or any other activities not directly related to collective bargaining representation.

More recently, in a case not related to education, *Air Line Pilots Association v. Miller,* the Supreme Court held that nonunion employees with complaints concerning agency service fees are not compelled to exhaust a union-controlled arbitration procedure. Instead, the Court decided that nonunion employees may immediately proceed to federal court. In *Air Line Pilots,* the Court noted that the union requirement that nonunion airline pilots exhaust union arbitration did not meet the impartial decision maker requirement set forth in the Court's *Chicago Teachers Union* decision.

Lower courts continue to define more precisely the rules that states must follow when addressing agency service fee disputes. For example, lower courts have established that it is not necessary for all states to employ an independent auditor to verify the correctness of union fee allocations (*Belhumeur v. Labor Relations Commission,* 1991). Additionally, lower courts have considered whether unions can be required to provide affirmative consent to agency service fee deductions. These courts have maintained that it is legally sufficient to provide only notice of the deduction of agency fees and an opportunity to object to agency service fees (*Mitchell v. Los Angeles Unified School District,* 1992).

Legal issues associated with union dues and associated fees have generated significant litigation in the area of collective bargaining involving school employees. This trend of heightened litigation associated with union dues and associated fees is likely to continue.

Kevin P. Brady

See also *Abood v. Detroit Board of Education; Chicago Teachers Union, Local No. 1 v. Hudson;* Collective Bargaining; *Davenport v. Washington Education Association;* Unions

Further Readings

Dodd, V. J. (2003). *Practical education law for the twenty-first century.* Durham, NC: Carolina Academic Press.

Legal Citations

Abood v. Detroit Board of Education, 433 U.S. 915 (1977).
Air Line Pilots Association v. Miller, 523 U.S. 866 (1998).

Belhumeur v. Labor Relations Commission, 580 N.E.2d 746 (Mass. 1991).
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986).
Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).
Lehnert v. Ferris Faculty Association, 501 U.S. 1244 (1991).
Mitchell v. Los Angeles Unified School District, 963 F.2d 258 (9th Cir. 1992), *cert. denied,* 506 U.S. 940 (1992).

Agostini v. Felton

The Supreme Court's 1997 judgment in *Agostini v. Felton* essentially reversed the decision it had made 12 years earlier in *Aguilar v. Felton* (1985). In *Aguilar,* a divided Court held that permitting Title I teachers paid by the New York City Board of Education to provide remedial mathematics and language arts instruction on site in religious schools violated the Establishment Clause. The permanent injunction that a federal trial court issued on remand in *Aguilar* became the basis for the Court's review in 1997. Without the need for a new trial, the *Agostini* Court relied on Federal Rules of Civil Procedure 60(b)(5), which permits a review of prior injunctive relief where a significant change has occurred in the law. The facts were identical in *Agostini* and *Aguilar.* Thus, the issue before the Supreme Court was the extent to which the law regarding interpretation of the Establishment Clause had changed during the intervening 12 years.

What the Law Says

Title I of the Elementary and Secondary Education Act of 1965 provides for federal funds to be channeled through states to local school systems, where the funds are to be used for all students who are eligible, as determined by their location in low-income areas or by their poor academic performance in meeting state outcomes standards. Title I funds are used primarily to purchase materials and employ teachers to work on site with eligible children. Title I expressly provides that students do not have to attend public schools in order to have access to Title I services and that students attending private (including religious) schools are entitled to a proportionate amount of the funding based on the ratio of public to private school eligible students (20 U.S.C. §§ 6312(c)(1)(F), 6321(a)(3)).

Among the students in New York City eligible for Title I services were students attending religious schools, primarily Catholic schools. When the New York City Board of Education authorized the expenditure of Title I funds for on-site services in these religious schools, several parties challenged the expenditure as violating the Establishment Clause.

The Court's Ruling

In *Aguilar* the Supreme Court found that the supervision plan that the New York City Board of Education had in place to prevent Title I teachers from being indoctrinated by the religious practices of the religious school and to prevent the teachers from imparting religious doctrine to students amounted to excessive entanglement, in violation of the Court's test in *Lemon v. Kurtzman* (1971). Following *Aguilar,* the Supreme Court decided three Establishment Clause cases that were to have a significant impact on the Court's jurisprudence in *Agostini: Witters v. Washington Department. of Services for the Blind* (1986); *Zobrest v. Catalina Foothills School District* (1993), and *Rosenberger v. Rector and Visitors of University of Virginia* (1995).

The *Witters* Court ruled that the Establishment Clause did not preclude the State of Washington from extending financial assistance under its state vocational rehabilitation assistance program to a blind person who chose to study at a Christian college to become a pastor, missionary, or youth director. The Supreme Court in *Zobrest* decided that a public school board's providing a sign language interpreter, pursuant to the Individuals with Disabilities Education Act (IDEA), to a student on site in a religious school did not constitute a violation of the Establishment Clause for much the same reason as in *Witters. Rosenberger* was the most far-reaching of the three cases and required that the University of Virginia fund the printing of a student religious organization's publication presenting contemporary topics from a Christian perspective, in much the same way that the university funded other publications presenting differing perspectives.

Agostini acknowledged that while the *Lemon* test continued to define permissible government conduct under the Establishment Clause, what had changed as a result of the three decisions was the Court's "understanding of the criteria used to assess whether aid to religion has an impermissible effect" (p. 223) and its presumption that "all government aid that directly assists the educational function of religious schools is invalid" (p. 225). As a result of this change in its interpretation of the Establishment Clause, in *Agostini* a divided Court reasoned that there was no more reason to presume that a full-time publicly paid Title I teacher would "depart from her assigned duties and instructions and embark on religious indoctrination" than that a post-*Zobrest* interpreter would "inculcate religion by altering her translation of classroom lectures" (p. 226).

In addition, the *Agostini* Court was of the opinion that as long as Title I remedial services are available only to eligible students, these services no more "impermissibly finance religious indoctrination" (p. 228) than did the sign language interpreter in *Zobrest.*

Agostini put an end to New York City's post-*Aguilar* $100 million in expenditures to continue providing Title I services to religious school students by transporting the students to public schools, furnishing computer-aided instruction, or parking trailers with Title I service providers on public streets outside the religious schools (p. 213). It is worth noting that since *Agostini* found only that providing on-site services was permissible under the Establishment Clause, providing such services could still violate state constitutions, a situation that occurred in *Witters* after the case was remanded to the Supreme Court of Washington. (*Witters v. State Commission for the Blind*).

Ralph D. Mawdsley

See also *Lemon v. Kurtzman;* State Aid and the Establishment Clause; *Zobrest v. Catalina Foothills School District*

Legal Citations

Agostini v. Felton, 521 U.S. 203 (1997).
Aguilar v. Felton, 473 U.S. 402 (1985).
Federal Rules of Civil Procedure, 60(b)(5).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Title I of the Elementary and Secondary Education Act, 20 U.S.C. §§ 6301 *et seq.*
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).
Witters v. State Commission for the Blind, 771 P.2d 1119 (Wash. 1989).
Witters v. Washington Department of Services for the Blind, 474 U.S. 481 (1986).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

Agostini v. Felton (Excerpts)

Agostini v. Felton *signaled a dramatic shift in the Supreme Court's First Amendment jurisprudence under the Establsihment Clause. In Agostini the Justices permitted the on-site delivery of Title I services to students who attended religiously affiliated non-public schools.*

Supreme Court of the United States

AGOSTINI

v.

FELTON

521 U.S. 203

Argued April 15, 1997.

Decided June 23, 1997.

Justice O'CONNOR delivered the opinion of the Court.

In *Aguilar v. Felton,* this Court held that the Establishment Clause of the First Amendment barred the city of New York from sending public school teachers into parochial schools to provide remedial education to disadvantaged children pursuant to a congressionally mandated program. On remand, the District Court for the Eastern District of New York entered a permanent injunction reflecting our ruling. Twelve years later, petitioners-the parties bound by that injunction-seek relief from its operation. Petitioners maintain that *Aguilar* cannot be squared with our intervening Establishment Clause jurisprudence and ask that we explicitly recognize what our more recent cases already dictate: *Aguilar* is no longer good law. We agree with petitioners that *Aguilar* is not consistent with our subsequent Establishment Clause

decisions and further conclude that, on the facts presented here, petitioners are entitled under Federal Rule of Civil Procedure 60(b)(5) to relief from the operation of the District Court's prospective injunction.

I

In 1965, Congress enacted Title I of the Elementary and Secondary Education Act of 1965 to "provid[e] full educational opportunity to every child regardless of economic background" (hereinafter Title I). Toward that end, Title I channels federal funds, through the States, to "local educational agencies" (LEA's). The LEA's spend these funds to provide remedial education, guidance, and job counseling to eligible students. An eligible student is one (i) who resides within the attendance boundaries of a public school located in a low-income area; and (ii) who is failing, or is at risk of failing, the State's student performance standards. Title I funds must be made available to *all* eligible children, regardless of whether they attend public schools and the services provided to children attending private schools must be "equitable in comparison to services and other benefits for public school children."

An LEA providing services to children enrolled in private schools is subject to a number of constraints that are not imposed when it provides aid to public schools. Title I services may be provided only to those private school students eligible for aid, and cannot be used to provide services on a "school-wide" basis. In addition, the LEA must retain complete control over Title I funds; retain title to all materials used to provide Title I services; and provide those services through public employees or other persons independent of the private school and any religious institution. The Title I services themselves must be "secular, neutral, and nonideological," and must "supplement, and in no case supplant, the level of services" already provided by the private school.

Petitioner Board of Education of the City of New York (hereinafter Board), an LEA, first applied for Title I funds in 1966 and has grappled ever since with how to provide Title I services to the private school students within its jurisdiction. Approximately 10% of the total number of students eligible for Title I services are private school students. Recognizing that more than 90% of the private schools within the Board's jurisdiction are sectarian, *Felton v. Secretary, United States Dept. of Ed.* [at the Second Circuit], the Board initially arranged to transport children to public schools for after-school Title I instruction. But this enterprise was largely unsuccessful . . . . The Board then moved the after-school instruction onto private school campuses, as Congress had contemplated when it enacted Title I. After this program also yielded mixed results, the Board implemented the plan we evaluated in *Aguilar v. Felton*

That plan called for the provision of Title I services on private school premises during school hours. Under the plan, only public employees could serve as Title I instructors and counselors. Assignments to private schools were made on a voluntary basis and without regard to the religious affiliation of the employee or the wishes of the private school. As the Court of Appeals in *Aguilar* observed, a large majority of Title I teachers worked in nonpublic schools with religious affiliations different from their own. The vast majority of Title I teachers also moved among the private schools, spending fewer than five days a week at the same school.

Before any public employee could provide Title I instruction at a private school, she would be given a detailed set of written and oral instructions emphasizing the secular purpose of Title I and setting out the rules to be followed to ensure that this purpose was not compromised. Specifically, employees would be told that (i) they were employees of the Board and accountable only to their public school supervisors; (ii) they had exclusive responsibility for selecting students for the Title I program and could teach only those children who met the eligibility criteria for Title I; (iii) their materials and equipment would be used only in the Title I program; (iv) they could not engage in team teaching or other cooperative instructional activities with private school teachers; and (v) they could not introduce any religious matter into their teaching or become involved in any way with the religious activities of the private schools. All religious symbols were to be removed from classrooms used for Title I services. The rules acknowledged that it might be necessary for Title I teachers to consult with a student's regular classroom teacher to assess the student's particular needs and progress, but admonished instructors to limit those consultations to mutual professional concerns regarding the student's education. To ensure compliance with these rules, a publicly employed field supervisor was to attempt to make at least one unannounced visit to each teacher's classroom every month.

In 1978, six federal taxpayers—respondents here—sued the Board in the District Court for the Eastern District of New York. Respondents sought declaratory and injunctive relief, claiming that the Board's Title I program violated the Establishment Clause. The District Court permitted the parents of a number of parochial

school students who were receiving Title I services to intervene as codefendants. The District Court granted summary judgment for the Board, but the Court of Appeals for the Second Circuit reversed. . . . In a 5-to-4 decision, this Court affirmed on the ground that the Board's Title I program necessitated an "excessive entanglement of church and state in the administration of [Title I] benefits." On remand, the District Court permanently enjoined the Board "from using public funds for any plan or program under [Title I] to the extent that it requires, authorizes or permits public school teachers and guidance counselors to provide teaching and counseling services on the premises of sectarian schools within New York City."

The Board, like other LEA's across the United States, modified its Title I program so it could continue serving those students who attended private religious schools. Rather than offer Title I instruction to parochial school students at their schools, the Board reverted to its prior practice of providing instruction at public school sites, at leased sites, and in mobile instructional units (essentially vans converted into classrooms) parked near the sectarian school. The Board also offered computer-aided instruction, which could be provided "on premises" because it did not require public employees to be physically present on the premises of a religious school.

It is not disputed that the additional costs of complying with *Aguilar*'s mandate are significant. Since the 1986–1987 school year, the Board has spent over $100 million providing computer-aided instruction, leasing sites and mobile instructional units, and transporting students to those sites. Under the Secretary of Education's regulations, those costs "incurred as a result of implementing alternative delivery systems to comply with the requirements of *Aguilar v. Felton*" and not paid for with other state or federal funds are to be deducted from the federal grant before the Title I funds are distributed to *any* student. These "*Aguilar* costs" thus reduce the amount of Title I money an LEA has available for remedial education, and LEA's have had to cut back on the number of students who receive Title I benefits. From Title I funds available for New York City children between the 1986–1987 and the 1993–1994 school years, the Board had to deduct $7.9 million "off-the-top" for compliance with *Aguilar.* When *Aguilar* was handed down, it was estimated that some 20,000 economically disadvantaged children in the city of New York and some 183,000 children nationwide would experience a decline in Title I services.

In October and December of 1995, petitioners-the Board and a new group of parents of parochial school students entitled to Title I services-filed motions in the District Court seeking relief under Federal Rule of Civil Procedure 60(b) from the permanent injunction entered by the District Court on remand from our decision in *Aguilar.* Petitioners argued that relief was proper under Rule 60(b)(5) and our decision in *Rufo v. Inmates of Suffolk County Jail* because the "decisional law [had] changed to make legal what the [injunction] was designed to prevent." Specifically, petitioners pointed to the statements of five Justices in *Board of Ed. of Kiryas Joel Village School Dist. v. Grumet,* calling for the overruling of *Aguilar.* The District Court denied the motion. . . . The Court of Appeals for the Second Circuit "affirmed substantially for the reasons stated in" the District Court's opinion. We granted certiorari and now reverse.

II

The question we must answer is a simple one: Are petitioners entitled to relief from the District Court's permanent injunction under Rule 60(b)(5), the subsection under which petitioners proceeded below, states:

"On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment [or] order . . . [when] it is no longer equitable that the judgment should have prospective application."

In *Rufo v. Inmates of Suffolk County Jail,* we held that it is appropriate to grant a Rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show "a significant change either in factual conditions or in law." A court may recognize subsequent changes in either statutory or decisional law. A court errs when it refuses to modify an injunction or consent decree in light of such changes.

Petitioners point to three changes in the factual and legal landscape that they believe justify their claim for relief under Rule 60(b)(5). They first contend that the exorbitant costs of complying with the District Court's injunction constitute a significant factual development warranting modification of the injunction. Petitioners also argue that there have been two significant legal developments since *Aguilar* was decided: a majority of Justices have expressed their views that *Aguilar* should be reconsidered or overruled; and *Aguilar* has in any event been undermined by subsequent Establishment Clause decisions. . . .

Respondents counter that, because the costs of providing Title I services off site were known at the time

Aguilar was decided, and because the relevant case law has not changed, the District Court did not err in denying petitioners' motions. Obviously, if neither the law supporting our original decision in this litigation nor the facts have changed, there would be no need to decide the propriety of a Rule 60(b)(5) motion. Accordingly, we turn to the threshold issue whether the factual or legal landscape has changed since we decided *Aguilar.*

We agree with respondents that petitioners have failed to establish the significant change in factual conditions required by *Rufo.* Both petitioners and this Court were, at the time *Aguilar* was decided, aware that additional costs would be incurred if Title I services could not be provided in parochial school classrooms. That these predictions of additional costs turned out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5).

We also agree with respondents that the statements made by five Justices in *Kiryas Joel* do not, in themselves, furnish a basis for concluding that our Establishment Clause jurisprudence has changed. In *Kiryas Joel,* we considered the constitutionality of a New York law that carved out a public school district to coincide with the boundaries of the village of Kiryas Joel, which was an enclave of the Satmar Hasidic sect. Before the new district was created, Satmar children wishing to receive special educational services under the Individuals with Disabilities Education Act (IDEA), could receive those services at public schools located outside the village. Because Satmar parents rarely permitted their children to attend those schools, New York created a new public school district within the boundaries of the village so that Satmar children could stay within the village but receive IDEA services on public school premises from publicly employed instructors. In the course of our opinion, we observed that New York had created the special school district in response to our decision in *Aguilar,* which had required New York to cease providing IDEA services to Satmar children on the premises of their private religious schools. Five Justices joined opinions calling for reconsideration of *Aguilar.* But the question of *Aguilar*'s propriety was not before us. The views of five Justices that the case should be reconsidered or overruled cannot be said to have effected a change in Establishment Clause law.

In light of these conclusions, petitioners' ability to satisfy the prerequisites of Rule 60(b)(5) hinges on whether our later Establishment Clause cases have so undermined *Aguilar* that it is no longer good law. We now turn to that inquiry.

III

A

In order to evaluate whether *Aguilar* has been eroded by our subsequent Establishment Clause cases, it is necessary to understand the rationale upon which *Aguilar,* as well as its companion case, *School Dist. of Grand Rapids v. Ball,* rested.

. . . .

B

Our more recent cases have undermined the assumptions upon which *Ball* and *Aguilar* relied. To be sure, the general principles we use to evaluate whether government aid violates the Establishment Clause have not changed since *Aguilar* was decided. For example, we continue to ask whether the government acted with the purpose of advancing or inhibiting religion, and the nature of that inquiry has remained largely unchanged. Likewise, we continue to explore whether the aid has the "effect" of advancing or inhibiting religion. What has changed since we decided *Ball* and *Aguilar* is our understanding of the criteria used to assess whether aid to religion has an impermissible effect.

1

As we have repeatedly recognized, government inculcation of religious beliefs has the impermissible effect of advancing religion. Our cases subsequent to *Aguilar* have, however, modified in two significant respects the approach we use to assess indoctrination. First, we have abandoned the presumption erected in *Meek* and *Ball* that the placement of public employees on parochial school grounds inevitably results in the impermissible effect of state-sponsored indoctrination or constitutes a symbolic union between government and religion. In *Zobrest v. Catalina Foothills School Dist.,* we examined whether the IDEA was constitutional as applied to a deaf student who sought to bring his state-employed sign-language interpreter with him to his Roman Catholic high school. We held that this was permissible, expressly disavowing the notion that "the Establishment Clause [laid] down [an] absolute bar to the placing of a public employee in a sectarian school." "Such a flat rule, smacking of antiquated notions of 'taint,' would indeed exalt form over substance." We refused to presume that a publicly employed interpreter would be pressured by the pervasively

sectarian surroundings to inculcate religion by "add[ing] to [or] subtract[ing] from" the lectures translated. In the absence of evidence to the contrary, we assumed instead that the interpreter would dutifully discharge her responsibilities as a full-time public employee and comply with the ethical guidelines of her profession by accurately translating what was said. Because the only government aid in Zobrest was the interpreter, who was herself not inculcating any religious messages, no government indoctrination took place and we were able to conclude that "the provision of such assistance [was] not barred by the Establishment Clause." *Zobrest* therefore expressly rejected the notion—relied on in *Ball* and *Aguilar*—that, solely because of her presence on private school property, a public employee will be presumed to inculcate religion in the students. *Zobrest* also implicitly repudiated another assumption on which *Ball* and *Aguilar* turned: that the presence of a public employee on private school property creates an impermissible "symbolic link" between government and religion.

. . . .

In *Zobrest,* however, we did not expressly or implicitly rely upon the basis Justice SOUTER now advances for distinguishing *Ball* and *Aguilar.* If we had thought that signers had no "opportunity to inject religious content" into their translations, we would have had no reason to consult the record for evidence of inaccurate translations. The signer in *Zobrest* had the same opportunity to inculcate religion in the performance of her duties as do Title I employees, and there is no genuine basis upon which to confine *Zobrest*'s underlying rationale—that public employees will not be presumed to inculcate religion—to sign-language interpreters. Indeed, even the *Zobrest* dissenters acknowledged the shift *Zobrest* effected in our Establishment Clause law when they criticized the majority for "stray[ing] . . . from the course set by nearly five decades of Establishment Clause jurisprudence." Thus, it was *Zobrest*-and not this litigation-that created "fresh law." Our refusal to limit *Zobrest* to its facts despite its rationale does not, in our view, amount to a "misreading" of precedent.

Second, we have departed from the rule relied on in *Ball* that all government aid that directly assists the educational function of religious schools is invalid. In *Witters v. Washington Dept. of Servs. for Blind,* we held that the Establishment Clause did not bar a State from issuing a vocational tuition grant to a blind person who wished to use the grant to attend a Christian college and become a pastor, missionary, or youth director. . . . The same logic applied in *Zobrest,* where we allowed the State to provide an interpreter, even though she would be a mouthpiece for religious instruction, because the IDEA's neutral eligibility criteria ensured that the interpreter's presence in a sectarian school was a "result of the private decision of individual parents" and "[could not] be attributed to state decisionmaking." Because the private school would not have provided an interpreter on its own, we also concluded that the aid in *Zobrest* did not indirectly finance religious education by "reliev[ing] [the] sectarian schoo[l] of costs [it] otherwise would have borne in educating[its] students."

Zobrest and *Witters* make clear that, under current law, the Shared Time program in *Ball* and New York City's Title I program in *Aguilar* will not, as a matter of law, be deemed to have the effect of advancing religion through indoctrination. Indeed, each of the premises upon which we relied in *Ball* to reach a contrary conclusion is no longer valid. First, there is no reason to presume that, simply because she enters a parochial school classroom, a full-time public employee such as a Title I teacher will depart from her assigned duties and instructions and embark on religious indoctrination, any more than there was a reason in *Zobrest* to think an interpreter would inculcate religion by altering her translation of classroom lectures. Certainly, no evidence has ever shown that any New York City Title I instructor teaching on parochial school premises attempted to inculcate religion in students. Thus, both our precedent and our experience require us to reject respondents' remarkable argument that we must presume Title I instructors to be "uncontrollable and sometimes very unprofessional."

As discussed above, *Zobrest* also repudiates *Ball*'s assumption that the presence of Title I teachers in parochial school classrooms will, without more, create the impression of a "symbolic union" between church and state. . . . Taking this view, the only difference between a constitutional program and an unconstitutional one is the location of the classroom, since the degree of cooperation between Title I instructors and parochial school faculty is the same no matter where the services are provided. We do not see any perceptible (let alone dispositive) difference in the degree of symbolic union between a student receiving remedial instruction in a classroom on his sectarian school's campus and one receiving instruction in a van parked just at the school's curbside. To draw this line based solely on the location of the public employee is neither "sensible" nor "sound," and the Court in *Zobrest* rejected it.

Nor under current law can we conclude that a program placing full-time public employees on parochial campuses to provide Title I instruction would impermissibly finance religious indoctrination. In all relevant respects, the provision

of instructional services under Title I is indistinguishable from the provision of sign-language interpreters under the IDEA. Both programs make aid available only to eligible recipients. That aid is provided to students at whatever school they choose to attend. Although Title I instruction is provided to several students at once, whereas an interpreter provides translation to a single student, this distinction is not constitutionally significant. Moreover, as in *Zobrest,* Title I services are by law supplemental to the regular curricula. These services do not, therefore, "reliev[e] sectarian schools of costs they otherwise would have borne in educating their students."

. . . .

We are also not persuaded that Title I services supplant the remedial instruction and guidance counseling already provided in New York City's sectarian schools. . . . We are unwilling to speculate that all sectarian schools provide remedial instruction and guidance counseling to their students, and are unwilling to presume that the Board would violate Title I regulations by continuing to provide Title I services to students who attend a sectarian school that has curtailed its remedial instruction program in response to Title I. Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid. *Zobrest* did not turn on the fact that James Zobrest had, at the time of litigation, been the only child using a publicly funded sign-language interpreter to attend a parochial school.

What is most fatal to the argument that New York City's Title I program directly subsidizes religion is that it applies with equal force when those services are provided off campus, and *Aguilar* implied that providing the services off campus is entirely consistent with the Establishment Clause. . . . Accordingly, contrary to our conclusion in *Aguilar,* placing full-time employees on parochial school campuses does not as a matter of law have the impermissible effect of advancing religion through indoctrination.

2

Although we examined in *Witters* and *Zobrest* the criteria by which an aid program identifies its beneficiaries, we did so solely to assess whether any use of that aid to indoctrinate religion could be attributed to the State. A number of our Establishment Clause cases have found that the criteria used for identifying beneficiaries are relevant in a second respect, apart from enabling a court to evaluate whether the program subsidizes religion. Specifically, the criteria might themselves have the effect of advancing religion by creating a financial incentive to undertake religious indoctrination. This incentive is not present, however, where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis. Under such circumstances, the aid is less likely to have the effect of advancing religion.

In *Ball* and *Aguilar,* the Court gave this consideration no weight. Before and since those decisions, we have sustained programs that provided aid to *all* eligible children regardless of where they attended school.

Applying this reasoning to New York City's Title I program, it is clear that Title I services are allocated on the basis of criteria that neither favor nor disfavor religion. The services are available to all children who meet the Act's eligibility requirements, no matter what their religious beliefs or where they go to school. The Board's program does not, therefore, give aid recipients any incentive to modify their religious beliefs or practices in order to obtain those services.

3

We turn now to *Aguilar*'s conclusion that New York City's Title I program resulted in an excessive entanglement between church and state. Whether a government aid program results in such an entanglement has consistently been an aspect of our Establishment Clause analysis. We have considered entanglement both in the course of assessing whether an aid program has an impermissible effect of advancing religion, and as a factor separate and apart from "effect." Regardless of how we have characterized the issue, however, the factors we use to assess whether an entanglement is "excessive" are similar to the factors we use to examine "effect." That is, to assess entanglement, we have looked to "the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." Similarly, we have assessed a law's "effect" by examining the character of the institutions benefited (*e.g.,* whether the religious institutions were "predominantly religious"), and the nature of the aid that the State provided (*e.g.,* whether it was neutral and nonideological) . Indeed, in *Lemon* itself, the entanglement that the Court found "independently" to necessitate the program's invalidation also was found to have the effect of inhibiting religion.

Not all entanglements, of course, have the effect of advancing or inhibiting religion. Interaction between

church and state is inevitable and we have always tolerated some level of involvement between the two. Entanglement must be "excessive" before it runs afoul of the Establishment Clause.

The pre-*Aguilar* Title I program does not result in an "excessive" entanglement that advances or inhibits religion. As discussed previously, the Court's finding of "excessive" entanglement in Aguilar rested on three grounds: (i) the program would require "pervasive monitoring by public authorities" to ensure that Title I employees did not inculcate religion; (ii) the program required "administrative cooperation" between the Board and parochial schools; and (iii) the program might increase the dangers of "political divisiveness." Under our current understanding of the Establishment Clause, the last two considerations are insufficient by themselves to create an "excessive" entanglement. They are present no matter where Title I services are offered, and no court has held that Title I services cannot be offered off campus. Further, the assumption underlying the first consideration has been undermined. In *Aguilar,* the Court presumed that full-time public employees on parochial school grounds would be tempted to inculcate religion, despite the ethical standards they were required to uphold. Because of this risk pervasive monitoring would be required. But after *Zobrest* we no longer presume that public employees will inculcate religion simply because they happen to be in a sectarian environment. Since we have abandoned the assumption that properly instructed public employees will fail to discharge their duties faithfully, we must also discard the assumption that *pervasive* monitoring of Title I teachers is required. There is no suggestion in the record before us that unannounced monthly visits of public supervisors are insufficient to prevent or to detect inculcation of religion by public employees. Moreover, we have not found excessive entanglement in cases in which States imposed far more onerous burdens on religious institutions than the monitoring system at issue here.

To summarize, New York City's Title I program does not run afoul of any of three primary criteria we currently use to evaluate whether government aid has the effect of advancing religion: It does not result in governmental indoctrination; define its recipients by reference to religion; or create an excessive entanglement. We therefore hold that a federally funded program providing supplemental, remedial instruction to disadvantaged children on a neutral basis is not invalid under the Establishment Clause when such instruction is given on the premises of sectarian schools by government employees pursuant to a program containing safeguards such as those present here. The same considerations that justify this holding require us to conclude that this carefully constrained program also cannot reasonably be viewed as an endorsement of religion. Accordingly, we must acknowledge that *Aguilar,* as well as the portion of *Ball* addressing Grand Rapids' Shared Time program, are no longer good law.

C

The doctrine of *stare decisis* does not preclude us from recognizing the change in our law and overruling *Aguilar* and those portions of *Ball* inconsistent with our more recent decisions. As we have often noted, "*[s]tare decisis* is not an inexorable command, but instead reflects a policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." That policy is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions. Thus, we have held in several cases that *stare decisis* does not prevent us from overruling a previous decision where there has been a significant change in, or subsequent development of, our constitutional law. As discussed above, our Establishment Clause jurisprudence has changed significantly since we decided *Ball* and *Aguilar,* so our decision to overturn those cases rests on far more than "a present doctrinal disposition to come out differently from the Court of [1985]." We therefore overrule *Ball* and *Aguilar* to the extent those decisions are inconsistent with our current understanding of the Establishment Clause.

Nor does the "law of the case" doctrine place any additional constraints on our ability to overturn *Aguilar.* Under this doctrine, a court should not reopen issues decided in earlier stages of the same litigation. The doctrine does not apply if the court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice." In light of our conclusion that *Aguilar* would be decided differently under our current Establishment Clause law, we think adherence to that decision would undoubtedly work a "manifest injustice," such that the law of the case doctrine does not apply.

IV

We therefore conclude that our Establishment Clause law has "significant[ly] change[d]" since we decided *Aguilar.* We are only left to decide whether this change in law entitles petitioners to relief under Rule 60(b)(5). We conclude that it does. Our general practice is to apply the rule of law we announce in a case to the parties before us. We adhere to this practice even when we overrule a case. In *Adarand Constructors, Inc. v. Pena,* for example, the District Court and Court of Appeals rejected the argument that racial classifications in federal programs should be evaluated under strict scrutiny, relying upon our decision in *Metro Broadcasting, Inc. v. FCC.* When we granted certiorari and overruled *Metro Broadcasting,* we did not hesitate to vacate the judgments of the lower courts. In doing so, we necessarily concluded that those courts relied on a legal principle that had not withstood the test of time.

We do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." Adherence to this teaching by the District Court and Court of Appeals in this litigation does not insulate a legal principle on which they relied from our review to determine its continued vitality. The trial court acted within its discretion in entertaining the motion with supporting allegations, but it was also correct to recognize that the motion had to be denied unless and until this Court reinterpreted the binding precedent.

. . . .

Respondents nevertheless contend that we should not grant Rule 60(b)(5) relief here, in spite of its propriety in other contexts. They contend that petitioners have used Rule 60(b)(5) in an unprecedented way—not as a means of *recognizing* changes in the law, but as a vehicle for *effecting* them. If we were to sanction this use of Rule 60(b)(5), respondents argue, we would encourage litigants to burden the federal courts with a deluge of Rule 60(b)(5) motions premised on nothing more than the claim that various judges or Justices have stated that the law has changed. We think their fears are overstated. As we noted above, a judge's stated belief that a case should be overruled does not make it so.

Most importantly, our decision today is intimately tied to the context in which it arose. This litigation involves a party's request under Rule 60(b)(5) to vacate a continuing injunction entered some years ago in light of a bona fide, significant change in subsequent law. The clause of Rule 60(b)(5) that petitioners invoke applies by its terms only to "judgment [s] hav[ing] prospective application." Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component. Our decision will have no effect outside the context of ordinary civil litigation where the propriety of continuing prospective relief is at issue. Given that Rule 60(b)(5) specifically contemplates the grant of relief in the circumstances presented here, it can hardly be said that we have somehow warped the Rule into a means of "allowing an 'anytime' rehearing."

Respondents further contend that "[p]etitioners' [p]roposed [u]se of Rule 60(b) [w]ill [e]rode the [i]nstitutional [i]ntegrity of the Court." Respondents do not explain how a proper application of Rule 60(b)(5) undermines our legitimacy. Instead, respondents focus on the harm occasioned if we were to overrule *Aguilar.* But as discussed above, we do no violence to the doctrine of *stare decisis* when we recognize bona fide changes in our decisional law. And in those circumstances, we do no violence to the legitimacy we derive from reliance on that doctrine.

As a final matter, we see no reason to wait for a "better vehicle" in which to evaluate the impact of subsequent cases on *Aguilar*'s continued vitality. To evaluate the Rule 60(b)(5) motion properly before us today in no way undermines "integrity in the interpretation of procedural rules" or signals any departure from "the responsive, non-agenda-setting character of this Court." Indeed, under these circumstances, it would be particularly inequitable for us to bide our time waiting for another case to arise while the city of New York labors under a continuing injunction forcing it to spend millions of dollars on mobile instructional units and leased sites when it could instead be spending that money to give economically disadvantaged children a better chance at success in life by means of a program that is perfectly consistent with the Establishment Clause.

For these reasons, we reverse the judgment of the Court of Appeals and remand the cases to the District Court with instructions to vacate its September 26, 1985, order.

It is so ordered.

Citation: *Agostini v. Felton,* 521 U.S. 203 (1997).

Alexander v. Choate

Alexander v. Choate (1985), even though it was not litigated in an educational context, is significant as one of the U.S. Supreme Court's early decisions on the meaning of Section 504 of the Rehabilitation Act of 1973. In addressing the question of reasonable accommodations and defenses under Section 504, *Alexander* should be of interest to those who asked to work with employees who are covered by the statute's provisions.

When, as a cost-saving measure, the state of Tennessee reduced from 20 to 14 the maximum number of days that it would provide support for hospital stays by Medicaid patients, a group of individuals with disabilities filed suit under Section 504. The plaintiffs in *Alexander* (1985) alleged that the change had such a disparate impact on persons with disabilities such as themselves that it amounted to unlawful discrimination. Further, the plaintiffs claimed that any limitation on the number of days was invalid for the same reason. After a federal trial court dismissed the complaint, the Sixth Circuit reversed in favor of the plaintiffs. The Supreme Court subsequently agreed to hear an appeal to consider the meaning of Section 504.

Writing for a unanimous Supreme Court, Justice Marshall ruled that Tennessee's reduction in Medicaid benefits did not violate the nondiscrimination requirements of Section 504. First, the Court examined the issue of whether intent to discriminate was a necessary predicate to a finding of discrimination under Section 504. While the Court did not resolve this question, Justice Marshall noted that both the history of Section 504's provision and a comparison to other federal discrimination statutes such as Title VI of the Civil Rights Act of 1964 suggested that Section 504 was designed to protect against disparate impact discrimination. As such, for the purposes of *Alexander,* the Court assumed that the law recognized such injuries and turned its attention to whether the state's actions in this instance were "the sort of disparate impact that federal law might recognize" (p. 299).

Citing *Southeastern Community College v. Davis* (1979), one of its earlier opinions in which it interpreted the statute, the Supreme Court acknowledged that Section 504 required "reasonable" accommodations. However, the Court pointed out that Section 504 did not call for alterations to state-operated programs that would have substantially or fundamentally altered the nature of the programs or benefits. As the Court explained,

> [Section 504] requires that an otherwise qualified handicapped individual must be provided with meaningful access to the benefit that the grantee offers. The benefit itself, of course, cannot be defined in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled; to assure meaningful access, reasonable accommodations in the grantee's program or benefit may have to be made. (p. 301)

The Court concluded that the 14-day hospital stay that Tennessee allowed under its Medicaid program provided "meaningful access," even though persons with disabilities may be more likely than those without disabilities to require longer stays. Likewise, the Court maintained that because the costs of making the requested accommodations would have been extensive, they exceeded the bounds of the "reasonable" accommodations contemplated by Section 504.

Julie F. Mead

See also Disparate Impact; Rehabilitation Act of 1973, Section 504; *Southeastern Community College v. Davis*

Further Readings

Ball, C. A. (2004). Preferential treatment and reasonable accommodation under the Americans with Disabilities Act. *Alabama Law Review, 55,* 951–995.

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Alito, Samuel A., Jr. (1950–)

Samuel A. Alito, Jr., is the 110th person appointed as justice on the U.S. Supreme Court, an honor that is the capstone of a distinguished career in public service.

Compared to current justices, Alito's background is noteworthy for its emphasis on criminal law. A lifelong Roman Catholic, Justice Alito's appointment created the nation's first-ever Catholic majority on the Supreme Court. In addition, he is the second Italian American to be appointed to the Court. Alito is viewed as a member of the Supreme Court's conservative wing.

Early Years

Justice Alito was born in April 1950 in Trenton, New Jersey, where both of his parents worked as schoolteachers. Alito's father was born in Italy and arrived in the United States as a child. After graduating from a public high school, the younger Alito attended Princeton University, where he distinguished himself academically. He led the debate team, served in the ROTC, and was honored with membership in the Phi Beta Kappa honor society.

He attended Yale Law School, where he again excelled academically. While at Yale, Alito joined the Federalist Society, a conservative legal organization dedicated to judicial restraint and restoring more balance between the federal government and the states.

Following his graduation from Yale, Alito served briefly in the U.S. Army, and then he began a prestigious clerkship for a federal appeals judge on the Third Circuit Court of Appeals. As a law clerk, Alito assisted the court of appeals judge with legal research and opinion writing. At the conclusion of his clerkship, Alito worked in the appellate division of the U.S. Attorney's Office in New Jersey. As an assistant U.S. Attorney, his chief responsibility was in handling criminal appeals on behalf of the U.S. government.

From 1981 to 1985, Alito was an assistant in the Office of the U.S. Solicitor General. The solicitor general's office is an elite component of the federal legal apparatus. The office is responsible for representing the interests of the federal government in the U.S. Supreme Court. As an assistant solicitor general, Alito argued 12 cases in the U.S. Supreme Court.

During Ronald Reagan's presidency, Alito served as deputy assistant U.S. Attorney in another highly regarded station of federal service, the Office of Legal Counsel of the U.S. Justice Department. The Office of Legal Counsel provides legal opinions and advice to the president and to agencies and officers of the U.S. government. Alito moved back to New Jersey in 1987 to serve as the U.S. Attorney for the state. In this post, Alito was responsible for managing all federal prosecutions for New Jersey as well as representing the U.S. in civil matters. Noteworthy cases during his tenure as U.S. Attorney included organized crime prosecutions and a successful investigation of corruption in public housing. Alito served as U.S. Attorney for 13 years.

On the Bench

In 1990, President George H. W. Bush nominated Alito to a judgeship on the U.S. Court of Appeals for the Third Circuit, and the Senate unanimously confirmed him. The Third Circuit hears federal appeals for Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands. During this time, Alito participated in thousands of cases and wrote hundreds of opinions. He earned a reputation as an articulate and thoughtful conservative jurist. Some commentators compared him with Justice Antonin Scalia, an outspoken conservative justice on the U.S. Supreme Court. Alito had served 13 years on the Court of Appeals when President George W. Bush nominated him to replace Justice Sandra Day O'Connor on the U.S. Supreme Court. Following a vote along party lines in the Senate, Alito was confirmed as an associate justice.

Alito is married to Martha-Ann Bomgardner, with whom he has two children. Those who know Alito describe him as a very hard worker who is reserved and courteous and who has a well-developed but dry sense of humor.

Supreme Court Record

It is often difficult to predict how a recently appointed justice will vote over time. Nevertheless, Alito's background and track record as an appellate judge suggest that he will likely prove to be quite conservative on criminal law cases. He has criticized some of the decisions from the U.S. Supreme Court that expanded the reach of constitutional protections for criminal defendants, particularly during the controversial tenure of former Chief Justice Earl Warren.

More broadly, Alito has argued that courts should be reluctant to impose their own views by

second-guessing decisions made by government officials. Alito is also expected to take a narrow view of the Establishment Clause of the First Amendment to the Constitution. That clause generally restricts government involvement in and approval of religion. On the other hand, Alito has generally embraced a more expansive view of the Free Exercise Clause, which protects the rights of the people to worship and express their faith free from restriction or interference by the government. On the divisive issue of abortion, Alito is unlikely to expand the Court's decisions that recognize a right to an abortion. His appointment may prove pivotal to the ideological direction of the Court, because it strengthened the conservative wing of the Court.

Stephen R. McCullough

See also Roberts Court

Further Readings

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Urofsky, M., & Finkelman, P. (2001). *A march of liberty: A constitutional history of the United States.* New York: Oxford University Press.

Ambach v. Norwick

In *Ambach v. Norwick* (1979), the U.S. Supreme Court ruled that a New York statute that forbade the granting of permanent teaching certification to aliens who qualified for but had not applied for and had no intention of applying for American citizenship did not violate the Equal Protection Clause of the Fourteenth Amendment.

Facts of the Case

Norwick, born in Scotland and a citizen of Great Britain, and Dachinger, a Finnish subject, each met all of the "educational requirements" New York required for a teaching certificate. In this case, both persons were qualified but refused to apply for American citizenship. Both persons asked the court to consider whether the statute's requiring American citizenship in order to receive a state teaching certificate was constitutional.

A federal trial court in New York applied "close judicial scrutiny," striking down the statute as overly broad when it applied to all resident aliens in all academic subject areas and did not consider the "alien's nationality, or the nature of the alien's relationship to this country, nor the alien's willingness to substitute some other sign of loyalty to this Nation." As such, the court decided that since the statute was discriminatory, it violated the Equal Protection Clause.

The Court's Ruling

On further review, the Supreme Court ruled that while the statute denied permanent certification to aliens, the commissioner of education had the authority to grant provisional certification to persons who were not yet eligible for citizenship but who possessed skills or competencies not readily available among teachers who had certification or to individuals who were unable to declare their intentions to become citizens for valid statutory reasons.

In responding to the trial court's recommendation that aliens be allowed to sign a loyalty oath in lieu of applying for citizenship, the Supreme Court noted that 11 times the Constitution makes a fundamental distinction between the rights of citizens and aliens. The Court thus determined that since the Constitution considered the status of citizenship legally significant, the government was entitled to wider latitude in limiting the participation of noncitizens in functions of government such as public education. The Court noted *that* "functions which go to the heart of representative government (p. 74)" is one situation where the state is only required to provide a rational relationship between the entity seeking protection and the retraction and limitations of rights.

The question then became whether the services provided by public school teachers were "functions which go to the heart of representative government" and if so whether a rational relationship existed between their professional services and the governmental interest of requiring citizenship before certification. In its analysis, the Court reviewed its own precedent from the previous term, wherein it ruled New York had not discriminated against policemen by requiring that all police officers be citizens of the

United States (*Foley v. Connelie,* 1978). In that case, the Court acknowledged that police fulfill a fundamental obligation of government which goes to the heart of a representative government. The Court added that due to the function of police officers, since a rational relationship existed between citizenship and their jobs, the State had not discriminated in requiring them to be citizens.

Similarly, the Supreme Court was of the opinion that public education fulfills a fundamental obligation of government by preparing individuals to be citizens and by preserving societal values. Additionally, the Court pointed out that the day-to-day services provided by public school teachers reinforce the country's basic responsibilities, including military service, cultural values and attitudes toward government, and preparing children for professional training. Especially on consideration that teaching includes teaching civic virtues to young children, the Court explained that the services provided by public school teachers go to the heart of a representative government and have a rational relationship to the function of government. As a result, it held that the New York statute meets the rational relationship requirement.

The Court concluded that teachers provided a function that goes to the heart of the government, and because there is a rational relationship, their entitlement to teaching certification was not accorded constitutional protection. In the eyes of the Court, because the aliens chose to maintain their foreign citizenship, they had, in effect, made a voluntary choice that precluded them from obtaining a permanent teaching certification and that because the decision was that of the aliens, the state of New York did not violate their rights under the Equal Protection Clause.

Brenda Kallio

See also Equal Protection Analysis; Teacher Rights

Legal Citations

Ambach v. Norwick, 441 U.S. 68 (1979).
Foley v. Connelie, 435 U.S. 291 (1978).
Wardell v. Board of Education of the City School District of the City of Cincinnati, 529 F.2d. 625 (6th Cir. 1976).

Americans with Disabilities Act

The Americans with Disabilities Act (ADA), Section 504 of the Rehabilitation Act, and the Individuals with Disabilities Education Act are three federal laws dealing with the disabled that have a major impact on school operations. This entry summarizes the key provisions of the ADA.

What the Law Says

The ADA was enacted in 1990 and signed into law by President George H. W. Bush (42 U.S.C. 12101 *et seq*.). The ADA's provisions are designed to ensure that neither physical nor programmatic barriers exclude persons with disabilities from full participation in society. Public and private schools are bound by ADA's requirements both as employers and as providers of public services, although ADA's scope is not limited to educational enterprises. Enacted under the Commerce Clause of Article 1 of the U.S. Constitution, this comprehensive anti-discrimination legislation has four purposes:

1. to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
2. to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
3. to ensure that the federal government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
4. to invoke the sweep of congressional authority, including the power to enforce the Fourteenth Amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities. (42 U.S.C. §12101)

In order to accomplish these purposes, the ADA requires that "No qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be

subjected to discrimination by said entity" (42 U.S.C. §12132).

While Section 504 of the Rehabilitation Act of 1973 prohibits discrimination "solely by reason of [a person's] disability" by any recipient of federal financial assistance, ADA has a much broader application. In fact, both public and private institutions are bound by ADA's provisions. As such, ADA essentially extends Section 504 obligations into the private sector.

The ADA has five titles that delineate its application. Title I, which addresses employment discrimination, applies to any employers with 15 or more employees. Under these provisions, otherwise qualified individuals with disabilities are entitled to reasonable accommodations to enable them to meet the essential qualifications of any job and may not be discriminated against in hiring, promotions, pay, or other benefits.

Title II concerns discrimination in "public services." This title applies to schools and largely replicates Section 504 in terms of how public schools must ensure nondiscrimination for their students. Private schools, though not directly bound by Section 504, must comply with the ADA and must reasonably accommodate students' disabilities within existing programs. However, private schools need not create new programs in order to address the educational needs of children.

Title III prohibits discrimination in "public accommodations" and includes provisions that require, among other things, that entities serving the public maintain barrier free access to facilities and services. Title IV applies to telecommunications. Finally, Title V contains a number of miscellaneous provisions, including those related to technical assistance.

In a manner similar to that of Section 504, individuals are eligible for protection against discrimination under the ADA if they have mental or physical impairments that substantially limit one or more of life's major activities; have a history of such impairment; or are regarded as having such impairments (42 U.S.C. §12102(1)). Major life activities include, but are not limited to walking, talking, hearing, breathing, seeing, learning, and working. The ADA specifically excludes persons who actively use alcohol or drugs from protection, although persons who are recovering alcoholics or addicts are protected from discrimination. Persons who believe they have been discriminated against may file complaints with the Equal Employment Opportunity Commission or the Office for Civil Rights.

Court Rulings

The Supreme Court has considered several questions related to various provisions of the ADA, albeit none in a school setting. However, insofar as they are informative for those interested in education, the remainder of this entry reviews these cases. For example in *Sutton v. United Air Lines, Inc.* (1999), the Court held that a determination concerning whether a physical or mental impairment "substantially limits a major life activity" must consider how the person functions with available corrective measures. Likewise, in *Murphy v. United Parcel Service* (1999), the Court was of the opinion that if medications could mitigate a condition such that a person functioned normally while medicated, the person could not be considered substantially limited under the ADA. Moreover, in *Toyota Motor Manufacturing v. Williams* (2002), the Court reasoned that a limitation to a major life activity had to be something that "prevented or restricted [a person] from performing tasks that are of central importance to most people's daily lives" (p. 187).

The Supreme Court has also considered what constitutes a "reasonable accommodation." For example, in *PGA Tour v. Casey Martin* (2001), the Court determined that even a competitor with a disability in a professional golf tournament was entitled to a reasonable accommodation for his disability. In pointing out that the ADA entitled the plaintiff to the use of a golf cart, the Court reasoned that unless a modification would "fundamentally alter" the nature of the activity, it must be allowed. In addition, a reasonable accommodation does not require an undue administrative or financial burden to be accepted. In such a case, *US Airways, Inc. v. Barnett* (2002), the Court concluded that because requiring an employer to ignore seniority provisions of a contract would have been unduly burdensome, it was not required as a reasonable accommodation.

Julie F. Mead

See also Disabled Persons, Rights of; Rehabilitation Act of 1973, Section 504

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Legal Citations

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Murphy v. United Parcel Service, 527 U.S. 516 (1999).

PGA Tour v. Casey Martin, 532 U.S. 661 (2001).

Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).

Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999).

Toyota Motor Manufacturing v. Williams, 534 U.S. 184 (2002).

US Airways, Inc. v. Barnett, 535 U.S. 391 (2002).

Ansonia Board of Education v. Philbrook

As part of a broad federal attack on discrimination in the workplace, Congress outlawed religious discrimination in employment in Title VII of the Civil Rights Act of 1964. In *Ansonia Board of Education v. Philbrook* (1986), the Supreme Court clarified an employer's obligation to make reasonable accommodations for employees who request leave to observe their religious holidays. In light of religious diversity in the education workforce, *Ansonia* assists schools in establishing lawful and effective administrative practices while attempting to provide reasonable and affordable leave benefits.

Facts of the Case

Ansonia involved a high school business teacher from Connecticut who found his religious beliefs in conflict with his school board's leave policy after he joined the Worldwide Church of God. Ronald Philbrook generally missed six school days annually to observe holy days as required by church tenets. Collective bargaining agreements between the board and teachers' union provided three days of paid leave annually to observe mandatory religious holidays. Yet, insofar as employees were not allowed to use personal business leave for religious observances, or for any uses covered by other leave provisions, Philbrook typically took three days of unpaid or unauthorized leave each year.

Beginning with the 1976–1977 school year, he either worked during his holy days beyond three or scheduled required hospital visits on those days. The board rejected Philbrook's request that he either be allowed to use personal business days for the uncovered religious observance days or to pay the cost of a substitute teacher but not reduce his salary for those days. Claiming religious discrimination, Philbrook brought suit under Title VII.

Title VII prohibits discrimination in employment based on religion in addition to race, color, national origin, and sex. A 1972 amendment to Title VII states that "religion" includes the religious observance and practice of an employee, unless reasonably accommodating the religious observance or practice would cause an undue hardship on the operation of the employer's organization.

The Court's Ruling

The Supreme Court first rejected the argument that employers must accept employees' preferred proposals unless those options cause them undue hardships. The Court observed that neither the wording nor the brief legislative history of the 1972 statutory revision supported such an interpretation. Rather, according to the Court, employers need only offer reasonable accommodations, whether an employee's preferred option or any other, to meet their statutory obligation. Moreover, the Court noted that employers do not have to show that each of their employees' alternative proposals would constitute undue hardship on their part, because they have already offered reasonable accommodations to the employees. As to the issue of undue hardship, in *Trans World Airlines, Inc. v. Hardison*

(1977), the Court had found that employers do not have to bear more than a de minimis cost but that this comes into play only when they reject all proposed reasonable accommodations.

Turning to the specific collective bargaining agreement and its application, the Court indicated that requiring Philbrook to take unpaid leave for religious absences exceeding the number granted in the collective bargaining agreement would have been reasonable. The Court explained that this would have been appropriate because Title VII does not require employers to accommodate religious observances at all costs. However, the Court decided that the lower courts failed to make sufficiently clear findings of how the collective bargaining agreement had been interpreted and applied, specifically whether personal business leave was in practice allowed for purposes other than observing religious days. Consequently, the Court remanded the case for a determination of whether the actual practice in administering the leave agreement constituted a reasonable accommodation.

Ansonia provides considerable guidance for school boards, because it protects the rights of educators to practice personal religious beliefs and maintain employment status. Yet, in finding that an employer meets its Title VII obligation when it offers the employee any reasonable accommodation, *Ansonia* also recognizes the authority of the school boards, not the employees, to determine the extent and nature of their leave policies, provided that they are reasonable and nondiscriminatory. Further, *Ansonia* upholds the legitimacy of otherwise valid collective bargaining agreements. Finally, by not requiring fully paid religious leave, *Ansonia* preserves the ability of school boards to protect their budgets from undue burdens.

Ralph Sharp

See also Civil Rights Act of 1964; Leaves of Absence; *McDonnell Douglas Corporation v. Green;* Teacher Rights; Title VII

Legal Citations

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Pinsker v. Joint District No. 28J of Adams and Arapahoe Counties, 735 F.2d 388 (10th Cir. 1984).
Title VII of the Civil Rights Act, 42 U.S.C. § 2000e.
Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977).

Antiharassment Policies

Historically, many school administrators and teachers perceived peer harassment as normal adolescent behavior that did not pose any substantial threat to student safety. However, in recent years, reports of peer harassment in secondary schools have risen to alarming levels. According to a study released by the National Institute of Child Health and Human Development, each year approximately 30% of students in Grades 6 to 10 are involved in peer harassment as a victim, harasser, or both. The heightened presence of peer harassment in secondary schools is of great concern to parents and educators.

Peer harassment in public schools can have devastating effects on the lives of student victims, who often experience depression or a decline in academic performance, and some of whom commit suicide. Peer harassment in schools varies in scope and type, from bullying other students for their lunches in the school cafeteria to pervasive peer sexual harassment. Incidents of school violence, such as the shootings at Columbine High School and Virginia Tech, illuminate the serious and sometime deadly consequences of peer harassment. In both these school shootings, the perpetrators were reportedly victims of bullying or harassment by their peers at some point during their schooling. Highly publicized school shootings such as these have served as a catalyst for bullying prevention programs in America's schools and for the emergence of parent advocacy groups, such as Families Against Bullying.

As a general rule, schools can be liable for failing to protect students from any form of peer harassment. This is evident in the Supreme Court's opinion in *Davis v. Monroe County Board of Education* (1999), in which the justices determined that public school boards that are the recipients of federal financial assistance may be held liable for peer harassment under Title IX if school officials who are in a position to remedy the situation, and who are in situations in

which they have substantial control over the harasser and the victim, act with deliberate indifference to harassment. Moreover, in order to be liable, the harassment must be "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit (p. 650)." Following *Davis,* a growing number of cases have rendered school officials, and their boards, liable for failing to protect students from harassment.

As more student victims continue to hold schools accountable for failing to prevent peer harassment, it is imperative that schools take the necessary measures to promote a harassment-free learning environment. States such as New Jersey and Vermont have responded to the increased pace and scope of peer harassment in secondary schools by enacting antibullying laws, which require school leaders to develop policies that prohibit harassment in public schools. The primary purpose of antiharassment policies is to deter peer harassment, teach students socially appropriate behavior, and reduce school liability risks by establishing a uniform system for schools to address harassment when it occurs.

Although the legislative intent behind the creation of antibullying laws is to promote supportive learning environments free of harassment, many schools' antiharassment policies have been met with stark criticism due to the belief that some policies violate students' First Amendment rights. For example, in *Saxe v. State College Area School District* (2001), the Third Circuit struck down an antiharassment policy from a district in Pennsylvania that prohibited "unsolicited derogatory remarks, slurs, jokes, demeaning behavior or comments, mimicking, name calling, graffiti, innuendo, gestures, threatening, or bullying (p. 203)" as unconstitutional. Relying on the landmark *Tinker v. Des Moines Independent Community School District* (1969), the court concluded that the overly broad language within the policy prohibited a significant amount of student speech protected by the First Amendment.

School administrators responsible for drafting antiharassment policies face a daunting task as they attempt to navigate their way through First Amendment jurisprudence, an area of law deemed challenging even by trained attorneys. While the Supreme Court clearly delineated in *Tinker* that school officials may limit student speech or conduct that they reasonably believe is likely to cause a substantial disruption of the schooling environment, greater clarity is needed regarding the extent to which school officials may limit harassing student expression within the boundaries of the Constitution. Despite the challenges associated with creating antiharassment policies that can muster constitutional scrutiny, the effort is worth the end result, which is a safe, harassment free learning environment for children.

Laura R. McNeal

See also Bullying; *Davis v. Monroe County Board of Education;* Free Speech and Expression Rights of Students; Sexual Harassment, Peer-to-Peer; *Tinker v. Des Moines Independent Community School District;* Title IX and Sexual Harassment

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Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

ARBITRATION

Arbitration refers to the process whereby parties involved in collective bargaining disputes agree to be legally bound by the decision of neutral, third-party intermediaries called arbitrators. Usually, arbitrators are chosen by state labor relations boards. In public education labor disputes, arbitrators are typically selected by mutual agreement of local school boards and employee bargaining units. The arbitration process needs to be distinguished from mediation, conciliation, fact-finding, and other forms of conflict resolution in collective bargaining disputes, because,

unlike arbitrations, these other measures of conflict resolution are not legally binding on the parties involved in the disagreements.

The arbitration process is preferred in labor disputes in both the private and public sectors, because it is seen as a relatively fast and inexpensive method of resolving legal disputes involving the meaning and interpretation of a contract. Additionally, the arbitration process effectively reduces judicial workloads. The current and continued judicial deference given to the arbitration process should ensure its wide use as a viable method of conflict resolution in labor disputes involving public education.

What Can Be Arbitrated?

There is a strong legal as well as public policy inclination in the United States favoring the use of arbitration to settle labor oriented disputes. This strong predisposition toward the use of arbitration to settle labor disputes is reflected in the law. In a famous trio of U.S. Supreme Court labor cases, commonly referred to as "the steelworkers' trilogy," the justices were of the opinion that the rights of employees to bargain collectively and to engage in arbitration should be construed broadly. These three labor cases are *United Steelworkers of America v. American Manufacturing Company* (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Company* (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corporation* (1960). Presently, national and state laws endorse the use of arbitration in disputes involving public education.

In recent years, a majority of states have adopted the legal principles of the steelworker's trilogy cases for the arbitrability and enforcement of collective bargaining disputes in the public sector, including public schools. In both private and public sector labor cases, the judicial tendency is to take a very broad view of the issues covered under arbitration. While variations and disagreements still exist among states concerning what issues are specifically subject to arbitration, no state currently allows the arbitration of prohibited subjects of collective bargaining. For instance, examples of collective-bargaining–prohibited subjects in public schools would be issues relating to staffing, transfer and assignment, school curricula, and the length of the school year. Topics in education labor disputes routinely covered under arbitration include labor conflicts involving teacher evaluations, contractual definitions of what constitutes a normal work week for teachers, and terminations of teachers' paid extracurricular activities.

Determining whether specific disputes are subject to arbitration falls into two basic categories: contractual or legal arbitrability. Contractual arbitrability refers to whether the parties agreed to bring their disputes to arbitration. Conversely, legal arbitrability addresses whether the parties lawfully can agree to allow an arbitrator to settle their dispute. Again, courts must evaluate whether collective bargaining agreements permit, or can legally be subject to, arbitration.

Judicial Deference

In the steelworkers' trilogy collection of labor cases, the Supreme Court effectively limited judicial involvement in the arbitration process and imposed a policy of judicial deference favoring arbitration. When arbitration is employed in the conflict resolution process of labor disputes, the role of the courts is significantly curtailed. Insofar as disputing parties in the arbitration process rely on an arbitrator's interpretation of the issues as well as the imposition of decisions and awards, the judiciary does not often deal with the merits of the cases. Instead, courts review arbitration decisions and awards only to assure that their legal outcomes draw their essences from the underlying collective bargaining agreements and that the legal remedies that arbitrators imposed were not contrary to law or the managerial prerogatives of local school boards.

The legal standard of review for arbitration disputes can potentially have a significant impact on their outcome. While the judicial review of arbitration orders is often limited in scope, the majority of state courts have developed specific standards of review for arbitration using both common law principles and statutory requirements. The most basic common law standard of review is that an arbitrator's award can be disallowed only in instances where there has been fraud or misconduct or there are obvious mistakes in law or fact that were used in the arbitrator's award decision.

Many state courts use what is referred to as the "essence" test developed by the Supreme Court in the steelworkers' trilogy cases. Basically, the essence test analyzes whether an arbitrator's award "derives its essence" from a collective bargaining agreement. If an award does draw its essence from the agreement, the courts must uphold the arbitration award.

Kevin P. Brady

See also Collective Bargaining; Contracts; Mediation; Unions

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Arlington Central School District Board of Education v. Murphy

Arlington Central School District Board of Education v. Murphy (2006) is the U.S. Supreme Court's first opinion construing a controversial provision of the Individuals with Disabilities Education Act (IDEA). At issue in *Murphy* was whether parents who prevailed in disputes with their school systems were entitled to reimbursement for costs associated with hiring expert witnesses and consultants who assisted them in litigation with their school boards over the educational placements of their children with disabilities.

The underlying dispute in *Murphy* involved parents of a student with disabilities who rejected a proposed individualized education program (IEP) for their son and requested a due process hearing. At the same time, the parents withdrew their son from his public school, unilaterally registering him in a private institution. After the parties exhausted administrative remedies via due process hearings, the dispute made its way to court. When the school board acknowledged that the parents were the prevailing party, it conceded that they were entitled to attorney fees under a provision of IDEA that authorizes a court to award "reasonable attorneys' fees as part of the costs" to parents who prevail in their complaints against their school boards (20 U.S.C. § 1415(i)(3)(B)). However, school officials urged the trial court to read the fee shifting provisions as applicable to recovery of attorneys' fees only. The court rejected the board's position and decided that consultant fees could be considered costs within the meaning of the IDEA.

The Second Circuit affirmed, joining the Third Circuit in so ruling. In contrast, the Seventh and Eighth Circuits read the IDEA as limiting recovery to attorney fees, because other costs were not defined, and the statute did not explicitly award fees for expert witnesses and or consultants. In order to resolve the split among the circuits, the Supreme Court agreed to hear an appeal.

Writing for the Supreme Court in its 6-to-3 decision, Justice Alito reversed in favor of the school board. The Court found that because the IDEA was enacted under the Spending Clause of the Constitution, school boards could be held responsible only for those fees about which the act provided clear notice. Insofar as the Court pointed out that the IDEA did not make any mention of fees for expert witnesses or consultants, the Court determined that states and school districts had not been given notice that they could be responsible for such costs. Further, the Court pointed out that although the IDEA contains provisions about how courts should calculate attorney fees to ensure

their reasonableness, Congress included no analogous language for expert witnesses and consultants.

In its analysis, the Supreme Court rejected the parents' claim that a notation in the conference committee report accompanying the bill that stated, "The conferees intend that the term 'attorneys' fees as part of the costs' include reasonable expenses and fees of expert witnesses (*Murphy,* 2006, p. 2462)" revealed congressional intent that fees for expert witnesses should be recoverable to the same extent as attorney fees. The Court concluded that this mention of fees for expert witnesses was insufficient to counter what it considered to be "the unambiguous text" (p. 2563) of the IDEA, which led to its rejecting the parental claim for reimbursement.

Justice Ginsburg, although agreeing with the Court's holding, disagreed with its reasoning as to the Spending Clause. She maintained that all that was necessary to resolve the dispute was to have noted that the IDEA's text omitted any reference to fees for expert witnesses and consultants.

Justice Breyer, joined by Justices Stevens and Souter, dissented. He argued that both the conference committee report and the fact that a provision of the Handicapped Children's Protection Act, which amended the IDEA to add the fee shifting provision in question, that directed the Government Accountability Office (GAO) to conduct a study that included tabulation of statistics about the costs of experts, made it clear that Congress intended "costs" to mean more than attorneys' fees. Breyer also thought that such an interpretation of IDEA more closely matched the act's overall intent. Finally, Breyer expressed concern that barring the opportunity for recovery of fees for expert witnesses and consultants would have a chilling effect on the ability of parents to advocate for the interests of their children.

Justice Souter also wrote a short dissent to underscore the documentary evidence he believed Justice Breyer persuasively demonstrated revealed Congress's intent to include expert fees as recoverable costs to prevailing parents challenging the sufficiency of a child's IEP.

Julie F. Mead

See also Attorney Fees

Further Readings

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Assault and Battery, Civil

Assault and battery are closely related intentional torts that are distinguished from one another by the presence or absence of physical contact. An assault occurs when an individual attempts to make an offensive bodily contact with another individual but fails to do so. During that attempt, there is an imminent fear of contact. In most cases, an assault includes not only threatening words but also an offer of physical violence. In contrast, battery requires an actual offensive bodily contact.

The following example illustrates the difference between assault and battery. If a student threatened to strike another student with a club, and the student being threatened was fearful that the threatening student would strike him, it may be considered assault. If on the other hand, the student with the club physically struck the other student, it may be considered battery. Assault can be distinguished from battery with the consideration that assault is more of a mental violation than a physical one.

Assault and battery are intentional torts that require deliberate acts. The most common types of intentional torts include assault, battery, false imprisonment, intentional infliction of emotional distress, and defamation, which includes libel (written) and slander (spoken). It is important to note that a batterer does not need to intend to hurt someone. Rather, a batterer must simply intend to touch another. For example, a student who intended to throw a pencil in

the classroom and hit someone could be liable for battery. It would not matter that the student did not intend to hurt someone; rather, all that matters is that the student intended to throw the pencil. Assault and battery may also be considered criminal wrongs depending on state criminal statutes.

It is not surprising that school boards are increasingly concerned about legal liability resulting from assault and battery. There have been cases of teachers being accused of assault and/or battery in situations involving sexual misconduct with students. In these instances, the plaintiffs need to demonstrate that the school officials were aware of the sexual misconduct and could have done something but chose not to intervene.

School officials should also be aware that students could allege battery if they are touched while being disciplined. However, the courts provide a great deal of leeway for teachers when they are disciplining students. On this same note, courts have generally agreed that teachers who engage in corporal punishment are not liable for battery unless they inflict excessive force on students and they act with malice.

An illustration comes from a recent case from Louisiana (*Boone v. Wayne Reese,* 2004), in which a mother filed suit on behalf of her child alleging assault and battery when a teacher pushed her son into a wall. A trial court decided both that the teacher did not act with malice and that the teacher's physical contact was needed to maintain order in the classroom. An appellate court affirmed on the basis that the contact with the student did not meet the definition of battery. Conversely, in a case from Pennsylvania (*Vicky M. v. Northeastern Education Intermediate Unit 19,* 2007), a federal trial court denied a school board's motion to dismiss a battery claim against a teacher who struck a special education student's arms and legs. Further, in a case from Arkansas (*Daniels v. Lutz,* 2005), a student and his mother sued a teacher and the school board for various intentional torts after the educator allegedly hit the child in the eye with a manila folder. In addition, the student claimed that the teacher grabbed him by the shirt and held his neck to prevent him from leaving the classroom. Insofar as the court rejected the board's argument that the teacher was immune from liability for battery, it permitted the case to proceed to trial.

School officials should also be aware of the potential for student-to-student assault and battery cases in schools. In a case from New York State (*Taylor v. Dunkirk City School District,* 2004), a school board sought further review of the denial of its motion for summary judgment in a negligent supervision claim, where one student assaulted another after class had ended. Reversing in favor of the board, an appellate court maintained that the board could not be liable because school officials lacked specific knowledge or notice concerning the dangerous conduct on the part of the student who caused the plaintiff's injury.

Indeed, the outcomes of assault and battery cases vary across states. Even so, these cases do demonstrate that school officials must take action if they are aware of the potential for assault and/or battery of students, whether by teachers or peers.

Suzanne E. Eckes

See also Antiharassment Policies

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Assistive Technology

Under the Individuals with Disabilities Education Act (IDEA) (2005), assistive technology (AT) is any device or item, purchased off the shelf or customized, that is used to increase, maintain, or improve the functional capacity of individuals with disabilities. The Assistive Technology Act of 2004 is designed to help states in promoting awareness about AT while providing

technical assistance, outreach, and ways to foster interagency coordination. The New Freedom Initiative of 2001 earmarked $120 million to promote the development and availability of assistive and universally designed technology to individuals with disabilities.

In addition, the IDEA requires school personnel to consider AT as a related service in developing the individualized education programs (IEP) of students with disabilities. Appropriate consideration of AT occurs when devices and services are matched to the learning characteristics and tasks that individuals are expected to perform. The least appropriate consideration of technology is a prewritten statement on the IEP forms or a check-off box for IEP teams to mark.

Assistive technology includes

- evaluating the needs of a child with a disability, including a functional evaluation of the child in the child's customary environment;
- purchasing, leasing, or otherwise providing for the acquisition of AT devices by children with disabilities;
- selecting, designing, fitting, customizing, adapting, applying, maintaining, or replacing AT devices;
- coordinating and using other therapies, interventions, or services with AT devices, such as those associated with existing education and rehabilitation plans and programs;
- providing training or technical assistance for a child with a disability or, if appropriate, that child's family; and
- providing training or technical assistance for professionals (including individuals providing education or rehabilitation services), employers, or other individuals who provide services to, employ, or are otherwise substantially involved in the major life functions of that child.

As such, AT services are those that directly assist individuals with disabilities in the selection, acquisition, or use of AT devices.

While the definition of AT is broad, generally, there are 10 components of AT: augmentative and alternative communication, adapted computer access, devices to assist listening and seeing, environmental control, adapted play and recreation, seating and positioning, mobility and powered mobility, prosthetics, rehabilitation robotics, and integration of technology into the home, school, community, and place of employment. The function of devices to assist listening, seeing, play, and recreation as well as seating and positioning and powered mobility are sufficiently transparent in terms of what they afford individuals with disabilities to accomplish. Environmental control devices allow individuals with disabilities greater control of their environment through devices such as switches to turn their computers on and off or to open and close garage doors. In an increasingly technological society, adapted computer access, including software programs for reading, mathematics, and writing, are perhaps the most common adaptations that allow individuals with disabilities to participate in the general education curriculum.

Augmentative and alternative communication devices range in complexity and transparency. An example of a low-tech device is a pointing board with symbols, pictures, and words. In contrast, a high tech alternative communication device is a voice output communication aid (VOCA). A VOCA creates a computer-generated synthesized "voice" that "speaks" for the individual via a computer chip. Augmentative communication devices are designed to mitigate communication challenges some people with disabilities face that prohibit them from meeting their daily needs.

Interestingly, VOCAs are at the center of a debate known as facilitated communication. Facilitated communication's most fervent advocate, Douglas Biklen, argues that problems with communication stem not from language disorders or cognitive disabilities but rather from an inability of disabled persons to express themselves. Augmentative and alternative devices, therefore, serve as the vehicle by which individuals with communication problems can communicate with others. The dispute centers not around VOCAs' usefulness but rather the authorship of the communication via the VOCA, because a number of empirical studies have revealed that communication using VOCAs is generated by the assistant who helps the individual with a disability.

The concepts of flexibility and adaptability are at the core of universal design (UD) principles for AT. UD reflects the idea of proactively designing products at the outset to meet the needs of as many people as possible rather than retrofitting or making accommodations for individuals with disabilities. The automatic door and the curb cut are concrete examples

describing universal design principles. Automatic doors remove the barrier of missing limbs to operate a door, while curb cuts allow individuals in wheelchairs to move from the sidewalk to the street.

Computers and software represent the most flexible and adaptable tools available to mitigate learning differences inherent in individuals with disabilities. WiggleWorks, a program for beginning readers, was the first software designed with UD principles in mind. Staff at the Center for Applied Special Technology (CAST) designed electronic books for Matthew, a student with cerebral palsy who was unable to speak. When other children saw how Matthew was learning, they insisted on using the computer-supported books. Advances in text-to-speech and speech-to-text technology have been achieved since WiggleWorks was designed. Kurzweil 3000, a software text-to speech voice synthesizer that allows users to access text with added visual, audible, and interactive reading aides, is representative of cutting-edge reading technology.

Assistive technology has the potential to allow individuals with disabilities greater participation and autonomy, but these benefits hinge on access at two levels. To be sure, appropriately trained personnel are needed who can facilitate the process as individuals with disabilities learn and adapt to these devices.

Theresa A. Ochoa

See also Individualized Education Program (IEP); Related Services

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Attorney Fees

Attorney fees are an incidental, generally necessary, but usually expensive cost of litigation, unless attorneys agree to provide representation voluntarily. The cost of representation is usually contractually arranged in advance, based on a cost per hour or a flat rate. Rule 1.5 of the American Bar Association's Model Rules of Professional Conduct provides guidance on the attorney-client relationship with regard to attorney fees. Individual state bar associations adopt local rules fees based upon the Model Rules. Rule 1.5 outlines factors for evaluating reasonableness of attorney fees, permits contingent fee arrangements except in divorce and criminal actions, and places limitations on the division of fees when attorneys from different firms represent the same client. This entry discusses the rules regarding who is responsible for paying attorney fees and, in particular, instances when litigants may recover fees from opposing parties in a lawsuit.

From a legal-historical perspective, the cost of providing for legal representation is a specific example of failure within the developing U.S. legal system to follow English common law. The British rule for attorney fees, indeed the rule for much of the world, requires unsuccessful litigants to pay the legal expenses for both sides. Under the "American Rule" for attorney fees, litigants pay their own legal expenses, and prevailing parties cannot collect fees from losing parties except in exceptional circumstances. Exceptions to the American Rule, where fee switching is allowed, can come from the common law or from statutory provisions awarding attorney fees to prevailing parties.

Common Law Exceptions

Common law in the United States has provided four traditional exceptions to the American Rule: bad faith doctrine, common fund doctrine, the private attorney general exception, and exception by contract agreement. Bad faith doctrine provides for attorney fees when a party willfully disobeys a valid court order, or when a party has acted "in bad faith, vexatiously, wantonly, or for oppressive reasons" (*F. D. Rich Co. v. Industrial Lumber Co.,* 1974, p. 129). The common

fund doctrine allows a prevailing party to obtain attorney fees when the litigation produces or creates a fund of money, or obtains a benefit, for others as well as the prevailing party. The private attorney general exception to the American Rule promotes the common good by allowing private litigants to identify statutory violations (for example, of environmental protection laws) and to force compliance through private litigation. The private attorney general exception was ultimately eliminated by the Supreme Court in *Alyeska Pipeline Service Co. v. Wilderness Society* (1975), in which the Court ruled that the authority to establish a private attorney exception rested with Congress, not the courts. Finally, the parties may negotiate a settlement for a cause of action and include in that settlement provisions for fee switching as a part of the contractual agreement.

Courts occasionally exercise their powers to provide for attorney fee shifting to resolve cases more equitably. In actions against insurance companies, for example, it is not uncommon for prevailing plaintiffs to ask for, and courts to award, attorney fees as an equitable remedy, when the insurer has breached its duty to defend, or when the insurer has breached the insurance contract. Individual jurisdictions will also create local exceptions to the American Rule through the exercise of equitable powers. In an illustrative situation, in New York State, the Shindler Rule provides that "if, through the wrongful act of his present adversary, a person is involved in earlier litigation with a third person in bringing or defending an action to present his interests, he is entitled to recover the reasonable value of attorney's fees and other expenses thereby suffered or incurred" (*Shindler v. Lamb,* 1959, p. 765; 1961).

Statutory Exceptions

Perhaps the greatest sources for exceptions to the American Rule are the federal Congress and the individual state legislatures. By the mid-1980s, over 150 federal statutes and 2,000 state laws providing for fee switching had been enacted by legislative bodies.

In the education context, there are two situations in which school boards are most likely to be required to pay for the attorney for plaintiffs against their school boards: claims in special education and claims under Section 1983 of the Civil Rights Act of 1871, which allows plaintiffs to sue the government. In special education, in the Handicapped Children's Protection Act, now codified as part of the Individuals with Disabilities Education Act (IDEA), Congress essentially overturned *Smith v. Robinson* (1984), a Supreme Court decision denying attorney fees for parents of students with disabilities who prevail in claims against their school boards. Interestingly, attorney fees under IDEA are available to both parents and boards, regardless of whether they are plaintiffs or defendants.

Plaintiffs who prevail under Section 1983 of the Civil Rights Act may benefit from a fee-switching provision that was added to civil rights law as the Civil Rights Attorney's Fees Award Act of 1976; this provision is generally called simply "Section 1988." Section 1988 authorizes reimbursement of attorney fees for plaintiffs who prevail with claims brought under the Constitution as well as under Title VI and Title VII of the Civil Rights Act of 1964, Title IX of the Education Amendments of 1972, the Americans with Disabilities Act, the Religious Freedom Restoration Act of 1993, the Religious Land Use and Institutionalized Persons Act of 2000, and the Violence Against Women Act.

In order to qualify for reimbursement of attorney fees under a federal fee-switching statute such as Section 1988, the party seeking the award must be deemed the "prevailing party." In *Hensley v. Eckerhart* (1983), the Supreme Court enunciated the Hensley Standard for determining prevailing party status as follows: "A typical formulation is that plaintiffs may be considered 'prevailing parties' for attorneys' fees purposes if they succeed on any significant issue in litigation which achieves some benefit the parties sought in bringing suit" (p. 440). Consequently, a party may be considered to prevail even if it receives only a portion of the requested relief. Interim awards of attorney fees are permissible under Section 1988 (*Hanrahan v. Hampton,* 1980), where plaintiffs receive at least some relief on the merits of their claims (*Hewitt v. Helms,* 1987), and where awards of nominal damages suffice to accord prevailing party status (*Farrar v. Hobby,* 1992).

Courts have made a small number of attorney fee awards under what is known as the "catalyst theory."

The catalyst theory allows an award of attorney fees, even though there is no judicially sanctioned change in the legal status of the parties. The catalyst theory arises from the argument that the activities of the plaintiff, often before filing a claim, served as a catalyst in forcing the defendant to change its behavior . Even so, the Supreme Court refused to apply the catalyst theory in *Buckhannon Board & Home Care v. West Virginia Dept. of Health & Human Services* (2001).

In terms of protective proceedings against vexatious plaintiffs, the Christianburg Standard allows a government agency that is the prevailing party to receive a fee award against a plaintiff, or against the plaintiff's attorney, who files a complaint or subsequent cause of action that is frivolous, unreasonable, or without foundation (*Christianburg Garment Co. v. EEOC,* 1978, pp. 412, 422).

David L. Dagley

See also Civil Rights Act of 1964; Title VII; Title IX and Athletics

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Hensley v. Eckerhart, 461 U.S. 424 (1983).
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Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb.
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Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d.
Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(k).
Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.
Violence Against Women Act, 42 U.S.C. §13981.

Authority Theory

Authority is a ubiquitous term, used commonly to refer to those who can command obedience and have decision-making power, either as individuals or as officials acting on behalf of agencies. In the West, the sources of law and authority of the state originate in the growth of parliament through statutory law and judicial shaping of common law, in the form of cases, statutes, regulations, or decisions of administrative bodies. Regulations, in the form of rules or orders issued by an agency of government, have the force of law and are authorized by statute. Mandatory authority is binding: It must be followed. Persuasive authority may be used to convince a court to apply the law in a particular direction; for example, decisions of higher courts are more persuasive than those of lower courts. In the administrative realm, persuasive authority is used to convince those higher in the hierarchy, for example, at the executive level, to interpret and apply policy in a particular manner. These instruments or sources of authority serve as the legal basis of social institutions, provide the basis of their legal power, define their mandates and obligations, define limits to their authority, and define limits to the authority of those who are delegated to act on their behalf.

Source of Validity

Law is also a normative social practice; in addition to morality, religion, and social conventions, it guides human behavior and provides reasons for action. The basis of legal authority lies in the type of validity, that is, the source of the norm enacted by a particular political institution or the norm's content; its justification concerns the moral legitimacy of law, providing the reasons for acknowledging its authority. Two main traditions exist in Western law.

The first, and older, dating back to medieval scholarship, is natural law, which claims that legal validity is derived from moral content rather than social origins. According to this theory, the authority of at least some legal standards necessarily derives, at least in part, from moral standards. Contemporary natural lawyers have suggested a more subtle interpretation of its main tenets—that natural law provides an elucidation of an ideal of law in its fullest or highest sense, concentrating on the ways in which it necessarily promotes the common good as a complement to positivistic law.

The second tradition, legal positivism, originating in the work of Jeremy Bentham, claims that legal validity is determined by social facts involving two claims. First, the social thesis asserts that law is a social phenomenon and that its conditions of legal validity consist of social facts; it is an instrument of political sovereignty or social conventions. Second, the separation thesis maintains that there is a conceptual separation between law and morality, that is, between what the law is and what the law ought to be. Joseph Raz's support for legal positivism rests upon arguing that the law is an authoritative social institution, in other words, a de facto authority not requiring other grounds for its validity.

Two additional perspectives influence legal theory and practice. Legal realism maintains that law should be understood as the actual practice of courts, law offices, and police stations rather than as statutes and treatises. Legal interpretivism claims that the authority and validity of law is not found in data or sets of facts but in the morally informed constructions of legal practice. A strong proponent of this last approach is Ronald Dworkin, who grounded his antipositivist legal theory in the interpretative nature of law, arguing that determining what the law requires in each case involves interpretative reasoning, which involves evaluative considerations resulting in an inseparable admixture of fact and evaluative judgment.

Application to Education

These various traditions have significant, although possibly subtle, effects on authority in education and the nature of arguments made for authority claims. Depending on the source for legal auhority—whether it is higher order moral or educational values grounded in sociopolitical values, the judicial system, the collective institutional actors with statutory powers, or actual administrative practice with delegated powers—differing groups of actors will be accorded legitimacy in policy formulation and its implementation. This affects the autonomy and authoritative powers of state agencies—such as departments or ministries, regional bodies such as school boards, or governing bodies at the local or school level—and the degree of collaboration required in determinations.

Challenges have recently emerged to these traditions. One challenge in particular, feminist jurisprudence, critiques the assumption of male authority in creating the language, logic, and structure of the law. It aims to erase gender-based distinctions in the law on issues regarding competition in the marketplace, labor relations, and violence against women through redressing inequalities, and for some, emphasizing the importance of relationships, context, and reconciliation over abstract principles of rights and logic. This critique can be extended to cover multicultural and other equity groups. A broader international critique, explored, for example, by Jennifer Beard and Sundhya Pahuja, questions the traditional moral and rights basis of international law, which it sees as rooted in colonialism and imperialism as sources of authority.

The implications for educational law are that both the participants and the values informing legal process change, in many cases devolving authority down from the state to community groups. This entails a more complex authority landscape uneasily shared by the state, equity groups, ethnic or cultural groups, and other forms of societal authority or interest groups, including religious organizations. For many jurisdictions this has meant a shift from a more authoritarian practice dominated by the state toward a pluralistic civil society model.

Weber and Bureaucracy

The most important and comprehensive theory of authority is that of Max Weber (1864–1920) who proposed a theory of legitimate authority or domination (*Herrschaft*) that reflects all possible grounds upon

which authority can be justified by the values that individuals hold. This produced a schema of three ideal or analytic, not empirical, types: traditional authority, derived from habitual social institution practices; legal-rational authority, grounded in formal logical principles; and the charismatic, arising from the extraordinary characteristics of an individual. Actual empirical reality is composed of varying admixtures of these pure analytic types, although one may be dominant for a period of time.

Most important for modern societies is the legal-rational, as Weber viewed it having permeated social institutions to the degree that other sources of value are excluded, producing the "iron cage" of bureaucratization. This is accompanied by a condition of "disenchantment," or a hollowing out of values other than calculable efficiency and effectiveness, resulting also in a spirit of managerialism replacing value-laden professionalism. The final consequence for authority is a less deferential attitude toward policy expertise and a more slavish adherence to the new fashion of "entrepreneurial leadership," directed in valuation terms toward cost-benefit analysis as a higher-order value.

In most societies, educational institutions, even at the university level, have become heavily bureaucratized, exacerbated by economic rationalism through the corporatization and commercialization of education. Traditionally, public education was dominated by state bureaucracy, with all the attendant bureau-pathologies that entails, producing a top-down obedience to state and state-delegated authority, in other words, bureaucratic officials. More recently, since the advent of the New Public Management vision in the early 1980s, economic values, accompanied by their respective accountability and information systems, serve as a primary source of authority, elevating the marketplace to an authoritative position in policy and decision making. This is reflected and enforced in changing legislation and policy as well as in staff appointment qualifications to accommodate this transformation.

The consequence for education is a culture in which traditional values of knowledge and the public good—including such principles as academic freedom, guided authority, and its practice—has been replaced by a managerialism grounded in economic competition and the authority of the marketplace.

Eugenie Angele Samier

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B

Baker v. Owen

Who has more authority in deciding how a child will be disciplined at school, especially when a parent's belief in how his or her child is to be disciplined is at odds with a school's disciplinary practices? What are some guidelines a school must adhere to in order to ensure that students are afforded minimal procedural due process in corporal punishment cases? Does corporal punishment constitute cruel and unusual punishment?

In *Baker v. Owen* (1975), the U.S. Supreme Court, in its first case addressing corporal punishment, summarily affirmed a ruling of a three-judge panel in a federal trial court in North Carolina that while parents generally have the right to choose among disciplinary practices for children, the essential responsibility of school officials to maintain discipline is a more compelling interest. Accordingly, the trial court decided that parents do not have the authority to restrict the discretion of school officials who seek to use corporal punishment on students who break school rules. Even given such discretion, corporal punishment disciplinary proceedings must be in accordance with minimum procedural due process protections, the Court said.

Facts of the Case

The mother of sixth grader Russell Baker instructed school officials not to corporally punish her son, because she opposed the practice on principle. After the student violated a school rule, officials administered corporal punishment and did not provide him with procedural due process. The mother then sued school officials, claiming that they violated her right to choose disciplinary methods under the Fourteenth Amendment and that the use of corporal punishment violated the Eight Amendment's prohibition against cruel and unusual punishment.

Baker is perhaps best known as providing guidance on what happens when two protected rights are at odds with each other: In this case, the right of parents to direct the education of their children, including how they may be disciplined at school, was at odds with the rights of educators to maintain discipline and order. The trial court reasoned that, based on interpretation of the Fourteenth Amendment liberty clause, parents do indeed have a protected right to decide among methods of discipline for their children.

At the same time, the trial court found that as important as parent's rights are, they are neither fundamental nor absolute, they are not afforded the highest degree of constitutional protection, and they do not apply across all situations. The court was of the opinion that because maintaining discipline and order were not only justified but essential for schools, such goals were more compelling and vital than a parent's right to choose disciplinary consequences for their children in a school setting. The court also explained that due to the controversial nature of school discipline and corporal punishment, on which there was not unquestioned social consensus, it would be unreasonable to suggest that parental opposition to corporal

punishment was fundamental and thus constitutionally protected.

Baker further provided guidance on whether corporal punishment without due process violated Fourteenth Amendment liberty protections, and it offered some criteria for determining what might be considered minimum standards for procedural due process. The court pointed out that students have a liberty interest in corporal punishment cases, and thus, procedural due process is a requirement in corporal punishment proceedings.

In order to balance the protected interests of students and schools in corporal punishment cases, the court further listed minimal procedures that might constitute procedural due process. These procedures include

- informing students beforehand that corporal punishment is a possibility for specific types of misbehavior;
- using corporal punishment after alternative methods of behavior modification have been tried and not as a first line of punishment;
- imposing corporal punishment in the presence of at least one other school official, who has been told, with the student present, why the student is receiving corporal punishment;
- if requested, informing the parent in writing of the reasons for corporal punishment; and
- identifying the school officials witnessing the punishment.

The Court's Ruling

The Supreme Court affirmed this ruling but eventually modified these procedures slightly in *Ingraham v. Wright* (1977). The decisions still provide some guidance to school officials and policymakers on what is considered procedural due process in corporal punishment cases.

On the question of whether corporal punishment is to be considered cruel and unusual punishment, the court acknowledged that such a question was unsettled. Even so, the trial court determined that the type and form of corporal punishment in *Baker,* two licks to the buttocks with a wooden drawer divider, did not rise to the level of cruel and unusual punishment. The Supreme Court later clarified that the cruel and unusual punishment clause does not apply to corporal punishment in schools, even if it is "exceptionally harsh" in nature, as in *Ingraham v. Wright.*

M. Karega Rausch

See also Due Process; Fourteenth Amendment; *Ingraham v. Wright;* Parental Rights

Legal Citations

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Behavioral Intervention Plan

The behavioral intervention plan (BIP) is related to the requirements of the Individuals with Disabilities Education Act (IDEA). The professional literature in special education is replete with research and recommendations for developing BIPs, based on functional behavioral assessments (FBAs) and positive behavioral strategies, as the primary means for controlling and improving the conduct of students with disabilities that interfere with their learning or that of others. However, such sources fail to clarify the differences between best practice and legal requirements. This entry focuses on the latter.

What the Law Says

The basic framework of legal requirements consists of the IDEA legislation and its regulations. Hailed for establishing the FBA-BIP model, the 1997 amendments to the legislation expressly mentioned an FBA, and they also mentioned a BIP indirectly within the limited context of a disciplinary change in placement. The amendments specifically require school board officials "to convene an IEP [individualized education program] meeting to develop an assessment plan" to address behavior that leads to placement changes, if children do not already have FBAs and BIPs. There were only two relevant related requirements in the disciplinary context: One was that children receive, in their changed placements, "services and modifications designed to address the behavior" that triggered the

placement change. The other was that the manifestation determination include the criteria by which it was decided that the school board officials had provided appropriate "behavior intervention strategies consistent with the child's IEP and placement."

Finally, and more broadly, the 1997 amendments required the IEP team "in the case of a child whose behavior impedes his or her learning or that of others [to] *consider, when appropriate,* strategies, including positive behavioral interventions . . . to address that behavior" [emphasis supplied].

The 2004 amendments retained and even strengthened the IEP requirement by removing the qualifier "when appropriate." Yet, in the disciplinary context, IDEA as amended in 2004 revised the express FBA-BIP requirement by limiting it to the reduced situations where the team determined that the behavior was a manifestation of the child's disability. Moreover, as part of its reduction of these manifestation determination results, the 2004 version removed altogether the related criterion discussed above. Finally, the 2004 amendments revised the other related requirements to having the child "receive, as appropriate, a functional behavioral assessment and behavior intervention services and modifications designed to address the behavior" (20 U.S.C. 1415(k)(D)(ii)).

The 1999 IDEA regulations made one significant addition: They extended the assessment plan requirement to the 11th cumulative day of removal in a school year; however, because the 2006 IDEA regulations dropped this requirement, it remains to be seen exactly how this will work.

Court Rulings

In light of this sketchy and soft framework, the published hearing/review officer and court decisions have been neither frequent nor consistent. A pair of contrasting cases is amply illustrative. In *Mason City Community School District,* 36 IDELR ¶ 50 (Iowa 2001), a hearing officer, who is a special education professor, noted the relevant IDEA requirements, including the absence of any definition or standards for a BIP. The hearing officer approved the district's BIP, while finding that the removals had not reached the requisite level. The significant aspect of the case is that the hearing officer cobbled together four required components for a BIP, specifically that it must be based on assessment data, be individualized, include positive behavior change strategies, and be consistently implemented and monitored. Although she comprehensively canvassed the published hearing/review officer decisions to date, the underlying authority for these relatively modest standards was notably limited by the absence of court decisions and the failure of any of the cited cases to attempt any such systematic specification.

By way of contrast, in *Alex R. v. Forrestville Valley Community Unit School District No. 221,* the Seventh Circuit decided another case where school board officials proactively provided a BIP in the IEP of a student with a disability prior to any notable extent of removals, although in this case the parents' challenge came after the district had suspended the student for 17 days within the first three months of the school year. With regard to the BIP, while acknowledging that the officials had complied with the procedural requirements, the parents argued that, based on the standards in *Mason City,* the BIP was substantively inappropriate.

The Seventh Circuit disagreed, noting that neither the legislation nor the regulations provided any substantive standards. Declining to go where Congress and the U.S. Department of Education had not gone, the court concluded as a matter of law that the district's BIP "could not have fallen short of substantive criteria that do not exist." Although hearing/review officers may be more amenable to best-practice arguments concerning BIPs, the Seventh Circuit's decision is representative of the predominant judicial view as reflected in cases from the Eighth Circuit (*School Board of Independent School District No. 11 v. Renollett,* 2006) as well as federal trial courts in Alabama (*Escambia County Board of Education v. Benton,* 2005) and Virginia (*County School Board v. Palkovics,* 2003).

Thus, although professional norms strongly favor early and careful development of BIPs, along with FBAs and positive behavioral strategies, neither Congress nor the courts have adopted these norms as IDEA requirements. Indeed, the latest version of the IDEA, on balance, has moved in the other direction.

Unless and until the advocates of FBAs and BIPs have succeeded in incorporating these best practices into the IDEA or at least corresponding state laws, the only basis, other than a receptive *Mason City*–type of hearing/review officer, is the moral and practical suasion of being professionally proactive.

Perry A. Zirkel

See also Free Appropriate Public Education; Inclusion; Individualized Education Program (IEP); Least Restrictive Environment; Response to Intervention (RTI)

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Escambia County Board of Education v. Benton, 406 F. Supp. 2d 1248 (S.D. Ala. 2005).

Mason City Community School District, 36 IDELR ¶ 50 (Iowa 2001).

School Board of Independent School District No. 11 v. Renollett, 440 F.3d 1007 (8th Cir. 2006).

Beilan v. Board of Public Education

In *Beilan v. Board of Public Education* (1958), the U.S. Supreme Court was faced with the issue of whether a teacher's dismissal for incompetence, due to a failure to respond to a superintendent's questions, violated his rights to due process under the U.S. Constitution. At least one of the superintendent's questions inquired as to whether the teacher had held a position with the Communist Political Association eight years earlier. Based on the relevancy of the questions posed and the teacher's failure to respond, the Court, by a five-to-four margin, ruled that the teacher's dismissal did not deprive him of his due process rights.

Beilan is typically placed in juxtaposition with the line of First Amendment loyalty cases placed before the courts as well as with Fifth Amendment self-incrimination claims. Indeed, the facts resemble some of the cases on First Amendment Freedom of Association challenges, but in this instance, the case ultimately rested on whether a teacher may remain silent or decline to respond when the questions related to the fitness of the teacher to serve, and the teacher's failure to respond amounted to incompetence.

Facts of the Case

The situation leading to the eventual discharge arose in June 1952, when Herman Beilan, a 22-year veteran teacher of the Philadelphia School District, was called into the superintendent's office to address matters that were presented as concerns about Beilan's loyalty. The superintendent posed an initial inquiry as to whether Beilan served as the press director of the Professional Section of the Communist Political Association. Instead of responding, Beilan requested time to consult an attorney before responding.

After consulting an attorney, in October 1952, Beilan informed the superintendent that he would not answer the initial question or other similar questions on matters related to his political or religious beliefs. The superintendent warned Beilan that failing to respond might result in dismissal, because it raised concern over his fitness to work in the district. A month later, the Board initiated Beilan's discharge process for incompetence based on his failure to respond to the superintendent's question and his refusal to answer other related questions.

The Court's Ruling

Beilan illustrates three legal propositions. First, inquiries relevant to the fitness and suitability of public school teachers are generally legitimate questions to pose. As the Court discussed, teachers have obligations to respond candidly and frankly to questions posed, and there is a general expectation of cooperation. While teachers do not forgo their First Amendment freedoms, a question relevant to teacher fitness and suitability may be asked—as occurred in this case. Second, *Beilan* made clear that fitness and suitability are not limited to classroom activities. The Court even mentioned that determining fitness includes a broad range of factors. Consequently, a teacher's refusal to respond to matters of past activities and potentially further inquires of other participation may be asked. Third, based on a state's statutory interpretation of fitness and suitability, the term "incompetence" may be applied broadly to this situation and serve as the proper grounds for teacher dismissal.

In *Beilan,* the basis of the dismissal was the teacher's refusal to respond to questions posed by the supervisor; it was not about the teacher's associations or activities as indicia of teacher loyalty. Accordingly, Beilan's failure to respond amounted to deliberate and insubordinate behavior, which under Pennsylvania law may terminate a teacher's employment for incompetence.

Finally, Beilan complained that he was denied due process, because he did not receive proper notice of the consequences if he did not respond. However, the Court noted that the record indicated sufficient warnings of the consequences if he failed to respond. In addition, the Court emphasized that Beilan was provided multiple opportunities to consult an attorney.

Jeffrey C. Sun

See also Due Process; Teacher Rights

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Bethel School District No. 403 v. Fraser

In *Bethel School District No. 403 v. Fraser* (1986), the Supreme Court held that school officials did not violate a high school student's free speech and due process rights when he was disciplined for making a lewd and vulgar speech at a school assembly. *Bethel* is known today for limiting the expression rights of students in school settings. Specifically, *Bethel* grants school officials the authority to restrict lewd, vulgar, or offensive student speech.

Facts of the Case

In *Bethel,* Matthew Fraser, a public high school student, gave a nominating speech for a classmate who was running for an office in student government. The speech, which occurred during school hours at an assembly as part of a school-sponsored educational program, was attended by approximately 600 students. During Fraser's speech, he made numerous sexual innuendos and references, causing the audience to react in a variety of ways; some appeared confused and embarrassed, while others yelled and made obscene gestures.

Prior to the student assembly, two educators warned Fraser that he should not give the speech and that if he did, serious consequences would result. After Fraser delivered the controversial speech, the school's assistant principal told him that by doing so he violated the school's policy prohibiting the use of obscene language. As punishment, school officials suspended Fraser for three days and removed his name from the list of possible graduation commencement speakers.

Disagreeing with his punishment, Fraser first went through the school board's grievance procedure, at which the hearing officer determined that the discipline that Fraser was subjected to was legitimate. Next, Fraser, through his father, filed suit in a federal trial

court in Washington State, alleging that officials infringed on his First Amendment right to freedom of speech. The court addressed three legal issues: first, that officials violated Fraser's free speech rights; second, that the discipline policy that prohibited the speech was "unconstitutionally vague and overbroad"; and third, that officials violated the Due Process Clause of the Fourteenth Amendment in removing Fraser's name from the list of graduation speakers. The court granted Fraser monetary damages and ordered the school board to allow him to speak at the graduation.

The school appealed the case to the Ninth Circuit, which affirmed in favor of Fraser. The Ninth Circuit maintained that Fraser's speech was no different from the student speech in *Tinker v. Des Moines Independent Community School District* (1969). In *Tinker,* the Supreme Court held that school officials could not discipline students who wore black armbands to protest the Vietnam War based solely on the fear that the students would cause a disruption.

Further, the Ninth Circuit rejected the schools' following three arguments. First, the court rejected the notion that Fraser's speech differed from the passive speech in *Tinker* because his speech actually caused a disruption. Second, the court disagreed that officials had the responsibility to protect minors from "lewd and indecent" language. Third, the court did not think that officials had the authority to control speech that occurred during a school-sponsored event.

The Court's Ruling

In a 7-to-2 decision, the Supreme Court reversed the Ninth Circuit's decision and agreed with the school's arguments. Specifically, the Court held that the discipline of Fraser did not violate the Free Speech Clause of the First Amendment or the Due Process Clause of the Fourteenth Amendment. Under the First Amendment, the Court reasoned that officials could discipline Fraser's lewd and indecent speech. Although *Tinker* established that students should be afforded free expression rights while at school, the Court explained that their rights are not equivalent to an adult's freedom of speech. Moreover, the Court pointed out that the sexual content of Fraser's speech was distinguishable from the nondisruptive, political speech that was at issue in *Tinker.*

The Court added that because schools are responsible for instilling certain values in students, officials at schools should be able to teach students about what is *not* socially acceptable speech. In a related case, the Supreme Court held in *FCC v. Pacifica Foundation* (1978) that the state has an interest in protecting children from vulgar and offensive language. The Court noted that on the one hand, while school officials should allow controversial views to be expressed, on the other, they must balance this interest with those of other students who may be offended by certain language.

Turning to the Fourteenth Amendment, the Court decided that officials did not violate Fraser's due process rights. First, the Court was of the opinion that a school's disciplinary policy does not need to be as descriptive as a criminal code, because such a policy does not impose criminal sentences. As such, the Court indicated that as a result of his two-day suspension, Fraser was afforded the appropriate level of due process procedures. Second, the Court found that Fraser received ample notice that his inappropriate speech could result in punishment. In fact, the Court determined not only that school officials had an antiobscenity rule, but also that they provided Fraser with sufficient warning of the consequences of his actions.

In upholding the rights of school officials to place limits on student expressive activities in school settings, *Fraser* is important because it acknowledges that they are responsible for more than simply passing on educational information and can expect students to behave in ways that are not disruptive to school activities.

Janet R. Rumple

See also Due Process; Free Speech and Expression Rights of Students; *Hazelwood School District v. Kuhlmeier; Morse v. Frederick; Tinker v. Des Moines Independent Community School District*

Legal Citations

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
FCC v. Pacifica Foundation, 438 U.S. 726 (1978).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Bethel School District No. 403 v. Fraser (Excerpts)

In Bethel School District No. 403 v. Fraser, *the Supreme Court upheld the authority of educational officials to discipline a student who, after being advised not to do so, violated school rules by delivering a lewd and obscene speech at a school assembly.*

Supreme Court of the United States

BETHEL SCHOOL DISTRICT NO. 403

v.

FRASER

478 U.S. 675

Argued March 3, 1986.

Decided July 7, 1986.

Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.

I

A

On April 26, 1983, respondent Matthew N. Fraser, a student at Bethel High School in Pierce County, Washington, delivered a speech nominating a fellow student for student elective office. Approximately 600 high school students, many of whom were 14-year-olds, attended the assembly. Students were required to attend the assembly or to report to the study hall. The assembly was part of a school-sponsored educational program in self-government. Students who elected not to attend the assembly were required to report to study hall. During the entire speech, Fraser referred to his candidate in terms of an elaborate, graphic, and explicit sexual metaphor.

Two of Fraser's teachers, with whom he discussed the contents of his speech in advance, informed him that the speech was "inappropriate and that he probably should not deliver it," App. 30, and that his delivery of the speech might have "severe consequences." *Id.,* at 61.

During Fraser's delivery of the speech, a school counselor observed the reaction of students to the speech. Some students hooted and yelled; some by gestures graphically simulated the sexual activities pointedly alluded to in respondent's speech. Other students appeared to be bewildered and embarrassed by the speech. One teacher reported that on the day following the speech, she found it necessary to forgo a portion of the scheduled class lesson in order to discuss the speech with the class.

A Bethel High School disciplinary rule prohibiting the use of obscene language in the school provides: "Conduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures."

The morning after the assembly, the Assistant Principal called Fraser into her office and notified him that the school considered his speech to have been a violation of this rule. Fraser was presented with copies of five letters submitted by teachers, describing his conduct at the assembly; he was given a chance to explain his conduct, and he admitted to having given the speech described and that he deliberately used sexual innuendo in the speech. Fraser was then informed that he would be suspended for three days, and that his name would be removed from the list of candidates for graduation speaker at the school's commencement exercises.

Fraser sought review of this disciplinary action through the School District's grievance procedures. The hearing officer determined that the speech given by respondent was "indecent, lewd, and offensive to the modesty and decency of many of the students and faculty in attendance at the assembly." The examiner determined that the speech fell within the ordinary meaning of "obscene," as used in the disruptive-conduct rule, and affirmed the discipline in its entirety. Fraser served two days of his suspension, and was allowed to return to school on the third day.

B

Respondent, by his father as guardian ad litem, then brought this action in the United States District Court for the Western District of Washington. Respondent alleged a violation of his First Amendment right to freedom of speech and sought both injunctive relief and monetary damages under 42 U.S.C. § 1983. The District Court held that the school's sanctions violated respondent's right to freedom of speech under the First Amendment to the United States Constitution, that the school's disruptive-conduct rule is unconstitutionally vague and overbroad, and that the removal of respondent's

name from the graduation speaker's list violated the Due Process Clause of the Fourteenth Amendment because the disciplinary rule makes no mention of such removal as a possible sanction. The District Court awarded respondent $278 in damages, $12,750 in litigation costs and attorney's fees, and enjoined the School District from preventing respondent from speaking at the commencement ceremonies. Respondent, who had been elected graduation speaker by a write-in vote of his classmates, delivered a speech at the commencement ceremonies on June 8, 1983.

The Court of Appeals for the Ninth Circuit affirmed the judgment of the District Court, holding that respondent's speech was indistinguishable from the protest armband in *Tinker v. Des Moines Independent Community School Dist.* The court explicitly rejected the School District's argument that the speech, unlike the passive conduct of wearing a black armband, had a disruptive effect on the educational process. The Court of Appeals also rejected the School District's argument that it had an interest in protecting an essentially captive audience of minors from lewd and indecent language in a setting sponsored by the school, reasoning that the School District's "unbridled discretion" to determine what discourse is "decent" would "increase the risk of cementing white, middle-class standards for determining what is acceptable and proper speech and behavior in our public schools." Finally, the Court of Appeals rejected the School District's argument that, incident to its responsibility for the school curriculum, it had the power to control the language used to express ideas during a school-sponsored activity.

We granted certiorari. We reverse.

II

This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist* that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." The Court of Appeals read that case as precluding any discipline of Fraser for indecent speech and lewd conduct in the school assembly. That court appears to have proceeded on the theory that the use of lewd and obscene speech in order to make what the speaker considered to be a point in a nominating speech for a fellow student was essentially the same as the wearing of an armband in *Tinker* as a form of protest or the expression of a political position.

The marked distinction between the political "message" of the armbands in *Tinker* and the sexual content of respondent's speech in this case seems to have been given little weight by the Court of Appeals. In upholding the students' right to engage in a nondisruptive, passive expression of a political viewpoint in *Tinker,* this Court was careful to note that the case did "not concern speech or action that intrudes upon the work of the schools or the rights of other students."

It is against this background that we turn to consider the level of First Amendment protection accorded to Fraser's utterances and actions before an official high school assembly attended by 600 students.

III

The role and purpose of the American public school system were well described by two historians, who stated: "[P]ublic education must prepare pupils for citizenship in the Republic. . . . It must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." In *Ambach v. Norwick* we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."

These fundamental values of "habits and manners of civility" essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular. But these "fundamental values" must also take into account consideration of the sensibilities of others, and, in the case of a school, the sensibilities of fellow students. The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

In our Nation's legislative halls, where some of the most vigorous political debates in our society are

carried on, there are rules prohibiting the use of expressions offensive to other participants in the debate. The Manual of Parliamentary Practice, drafted by Thomas Jefferson and adopted by the House of Representatives to govern the proceedings in that body, prohibits the use of "impertinent" speech during debate and likewise provides that "[n]o person is to use indecent language against the proceedings of the House." The Rules of Debate applicable in the Senate likewise provide that a Senator may be called to order for imputing improper motives to another Senator or for referring offensively to any state. Senators have been censured for abusive language directed at other Senators. Can it be that what is proscribed in the halls of Congress is beyond the reach of school officials to regulate?

The First Amendment guarantees wide freedom in matters of adult public discourse. A sharply divided Court upheld the right to express an antidraft viewpoint in a public place, albeit in terms highly offensive to most citizens. It does not follow, however, that simply because the use of an offensive form of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public school. In *New Jersey v. T.L.O.,* we reaffirmed that the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings. As cogently expressed by Judge Newman, "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket."

Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed, the "fundamental values necessary to the maintenance of a democratic political system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools." The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board.

The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class. Inescapably, like parents, they are role models. The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.

The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students—indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students. The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality. Some students were reported as bewildered by the speech and the reaction of mimicry it provoked.

This Court's First Amendment jurisprudence has acknowledged limitations on the otherwise absolute interest of the speaker in reaching an unlimited audience where the speech is sexually explicit and the audience may include children. In *Ginsberg v. New York,* this Court upheld a New York statute banning the sale of sexually oriented material to minors, even though the material in question was entitled to First Amendment protection with respect to adults. And in addressing the question whether the First Amendment places any limit on the authority of public schools to remove books from a public school library, all Members of the Court, otherwise sharply divided, acknowledged that the school board has the authority to remove books that are vulgar. These cases recognize the obvious concern on the part of parents, and school authorities acting in loco parentis, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech.

We have also recognized an interest in protecting minors from exposure to vulgar and offensive spoken language. . . .

We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the

students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students. Accordingly, it was perfectly appropriate for the school to disassociate itself to make the point to the pupils that vulgar speech and lewd conduct is wholly inconsistent with the "fundamental values" of public school education. Justice Black, dissenting in *Tinker,* made a point that is especially relevant in this case: "I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.".

IV

Respondent contends that the circumstances of his suspension violated due process because he had no way of knowing that the delivery of the speech in question would subject him to disciplinary sanctions. This argument is wholly without merit. We have recognized that "maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship." Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions. Two days' suspension from school does not rise to the level of a penal sanction calling for the full panoply of procedural due process protections applicable to a criminal prosecution. The school disciplinary rule proscribing "obscene" language and the prespeech admonitions of teachers gave adequate warning to Fraser that his lewd speech could subject him to sanctions.

The judgment of the Court of Appeals for the Ninth Circuit is

Reversed.

Note: *Chief Justice Burger's majority opinion did not report the speech at issue. However, since Justice Brennan included it on p. 687 of his concurrence, it is reproduced here in its entirety.*

"'I know a man who is firm—he's firm in his pants, he's firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm.

"'Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he'll take an issue and nail it to the wall. He doesn't attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds.

"'Jeff is a man who will go to the very end—even the climax, for each and every one of you.

"'So vote for Jeff for A.S.B. vice-president—he'll never come between you and the best our high school can be.'"

Citation: *Bethel School District No. 403 v. Fraser,* 478 U.S. 675 (1986).

Bilingual Education

Several educational programs exist within public school systems to address the instructional needs of students who do not speak English. Two programs in particular, bilingual education and English immersion, have competed for support from policymakers for adoption in schools. Both of these programs have been influenced significantly by continuing legal and political debates across the United States. This entry discusses bilingual education and related laws and court decisions.

Program Overview

Bilingual education focuses on instruction in two languages, including the student's home language as well as English. Bilingual education provides instruction in students' native languages while simultaneously helping them to achieve English proficiency or bilingual fluency. English immersion programs, on the other hand,

zero in on instruction in English. Those who favor bilingual education claim that when English language learner (ELL) students are taught in English immersion programs, children receive inadequate support in general education classrooms.

Bilingual education programs are often described as one-way or two-way dual language programs. One-way dual language programs typically serve only bilingual and ELL students; these programs are likely to exist in schools where one language group, such as Spanish-speaking students, is dominant. Conversely, two-way programs may include native English-speaking children with bilingual and ELL students in the same dual language program.

Historical foundations for bilingual instruction date back to the late 1800s, when assimilation into the American culture, especially the ability to speak and understand English, was strongly desired. The ability to speak and understand English was considered critical to success in America. Moreover, antagonism toward non–English speakers grew during World War I. During this period, bilingual education was all but dismantled with the passage of English-only laws in many states.

Laws and Court Rulings

In *Meyer v. Nebraska* (1923), a teacher challenged his conviction for violating a state statute that prohibited the teaching of schoolchildren in foreign languages in public, private, or parochial school after he provided instruction in German in a parochial school. According to the Nebraska legislature, the legislation was needed to promote the Americanization of foreign-born students and to ensure that children learned the English language and observed American ideals.

The state supreme court upheld the conviction. In its opinion, the court declared that allowing the children of foreigners to be taught in their native language was a threat to the country. On appeal, the U.S. Supreme Court reversed in holding that such a statute forbidding instruction in a foreign language prior to students' completion of the eighth grade violated both their liberty interests and those of their parents, rights that were guaranteed under the Fourteenth Amendment. Although bilingual education was not specifically mentioned in the opinion, the Court's decision invalidated English-only legislative efforts that impeded bilingual education.

Federal Action

The Bilingual Education Act of 1968 signifies the emergence of federal policy to address the needs of a growing language-minority student population. Senator Ralph Yarborough, a Democrat from Texas, initiated legislation to provide federal funding for schools to adopt bilingual education programs. Congress enacted this legislation as Title VII of the Elementary and Secondary Education Act, referred to as the Bilingual Education Act of 1968.

As a result of this federal legislation, bilingual education began to regain favor and support across many states. Of particular impact was the fact that the Bilingual Education Act mandated funding for bilingual education programs. Even though funding was available, the act did not provide school systems with clear guidelines regarding the extent and type of programs and services that were to be provided to non-English-speaking students. That is, federal policymakers disagreed and failed to make clear whether bilingual education programs were to promote students' bilingual skills or to transition students into English dominated instructional classrooms.

Given the lack of clear guidelines and purpose, educators and parents appealed to the courts to mandate specific educational programs for ELLs. The Supreme Court's ruling in *Lau v. Nichols* in 1974 is perhaps the most widely recognized case addressing the right of non-English-speaking students. In *Lau,* the Court concluded that the school board discriminated against non-English-speaking Chinese students enrolled in the San Francisco Public School System. Specifically, the Court explained that the students were denied their right to an equal education as required by Section 601 of the Civil Rights Act of 1964. However, the Court failed to establish a specific remedy, such as a bilingual education program, to redress the rights of students who were non-English-speaking.

During the 1970s, the Office for Civil Rights (OCR) took something of an activist approach to the regulation of bilingual education. OCR officials scrutinized school district practices for violations of OCR guidelines and funding, placing funding at risk for school systems that were found to be noncompliant. Yet, by the 1980s, critics of bilingual education had gained political clout, and the English-only movement emerged again. During this time, funds to English-only methods increased while funding and time limits were placed upon bilingual education programs.

A Legal Reaction

In the 1990s, Propositions 227 and 203 passed in California and Arizona, respectively, both of which limited the use of bilingual education in public schools. The elimination of the Bilingual Education Act by reauthorizing it as Title III (Part A of which is the English Language Acquisition, Language Acquisition, and Academic Achievement Act) of the No Child Left Behind Act (NCLB) signifies the decreasing political clout of bilingual education programs. As a part of school reform efforts in 2001, Title III of NCLB provides funds for English language learners (ELLs) through competitive grants. The term *bilingual education* is no longer used; instead, the focus is on rapid acquisition of English language skills.

Pursuant to NCLB, ELLs are expected to meet state academic achievement standards, as evidenced by student performance on statewide assessments. Public schools are required to report student achievement by gender, race, family income level (limited to whether or not students are living in poverty), disability, and English proficiency. Under NCLB, ELLs are included in the English proficiency group, which is referred to as the limited-English-proficient subgroup for purposes of reporting student achievement data.

Ongoing political debates, the lack of clear guidelines, and inconclusive evidence regarding the value of bilingual education will continue to foster disagreement regarding the adoption of bilingual education programs. Schools are legally obligated to demonstrate adequate yearly progress for ELLs, but there remains much debate around just how best to promote high academic achievement for English language learners. Thus, school leaders must adhere to the legal mandates of NCLB, including Title III, and they must be aware of emerging, albeit often conflicting, research on bilingual education.

Susan C. Bon

See also English as a Second Language; Fourteenth Amendment; *Lau v. Nichols;* Limited English Proficiency; *Meyer v. Nebraska*

Legal Citations

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Meyer v. Nebraska, 262 U.S. 390 (1923).
No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).
Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Bill of Rights

The Bill of Rights is generally recognized as a part of the U.S. Constitution that guarantees each person certain basic rights. The individual freedoms guaranteed by the Bill of Rights have been demarcated by a large number of court cases that have defined the rights of all citizens, including teachers and students in public education. The fascinating story of how these rights became a part of the Constitution and the specific freedoms that they guarantee is presented in this entry, along with their application to education. Even though not all of the Amendments have a direct impact on education, all are identified in this entry.

Origins of the Bill of Rights

Following the conclusion of the Revolutionary War with Great Britain, there was widespread discontent with the functioning of the new government under the Articles of Confederation. In fact, there were many problems that neither the individual states nor the weak federal government could solve. The Continental Congress passed a resolution calling for a Constitutional Convention to meet in May of 1787 in Philadelphia to revise the Articles of Confederation.

The state legislatures chose 74 delegates, but only 55 were able to attend the Constitutional Convention.

The delegates elected George Washington as the presiding officer and decided that they would meet behind closed doors and that they would not discuss what was taking place even with their family members.

The delegates to the Constitutional Convention went beyond revising the Articles of Confederation by writing a new Constitution that created three branches of government with specific powers for a strong central government. Each state would have to ratify the new Constitution, and it would go into effect when nine states ratified it. It took two years for nine states to ratify the new Constitution. The emotions and feelings in New York were so strong during the ratification process that the group of men who supported the new Constitution wrote newspaper articles supporting the ratification and became known as The Federalists. The Federalists, who were led by Alexander Hamilton, James Madison, and John Jay, wrote 85 articles that together became known as *The Federalist Papers.* The anti-Federalists responded with their newspaper articles and pointed out the absence of a bill of rights in the Constitution. North Carolina rejected the Constitution because there was no bill of rights.

The founding fathers knew their history; they understood that the powers of a ruler could not easily be restrained but could be limited because of the action of brave men. A significant time that a ruler had his power curtailed occurred on June 15, 1215, when nobles in England rebelled against King John's actions and forced him to sign at Runnymede a document that became known as the *Magna Carta.* This document enumerated certain rights of the nobles and the responsibilities of the king. The *Magna Carta* limited the power of the king. The concepts of due process of law and trial by jury of peers can be traced back to this document.

Another historical document, The English Bill of Rights of 1689, provided for the following rights: petition of the king, freedom of speech, freedom from excessive bail, and freedom from the infliction of cruel and unusual punishment. All of these rights eventually would become part of the U.S. Bill of Rights.

The U.S. House of Representatives, at the urging of James Madison, prepared 17 amendments to the U.S. Constitution that were sent to the Senate for concurrence. The Senate met behind closed doors and reduced the 17 proposed amendments to 12. A conference committee met and agreed on the 12 amendments, and both the House and Senate agreed with the conference committee report. In September 1789, the Congress submitted the 12 amendments to the states for their ratification. The first amendment was to authorize the expansion of the House of Representatives, and the second would prevent members of the House and Senate from raising their salaries during their current term of office, but these two amendments were not ratified by the states. However, the original Second Amendment would be ratified in 1992 and became the Twenty-Seventh Amendment. What was left, then, were the 10 amendments that became the Bill of Rights.

The Federal Bill of Rights

The First Amendment has five specific rights that are applicable to public schools. The first right, religious freedom, guarantees that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Among the dozens of Supreme Court cases on religion, perhaps the best known and certainly most widely applied case is *Lemon v. Kurtzman* (1971), wherein the Court created a tripartite test to evaluate interactions between religion and public education.

The second right is the freedom of speech, which has led to numerous court cases involving students and teachers. Perhaps the most famous case involving student speech is *Tinker v. Des Moines Independent Community School District* (1969), in which the Supreme Court ruled that students could wear armbands protesting the Vietnam War if there was no disruption of school activities. Later, the Court noted that students can be disciplined for lewd speech in *Bethel School District No. 403 v. Fraser* (1986). More recently, in *Morse v. Frederick* (2007), the Court reasoned that school officials could prevent a student from displaying a message that appeared to endorse drug use as he watched the Olympic torch pass the front of his school. Turning to the rights of teachers, the Supreme Court recognized that they could address matters of public concern in *Pickering v. Board of Education of Township High School District 205, Will County* (1968).

The third right is the freedom of press, an issue that was contested in an educational setting in *Hazelwood School District v. Kuhlmeier* (1988). Entering a judgment in favor of school officials in a dispute over the contents of a school-sponsored newspaper, the Supreme Court explained that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 273).

The fourth right is the freedom to assemble, often associated with teacher unions; the fifth right is the right to "petition the Government for a redress of grievances."

The Second Amendment says "the right of people to keep and bear Arms, shall not be infringed." While this amendment does not have a direct impact on schools, the Supreme Court has rendered a judgment in only one case, *U.S. v. Miller* (1939), which required the registration of sawed-off shotguns for personal use. Public schools may and do restrict faculty and students from bringing firearms to school due to safety concerns.

The Third Amendment, which forbids the government from housing troops in private residences, has no application to schools today. This amendment was a direct result of the British Quartering Act, which required the colonists to feed and house British soldiers without recompense.

The Fourth Amendment prohibits government officials from searching the "houses, papers, and effects" of persons unless they first acquire search warrants The Supreme Court upheld the warrantless searches of students in *New Jersey v. T. L. O. (1985).* The Court subsequently upheld drug testing of student-athletes in *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002).

The Fifth Amendment grants specific rights to persons accused of crimes, and it requires the federal government to follow specific procedures in dealing with citizens. Interestingly, if only educational officials, not the police, question students about misbehavior in schools, then the students are not entitled to the right to a warning that the Supreme Court established in *Miranda v. Arizona* (1966).

The Sixth Amendment, which provides citizens with the right to a trial by jury of their peers and to have a public defender provided at no cost, has no direct application in schools.

The Seventh Amendment, which spells out the right to a trial by jury in "suits at common law," has no direct application in schools.

The Eighth Amendment provides protections for the accused, perhaps most notably from "cruel and unusual punishment." In *Ingraham v. Wright* (1977), the Supreme Court was of the opinion that the use of corporal punishment in schools did not violate the Eighth Amendment.

According to the Ninth Amendment, "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." This Amendment has no direct application in schools.

The Tenth Amendment stipulates that if powers are not delegated to the federal government, they are reserved to the states or the people. The growing role of the federal government in education notwithstanding, insofar as education is not mentioned explicitly in the U.S. Constitution, it falls within the purview of the states under this amendment.

Robert J. Safransky

See also Religious Activities in Public Schools; State Aid and the Establishment Clause; Teacher Rights

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U.S. v. Miller, 307 U.S. 174 (1939).
Vernonia School District 47 J v. Acton, 515 U.S. 646 (1995).

Bishop v. Wood

Bishop v. Wood (1976) dealt with an employment dispute between a former police officer and the city for which he worked. *Bishop* provides two key legal propositions for public employees generally, including educators in public schools who are subject to dismissal from their jobs. First, *Bishop* makes it clear that interpretations of state law determine whether constitutionally protected property interests in public employment exist, such as tenure or other interests involving continued employment. Second, *Bishop* stands for the notion that if officials do not reveal the reasons for dismissing public employees, then they will not have violated the liberty interests of the former employees, even if the reasons were false.

Facts of the Case

The dispute arose when Carl Bishop was dismissed from his job as a police officer in Marion, North Carolina. Behind closed doors, the city manager informed Bishop of the reasons for his dismissal but did not afford him a hearing with an opportunity to redress the asserted claims leading to his dismissal. Bishop alleged that the reasons for his dismissal were untrue and that the false statements harmed his reputation. Consequently, Bishop unsuccessfully sued the city under the Fourteenth Amendment, claiming that he was deprived of property and liberty interests. A federal trial court and the Fourth Circuit rejected his charges.

The Court's Ruling

In reviewing the first of the two issues before it, the U.S. Supreme Court found it necessary to consider whether Bishop could actually have expected continued employment as a constitutional property right. The Court explained that because the legal right of continued governmental employment generally represents a constitutionally protected property interest, challenges to a public employee's property interest would require due process, such as a hearing or an opportunity for appeal.

In this case, with nearly three years of employment, Bishop contended that his employment status, which was that of a permanent employee, warranted a reasonable expectation of continued employment. As support for his argument, the plaintiff cited an employment provision on dismissal processes within the applicable city ordinance. The provision stated that dismissals of permanent employees, namely city employees who satisfactorily complete their six-month probationary periods, required written notice and reasons for their being discharged.

Accordingly, based on two reasons, Bishop claimed that he had a property interest. First, he interpreted the phrase "permanent employee" in the ordinance to implicitly attach an expectation of his continued employment or a constitutionally based property interest. Additionally, because termination proceedings could only have proceeded if supported by just cause such as a qualifying reason for dismissal, absent one of the enumerated reasons provided in the ordinance, Bishop maintained that his being discharged from public employment was improper.

In upholding Bishop's dismissal in a 5-to-4 vote, the Supreme Court decided that interpretations of provisions over governmental employment should be left to the state. To this end, even though the Court noted that the ordinance may have been interpreted either with or without an employee's expectation of continued employment, it believed that the determination of whether Bishop could have viewed his status as a

permanent employee with an expectation of continued employment that attaches a constitutional property interest was left to North Carolina law. Insofar as the Court did not think that any direct authority existed on how to interpret state law, it relied on the trial and appellate courts' interpretations, both of which agreed that the ordinance did not afford state public employees an expectation of continued employment. Instead, the Court was convinced that because city employees worked at the will and pleasure of the city, no constitutional property interest was involved.

The Court next turned to the second issue in noting that the basis for the deprivation of liberty rights rests on some harm to one's good name, reputation, honor, or integrity. When the reasons for termination are not made public, the Court was of the opinion that a claim for the deprivation of liberty rights cannot be sustained, even if the statements were false. In *Bishop,* the Court pointed out that because the reasons for the plaintiff's dismissal were given in private, his claim had to fail.

At the same time, Bishop argued that officials disclosed false reasons, which caused harm to his reputation, during the discovery phase. In rejecting this claim, the Court posited that the dismissal discussions that were uncovered during the evidentiary discovery process or related to the filing of a case cannot serve as evidence of public disclosure, because the public disclosure would not have occurred otherwise. The Court concluded that even if the reasons for the plaintiff's dismissal were false, because they were made in private, he was not deprived of any liberty interests.

Jeffrey C. Sun

See also *Board of Regents v. Roth;* Fourteenth Amendment; *Perry v. Sindermann*

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Black, Hugo L. (1886–1971)

Hugo Lafayette Black served as an associate justice of the Supreme Court of the United States from August 17, 1937, to September 17, 1971. His 34 years on the high Court make him one of the longest-serving justices of all time. This entry reviews his life and his contributions to the Court.

Early Years

Justice Black was born on February 27, 1886, in rural Clay County, Alabama. He entered Birmingham Medical College in 1903 but transferred to the University of Alabama law school a year later. Following graduation from law school in 1906, Black practiced law in Ashland, Alabama, for one year, before moving to Birmingham. He served as a judge on the Birmingham Police Court from 1910 to 1911 and as the prosecuting attorney for Jefferson County, Alabama (metropolitan Birmingham), from 1914 to 1917. Black also served as a captain in the U.S. Army during World War I and was discharged in 1919. On returning to civilian life, Black resumed private practice in Birmingham.

In 1926, Black was elected to the U.S. Senate from Alabama, and he was reelected in 1932. On August 12, 1937, President Franklin D. Roosevelt nominated him to the Supreme Court as the replacement for Associate Justice Willis Van Devanter. Black was confirmed by the Senate five days later on August 17, 1937.

Supreme Court Record

As a Supreme Court justice, Black followed a "textualist" or "strict constructionist" approach to constitutional and statutory interpretation. He emphatically rejected the concept of "substantive due process," which the Supreme Court had used to invalidate much of Roosevelt's New Deal. Black believed that government could do anything it wished as long it did not violate an explicit textual provision of the Constitution. He believed that if judges invalidated statutes on "natural law" grounds, then they were engaging in judicial activism. Thus, he dissented in *Griswold v. Connecticut* (1965) when the Court struck

down a state law banning contraceptives. In his view, nothing in the Constitution prohibited the law, even though the law was, in his judgment, unwise.

At the same time, Justice Black took a broad view of the restrictions that were contained in the text. In *Gideon v. Wainwright* (1963), he found that the Sixth Amendment required the appointment of legal counsel for the poor. Similarly, in his dissent in *Adamson v. California* (1947), he took the position that the Fourteenth Amendment made *all* provisions of the Bill of Rights applicable to the states. His theory of "total incorporation" stood in stark contrast to his colleagues' theories, notably that of Justice Felix Frankfurter, who believed in "selective incorporation." In Black's view, selective incorporation turned on a vague and amorphous standard.

Consistent with his theory of total incorporation, Black authored *Everson v. Board of Education of Ewing Township* (1947), which held that the Establishment Clause applied to the states. He later wrote opinions striking down religious instruction in public schools (*McCollum v. Board of Education,* 1948) and recitation of government-authored prayers (*Engel v. Vitale,* 1962).

Perhaps most famously, Black took an absolutist view of the First Amendment and insisted, "No law means no law." Consequently, in *New York Times Co. v. United States* (1971), he rejected the federal government's national security concerns and allowed the publication of the Pentagon Papers. However, Black drew a sharp distinction between speech, which he viewed as being absolutely protected, and expressive conduct, which he thought had no protection. Thus, he dissented in *Tinker v. Des Moines Independent Community School District* (1969) when the Court held that students had a right to wear armbands to protest the Vietnam War.

A stroke forced Black to retire from the Court on September 17, 1971. He passed away eight days later on September 25, 1971. He is buried in Arlington National Cemetery.

William E. Thro

See also *Engel v. Vitale; Everson v. Board of Education of Ewing Township; Illinois ex rel. McCollum v. Board of Education; Tinker v. Des Moines Independent Community School District*

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Board of Education, Island Trees Union Free School District No. 26 v. Pico

In *Board of Education, Island Trees Union Free School District No. 26 v. Pico* (1982), for the first and only time, the U.S. Supreme Court addressed the removal of books from public schools' libraries. At issue was whether a school board's decision to remove nine books from school libraries should have been limited by the First Amendment. Although the decision in *Pico* was a fractured one, with seven of the nine Justices writing separate opinions, it does provide guidance for the removal of library books. Under *Pico's* plurality, the motivation for the book removal is the central factor in determining constitutionality. If the purpose of removing books is purely to eliminate diversity of ideas for nationalistic, political, or religious

reasons, then the action is impermissible. However, if board officials can point to a nondiscriminatory reason for removing books, such as vulgarity or educational unsuitability, then they are granted wide discretion in removing public school library books.

Facts of the Case

Pico arose when five students in New York sought injunctive and declaratory relief in *Pico* by invoking 42 U.S.C. § 1983, claiming that their school board violated their First Amendment rights. After initially attempting to ban the books because they were "anti-American, anti-Christian, anti-Semitic and just plain filthy," the board, on recommendation of the superintendent, appointed a review committee, which advised that five of the books at issue be kept in the library. The board overruled the committee's recommendation, giving no explanation of its actions, and banned all but two of the books.

A federal trial court granted the board's motion for summary judgment on the basis that its motivation stemmed from a "conservative educational philosophy," which was permissible in light of the wide discretion usually given to school boards. Subsequently, the Second Circuit reversed and remanded in pointing out that there was an issue of fact regarding the board's motives.

The Court's Ruling

On further review at the U.S. Supreme Court, Justice William J. Brennan wrote for a plurality. He emphasized the narrow nature of the Court's holding, limiting it only to the removal of library books and excluding mandatory readings in course curricula and decisions regarding the acquisition of library books. Justice Brennan reasoned that local school boards should have substantial discretion in their curriculum choices and that there is an important interest in protecting nationalistic, political, and social values of schoolchildren. Even so, he noted, citing Court precedent, students retain some First Amendment rights even at school, and those rights were fully implicated in the case at bar. Placing significant value both on the role that school libraries play in the valuable and free-choice discovery of knowledge and on the right that schoolchildren have in access to information, the Court held that the board should not have been able to suppress the particular ideas within books, simply because it did not agree with them.

At the same time, the Court created an exception for the removal of library books with "pervasive vulgarity" or those that are educationally unsuitable. Insofar as the board appointed, but did not follow the recommendation of a review committee and other district employees, the Court was of the opinion that there was a possibility that it acted with unconstitutional intent in removing the books. Accordingly, the plurality affirmed the order of the Second Circuit and remanded the dispute for further findings of fact. There is no later judicial record of any such actions, suggesting that the parties reached an out-of-court settlement.

Four justices wrote separate individual dissents in *Pico*, expressing outrage that the plurality recognized a right to receive information. The dissenters also feared that the plurality's subjective standard would not provide sufficient guidance to lower courts and school boards. In addition, Justice Warren Burger emphasized that because school boards are closer to the community and parents than are courts, they are better equipped to make decisions of removal, and courts should grant them wide discretion.

Pico does provide some guidance for school boards that wish to remove books from their libraries. First, if educational officials have procedures for removing library books, then they should follow them closely. Second, boards must ensure that the motivations for removing books are in accord with *Pico,* meaning that while they can exclude books based on vulgarity or educational unsuitability, they cannot act purely from nationalistic, political, or religious values.

Emily Richardson

See also First Amendment; *Tinker v. Des Moines Independent Community School District; United States v. American Library Association*

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Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls

The U.S. Supreme Court's decision in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) addressed the legal issue of whether suspicionless drug-testing of students, pursuant to a board's student activities drug-testing policy, was reasonable under the U.S. Constitution's Fourth Amendment, which guarantees protection from unreasonable searches and seizures. In largely applying the test that it enunciated in *Vernonia School District 47J v. Acton* (1995), the Court ruled the policy was constitutional based on five reasons, as discussed in this entry.

Facts of the Case

The policy at issue required all students who wished to participate in competitive extracurricular activities to submit urine for drug testing and to provide school officials with a list of all prescription drugs that they took. The samples were collected by teachers, who stood outside of bathroom stalls. If test results were positive, they were kept confidential, except that parents were notified, and students were referred to counseling. Students were not reported to the police, and only repeated positive tests or refusals to participate in counseling could have led to students' being excluded from extracurricular activities.

After Lindsay Earls, a participant in several activities, filed suit against the school board in a federal trial court in Oklahoma, challenging the policy as a violation of the Fourth Amendment, the court granted the board's motion for summary judgment. Subsequently, the Tenth Circuit reversed in favor of Earls, deciding that the policy violated the Fourth Amendment. On further review, the Supreme Court reversed in ruling that the policy passed constitutional muster.

The Court's Ruling

The Court, in an opinion authored by Justice Thomas, reasoned that students who participate in extracurricular activities have limited expectations of privacy. The Court observed that because these activities required students to use communal team dressing rooms and lockers, they voluntarily subject themselves to intrusions of their privacy. The Court also found the testing procedure was constitutionally permissible, because it was virtually identical to the one employed in *Vernonia School District 47J v. Acton,* wherein it determined that any intrusion on student privacy was negligible. Additionally, the Court was satisfied that the policy clearly required confidentiality, and test records were kept separate from students' other files. Further, insofar as the Court explained that the results were not given to the police and the only real consequence was exclusion from extracurricular activities, it concluded that the invasion of students' privacy was not significant.

The Court next asserted that the evidence of drug use offered by school officials was sufficient to justify the policy, because the Court had not required a particularized or pervasive problem to allow drug testing. To this end, the Court agreed that the policy served the board's interest in protecting the safety and health of its students. Finally, while expressing no opinion as to the wisdom of the policy, the Court ruled that the policy was a reasonable means of advancing the district's interest of preventing drug use by its students.

Justice Breyer's concurring opinion emphasized the size of the serious drug problem in American schools and the failure of government efforts to restrict supply to reduce teenage drug use. He also noted that public schools need to find effective means to address the problem and that educators need to work to change the school environment to discourage peer pressure to use drugs. In dissent, Justice

O'Connor argued that based on her contention that *Vernonia* had been resolved incorrectly, it followed that the policy at issue failed the balancing approach that it had enunciated.

Justice Ginsberg dissented on the ground that the circumstances in the *Earls* case were significantly different from those in *Vernonia.* Citing the commonalities with *Vernonia* that the Court emphasized, she was of the view that attending public school and electing to participate in extracurricular activities alone did not justify such intrusive, suspicionless searches. Along with concerns for student privacy, Ginsberg was troubled by the lack of evidence to justify the need for the policy.

In sum, *Earls,* like its predecessor case, *Vernonia,* stands for the proposition that while school boards are free to enact carefully crafted suspicionless drug-testing policies for students who wish to participate in extracurricular activities, and these policies can be upheld as constitutional, boards are under no legal obligation to do so.

Patricia Ehrensal

See also Drug Testing of Students; Extracurricular Activities, Law and Policy; *Vernonia School District 47J v. Acton*

Legal Citations

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), *on remand,* 300 F.3d 1222 (10th Cir. 2002).

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Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls (Excerpts)

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls *was the second time that the Supreme Court upheld random drug testing of students who participated in competitive extracurricular activities.*

Supreme Court of the United States

BOARD OF EDUCATION OF INDEPENDENT SCHOOL DISTRICT NO. 92 OF POTTAWATOMIE COUNTY

v.

EARLS et al.

536 U.S. 822

Argued March 19, 2002.

Decided June 27, 2002.

Justice THOMAS delivered the opinion of the Court.

The Student Activities Drug Testing Policy implemented by the Board of Education of Independent School District No. 92 of Pottawatomie County (School District) requires all students who participate in competitive extracurricular activities to submit to drug testing. Because this Policy reasonably serves the School District's important interest in detecting and preventing drug use among its students, we hold that it is constitutional.

I

The city of Tecumseh, Oklahoma, is a rural community located approximately 40 miles southeast of Oklahoma City. The School District administers all Tecumseh public schools. In the fall of 1998, the School District adopted the Student Activities Drug Testing Policy (Policy), which requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity. In practice, the Policy has been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics. Under the Policy, students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbituates, not medical conditions or the presence of authorized prescription medications.

At the time of their suit, both respondents attended Tecumseh High School. Respondent Lindsay Earls was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Respondent Daniel James sought to participate in the Academic Team. Together with their parents, Earls and James [sued] the School District, challenging the Policy both on its face and as applied to their participation in extracurricular activities. They alleged that the Policy violates the Fourth Amendment as incorporated by the Fourteenth Amendment and requested injunctive and declarative relief. They also argued that the School District failed to identify a special need for testing students who participate in extracurricular activities, and that the "Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school."

Applying the principles articulated in *Vernonia School Dist. 47J v. Acton,* in which we upheld the suspicionless drug testing of school athletes, the United States District Court for the Western District of Oklahoma rejected respondents' claim that the Policy was unconstitutional and granted summary judgment to the School District.

The United States Court of Appeals for the Tenth Circuit reversed, holding that the Policy violated the Fourth Amendment. . . . We granted certiorari and now reverse.

II

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Searches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests. We must therefore review the School District's Policy for "reasonableness," which is the touchstone of the constitutionality of a governmental search.

In the criminal context, reasonableness usually requires a showing of probable cause. The probable-cause standard, however, "is peculiarly related to criminal investigations" and may be unsuited to determining the reasonableness of administrative searches where the "Government seeks to *prevent* the development of hazardous conditions." The Court has also held that a warrant and finding of probable cause are unnecessary in the public school context because such requirements "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed.' "

Given that the School District's Policy is not in any way related to the conduct of criminal investigations *infra,* respondents do not contend that the School District requires probable cause before testing students for drug use. Respondents instead argue that drug testing must be based at least on some level of individualized suspicion. It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. But we have long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." "[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' "

Significantly, this Court has previously held that "special needs" inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

In *Vernonia,* this Court held that the suspicionless drug testing of athletes was constitutional. The Court, however, did not simply authorize all school drug testing, but rather conducted a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. Applying the principles of *Vernonia* to the somewhat different facts of this case, we conclude that Tecumseh's Policy is also constitutional.

A

We first consider the nature of the privacy interest allegedly compromised by the drug testing. As in *Vernonia,* the context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general.

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.

Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in *Vernonia.* This distinction, however, was not essential to our decision in *Vernonia,* which depended primarily upon the school's custodial responsibility and authority.

In any event, students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

B

Next, we consider the character of the intrusion imposed by the Policy. Urination is "an excretory function traditionally shielded by great privacy." But the "degree of intrusion" on one's privacy caused by collecting a urine sample "depends upon the manner in which production of the urine sample is monitored."

Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must "listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody." The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student. This procedure is virtually identical to that reviewed in *Vernonia,* except that it additionally protects privacy by allowing male students to produce their samples behind a closed stall. Given that we considered the method of collection in *Vernonia* a "negligible" intrusion, the method here is even less problematic.

In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. Respondents nonetheless contend that the intrusion on students' privacy is significant because the Policy fails to protect effectively against the disclosure of confidential information and, specifically, that the school "has been careless in protecting that information: for example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them." But the choir teacher is someone with a "need to know," because during off-campus trips she needs to know what medications are taken by her students. Even before the Policy was enacted the choir teacher had access to this information. In any event, there is no allegation that any other student did see such information. This one example of alleged carelessness hardly increases the character of the intrusion.

Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Indeed, a student may test positive for drugs twice and still be allowed to participate in extracurricular activities. After the first positive test, the school contacts the student's parent or guardian for a meeting. The student may continue to participate in the activity if within five days of the meeting the student shows proof of receiving drug counseling and submits to a second drug test in two weeks. For the second positive test, the student is suspended from participation in all extracurricular activities for 14 days, must complete four hours of substance abuse counseling, and must submit to monthly drug tests. Only after a third positive test will the student be suspended from participating in any extracurricular activity for the remainder of the school year, or 88 school days, whichever is longer.

Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant.

C

Finally, this Court must consider the nature and immediacy of the government's concerns and the efficacy

of the Policy in meeting them. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. As in *Vernonia,* "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the "drug situation." We decline to second-guess the finding of the District Court that "[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy."

Respondents consider the proffered evidence insufficient and argue that there is no "real and immediate interest" to justify a policy of drug testing nonathletes. We have recognized, however, that "[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime," but that some showing does "shore up an assertion of special need for a suspicionless general search program." The School District has provided sufficient evidence to shore up the need for its drug testing program.

Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *Von Raab* the Court upheld the drug testing of customs officials on a purely preventive basis, without any documented history of drug use by such officials. In response to the lack of evidence relating to drug use, the Court noted generally that "drug abuse is one of the most serious problems confronting our society today," and that programs to prevent and detect drug use among customs officials could not be deemed unreasonable. Likewise, the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals' novel test that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a "drug problem."

Respondents also argue that the testing of nonathletes does not implicate any safety concerns, and that safety is a "crucial factor" in applying the special needs framework. They contend that there must be "surpassing safety interests" or "extraordinary safety and national security hazards," in order to override the usual protections of the Fourth Amendment. Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.

We also reject respondents' argument that drug testing must presumptively be based upon an individualized reasonable suspicion of wrongdoing because such a testing regime would be less intrusive. In this context, the Fourth Amendment does not require a finding of individualized suspicion and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use. In any

case, this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means, because "[t]he logic of such elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."

Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia* there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

III

Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Citation: *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* 536 U.S. 822 (2002), *on remand,* 300 F.3d 1222 (10th Cir. 2002).

Board of Education of Kiryas Joel Village School District v. Grumet

Board of Education of Kiryas Joel Village School District v. Grumet presents a somewhat unusual controversy as far as church-state suits are concerned. The Supreme Court was asked to rule on a legislative enactment that represented an attempt to provide necessary special education services to children with disabilities who belonged to a religious sect whose dictates prevented the children from mingling with others who did not share their beliefs. Even though the legislation had a secular purpose, the Supreme Court struck it down, in part, because it saw that the inadvertent message created by the legislation could be one of endorsing a particular religion.

Facts of the Case

Following a long legal dispute over the delivery of special education services to students who attended a religious school operated by the Satmar Hasidic Sect, the New York State legislature enacted a statute that created a school system with boundaries that were contiguous with the sect's village. The sole public school in the district was to provide educational services to students with disabilities. Not surprisingly, the creation of the district led to legal challenges.

A state trial court, in *Grumet v. New York State Education Department* (1992), found that the law creating the school district for the purpose of providing special education services to the students violated the Establishment Clauses of both the federal and state constitutions. The court wrote that the law violated all three prongs of the Supreme Court's *Lemon v. Kurtzman* test because it had a sectarian rather than a secular purpose; it was enacted to meet the religious needs of the sect; and it had the effect of advancing, protecting, and fostering the religious beliefs of the community. The court concluded that the law fostered excessive entanglement with religion in that public officials had to take steps to ensure that public funds were not spent furthering religious purposes.

On further review, an intermediate state appellate court affirmed. Noting that the challenged statute was designed not just to provide special education services to the children in the village but also to offer them in a manner so that the students would remain subject to the language, lifestyle, and environment created by the community of Satmar Hasidim, the court agreed that the statute violated the federal and state constitutions. The court emphasized that the statute authorized a religious community to dictate where secular public educational services should be provided to children of the community.

Thus, the court maintained that the law created the type of symbolic impact that is impermissible under the second prong of *Lemon.* That symbolic union, according to the court, was likely to be perceived by the Satmar Hasidim as an endorsement of their religion and by others as a disapproval of their own individual religious beliefs. The impermissible effect, in the court's view, was the symbolic impact of creating a new school district, the boundaries of which were coterminous with a religious community, to provide educational services that were already available, inasmuch as the original dispute between the religious community and the public school system was based on the religious tenets, practices, and beliefs of the community.

The state's highest court also affirmed. In *Grumet v. Board of Education of the Kiryas Joel Village School District* (1993), the judges agreed that the statute authorized a religious community to dictate where secular public educational services would be provided while creating the type of impermissible symbolic impact that the second prong of *Lemon* forbade. In view of the fact that only Hasidic children would attend the schools in the district, and only members of the sect were likely to serve as school board members, the court agreed that this symbolic union of church and state was likely to be viewed as an endorsement of the sect's religious choices and by others as a disapproval of their own individual religious choices.

The Court's Ruling

On further review, the Supreme Court also affirmed in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994). Writing for the majority, Justice David Souter held that the state law departed from the constitutional mandate of neutrality toward religion by delegating the state's discretionary authority over public schools to a group defined by its character as a religious community in a context that gave no assurance that governmental power would be exercised neutrally. Souter wrote that a state may not delegate its civic authority to a group chosen according to religious criteria. Insofar as authority over public schools belongs to the state, it cannot be delegated to a local school district defined by the state to grant political control to a religious group, according to the Court.

Consequently, the Court decided that the law resulted in a forbidden fusion of governmental and religious functions, because the statute delegated power to an electorate defined by common religious belief and practice. In the final analysis, the majority determined that the state statute crossed the line from permissible accommodation to impermissible establishment.

Shortly after the Supreme Court ruled in *Kiryas Joel,* the New York State legislature modified the statute in attempt to address the constitutional infirmities. However, all three branches of the New York State courts again invalidated the law (*Grumet v. Cuomo,* 1997; *Grumet v. Pataki,* 1999a) and the Supreme Court refused to hear a further appeal (*Grumet v. Pataki* (1999b).

Allan G. Osborne, Jr.

See also First Amendment; *Lemon v. Kurtzman;* State Aid and the Establishment Clause

Legal Citations

Grumet v. New York State Education Department, 579 N.Y.S.2d 1004 (N.Y. Sup. Ct. 1992), *aff'd,* 592 N.Y.S.2d 123 (N.Y. App. Div. 1992), *aff'd as modified sub nom. Grumet v. Board of Education of the Kiryas Joel Village School District,* 601 N.Y.S.2d 61 (N.Y. 1993), *aff'd sub nom. Board of Education of Kiryas Joel Village School District v. Grumet,* 512 U.S. 687 (1994).

Grumet v. Cuomo, 659 N.Y.S.2d 173 (N.Y. 1997).

Grumet v. Pataki, 697 N.Y.S.2d 846 (N.Y. 1999a), *cert. denied,* 528 U.S. 946 (1999b).

Lemon v. Kurtzman, 403 U.S. 602 (1971).

Board of Education of the Hendrick Hudson Central School District v. Rowley

In 1982, the Supreme Court decided *Board of Education of the Hendrick Hudson Central School District v. Rowley.* In *Rowley,* the Court, for the first time, resolved a case interpreting portions of what was then called the Education for All Handicapped Children Act (EAHCA), the legislation that would later be renamed the Individuals with Disabilities Education Act (IDEA, 1990). Pursuant to the EAHCA and, later, the IDEA, states, through local school boards, are obligated to provide students with disabilities a free appropriate public education (FAPE) in the least restrictive environment as detailed in an individualized education program (IEP) for each child. In *Rowley,* the Court offered a definition of FAPE. The Court concluded that the states' obligation to provide FAPE was satisfied "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (p. 203).

Facts of the Case

Amy Rowley was a deaf student enrolled in kindergarten in public school in Peekskill, New York. Prior to the beginning of her kindergarten year, Amy's parents met with school administrators to plan for her attendance and to determine what supplemental services would be necessary for her education. During a short portion of her kindergarten year, Amy was provided with a sign language interpreter in the classroom. Following a two-week trial period, the interpreter reported that Amy did not need his services in the classroom. After her kindergarten year, an IEP was prepared for Amy.

The IEP provided that Amy would remain in the regular classroom and would be provided with an FM wireless hearing aid in the classroom, and, additionally, she would receive instruction from a tutor for one hour a day and from a speech therapist for three hours per week outside of the classroom. Amy's parents objected to portions of the IEP, requesting that the school provide Amy with a sign language interpreter instead of the other forms of assistance identified in the IEP. School administrators refused the request, concluding that Amy did not need an interpreter in the classroom.

Amy's parents sought administrative and judicial review of the school's decision pursuant to the EAHCA. The Rowleys argued that because Amy could only decode a fraction (approximately 60%) of the oral language available to hearing students in class, she was entitled to a sign-language interpreter. Without an interpreter, they argued, Amy would be denied the educational opportunity available to her classmates.

After a hearing officer declared that Amy was entitled to an interpreter, the school board sought judicial review. A federal trial court in New York ruled, and the Second Circuit affirmed, that Amy was being denied the opportunity to achieve her potential at a level "commensurate with the opportunity provided other children"—a standard that echoed the regulations implemented for Section 504 of the Rehabilitation Act of 1973.

The Court's Ruling

The Supreme Court reversed, rejecting the Section 504 standard. Instead, the Court found that Amy was receiving an educational benefit sufficient to meet the FAPE requirement of EAHCA. According to the Court, the instruction need only confer some educational benefit to qualify as FAPE. The Court reasoned that Amy benefited educationally (and, thus, received FAPE) as demonstrated by her passing grades in individual subjects and her grade-to-grade progress. In reaching this conclusion, the Court declared that EAHCA did not require school boards to "maximize the potential of handicapped children commensurate with the opportunity provided to other children" (p. 189). Therefore, the Court did not think that Amy was entitled to a sign language interpreter in the classroom. The justices instructed future courts to limit their inquiries to whether school officials complied with the procedural protections of EAHCA and whether students' instructional programs were reasonably calculated to lead to educational benefit.

In reaching its outcome, the Supreme Court opted not to enunciate a standard of equal opportunity for students with disabilities. The Court stated that the

Rowleys "correctly note that [in enacting the EAHCA,] Congress sought 'to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws.' But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services" (p. 198).

The "educational benefit" standard that the Supreme Court articulated in *Rowley* has been viewed as a minimalist requirement for what constitutes FAPE. Regardless, subsequent courts have struggled to interpret the meaning of "some educational benefit." Ensuing federal courts have broadened the definition to require that an appreciable, meaningful, or more-than-trivial benefit be conferred by the education provided. Other cases expanded the educational benefit definition to require progress, effective results, or demonstrable improvements.

In addition to providing a definition for FAPE, the *Rowley* Court also articulated a standard of judicial deference to the decision making of educational authorities. The Supreme Court cautioned the courts not "to substitute their own notions of sound educational policy for those of the school authorities which they review," noting that judges were ill-equipped to make decisions about appropriate educational methodologies (p. 206). In the years since the *Rowley* opinion was handed down, school boards and officials seeking to overcome parents' judicial challenges to methodological choices need only demonstrate that the methodological choice is reasonably calculated to lead to student progress.

John A. LaNear and Elise M. Frattura

See also Free Appropriate Public Education; Individualized Education Program (IEP); Least Restrictive Environment; Rehabilitation Act of 1973, Section 504

Legal Citations

Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).

Mills v. District of Columbia Board of Education, 348 F. Supp. 866 (D.C. 1972).

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (1972).

Board of Education of the Hendrick Hudson Central School District v. Rowley (Excerpts)

In Board of Education of the Hendrick Hudson Central School District v. Rowley, *its first case dealing with federal special education law, the Supreme Court found that school boards need only provide eligible children with an education that confers some educational benefit.*

Supreme Court of the United States

BOARD OF EDUCATION OF THE HENDRICK HUDSON CENTRAL SCHOOL DISTRICT, WESTCHESTER COUNTY

v.

ROWLEY

458 U.S. 176

Argued March 23, 1982.

Decided June 28, 1982.

Justice REHNQUIST delivered the opinion of the Court.

This case presents a question of statutory interpretation. Petitioners contend that the Court of Appeals and the District Court misconstrued the requirements imposed by Congress upon States which receive federal funds under the Education of the Handicapped Act. We agree and reverse the judgment of the Court of Appeals.

I

The Education of the Handicapped Act (Act), provides federal money to assist state and local agencies in educating handicapped children, and conditions such funding upon a State's compliance with extensive goals and procedures. . . .

[The Court provided a history of the Act and an overview of its key features].

. . . .

II

This case arose in connection with the education of Amy Rowley, a deaf student at the Furnace Woods School in

the Hendrick Hudson Central School District, Peekskill, N.Y. Amy has minimal residual hearing and is an excellent lipreader. During the year before she began attending Furnace Woods, a meeting between her parents and school administrators resulted in a decision to place her in a regular kindergarten class in order to determine what supplemental services would be necessary to her education. Several members of the school administration prepared for Amy's arrival by attending a course in sign-language interpretation, and a teletype machine was installed in the principal's office to facilitate communication with her parents who are also deaf. At the end of the trial period it was determined that Amy should remain in the kindergarten class, but that she should be provided with an FM hearing aid which would amplify words spoken into a wireless receiver by the teacher or fellow students during certain classroom activities. Amy successfully completed her kindergarten year.

As required by the Act, an IEP was prepared for Amy during the fall of her first-grade year. The IEP provided that Amy should be educated in a regular classroom at Furnace Woods, should continue to use the FM hearing aid, and should receive instruction from a tutor for the deaf for one hour each day and from a speech therapist for three hours each week. The Rowleys agreed with parts of the IEP, but insisted that Amy also be provided a qualified sign-language interpreter in all her academic classes in lieu of the assistance proposed in other parts of the IEP. Such an interpreter had been placed in Amy's kindergarten class for a 2-week experimental period, but the interpreter had reported that Amy did not need his services at that time. The school administrators likewise concluded that Amy did not need such an interpreter in her first-grade classroom. They reached this conclusion after consulting the school district's Committee on the Handicapped, which had received expert evidence from Amy's parents on the importance of a sign-language interpreter, received testimony from Amy's teacher and other persons familiar with her academic and social progress, and visited a class for the deaf.

When their request for an interpreter was denied, the Rowleys demanded and received a hearing before an independent examiner. After receiving evidence from both sides, the examiner agreed with the administrators' determination that an interpreter was not necessary because "Amy was achieving educationally, academically, and socially" without such assistance. The examiner's decision was affirmed on appeal by the New York Commissioner of Education on the basis of substantial evidence in the record. Pursuant to the Act's provision for judicial review, the Rowleys then brought an action in the United States District Court for the Southern District of New York, claiming that the administrators' denial of the sign-language interpreter constituted a denial of the "free appropriate public education" guaranteed by the Act.

The District Court found that Amy "is a remarkably well-adjusted child" who interacts and communicates well with her classmates and has "developed an extraordinary rapport" with her teachers. It also found that "she performs better than the average child in her class and is advancing easily from grade to grade," but "that she understands considerably less of what goes on in class than she could if she were not deaf" and thus "is not learning as much, or performing as well academically, as she would without her handicap." This disparity between Amy's achievement and her potential led the court to decide that she was not receiving a "free appropriate public education," which the court defined as "an opportunity to achieve [her] full potential commensurate with the opportunity provided to other children. . . ."

A divided panel of the United States Court of Appeals for the Second Circuit affirmed. The Court of Appeals "agree[d] with the [D]istrict [C]ourt's conclusions of law," and held that its "findings of fact [were] not clearly erroneous."

We granted certiorari to review the lower courts' interpretation of the Act. Such review requires us to consider two questions: What is meant by the Act's requirement of a "free appropriate public education"? And what is the role of state and federal courts in exercising the review granted by 20 U.S.C. § 1415? We consider these questions separately.

III

A

This is the first case in which this Court has been called upon to interpret any provision of the Act. As noted previously, the District Court and the Court of Appeals concluded that "[t]he Act itself does not define 'appropriate education,'" but leaves "to the courts and the hearing officers" the responsibility of "giv[ing] content to the requirement of an 'appropriate education.'" Petitioners contend that the definition of the phrase "free appropriate public education" used by the courts below overlooks the definition of that phrase actually found in the Act. Respondents agree that the Act defines

"free appropriate public education," but contend that the statutory definition is not "functional" and thus "offers judges no guidance in their consideration of controversies involving 'the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education.'" The United States, appearing as *amicus curiae* on behalf of respondents, states that "[a]lthough the Act includes definitions of a 'free appropriate public education' and other related terms, the statutory definitions do not adequately explain what is meant by 'appropriate.'"

We are loath to conclude that Congress failed to offer any assistance in defining the meaning of the principal substantive phrase used in the Act. It is beyond dispute that, contrary to the conclusions of the courts below, the Act does expressly define "free appropriate public education": "The term 'free appropriate public education' means special education and related services which (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the State educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the State involved, and (D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title."

"Special education," as referred to in this definition, means "specially designed instruction, at no cost to parents or guardians, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions . . . ."

Like many statutory definitions, this one tends toward the cryptic rather than the comprehensive, but that is scarcely a reason for abandoning the quest for legislative intent. Whether or not the definition is a "functional" one, as respondents contend it is not, it is the principal tool which Congress has given us for parsing the critical phrase of the Act. We think more must be made of it than either respondents or the United States seems willing to admit.

According to the definitions contained in the Act, a "free appropriate public education" consists of educational instruction specially designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child "to benefit" from the instruction. Almost as a checklist for adequacy under the Act, the definition also requires that such instruction and services be provided at public expense and under public supervision, meet the State's educational standards, approximate the grade levels used in the State's regular education, and comport with the child's IEP. Thus, if personalized instruction is being provided with sufficient supportive services to permit the child to benefit from the instruction, and the other items on the definitional checklist are satisfied, the child is receiving a "free appropriate public education" as defined by the Act.

. . . .

Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children. Certainly the language of the statute contains no requirement like the one imposed by the lower courts—that States maximize the potential of handicapped children "commensurate with the opportunity provided to other children." That standard was expounded by the District Court without reference to the statutory definitions or even to the legislative history of the Act. Although we find the statutory definition of "free appropriate public education" to be helpful in our interpretation of the Act, there remains the question of whether the legislative history indicates a congressional intent that such education meet some additional substantive standard. For an answer, we turn to that history.

B

1

As suggested in Part I, federal support for education of the handicapped is a fairly recent development. Before passage of the Act some States had passed laws to improve the educational services afforded handicapped children, but many of these children were excluded completely from any form of public education or were left to fend for themselves in classrooms designed for education of their nonhandicapped peers. . . .

[The Court reviewed *Pennsylvania Association for Retarded Children v. Commonwealth* (*PARC*), and *Mills v. Board of Education of the District of Columbia (Mills)*, seminal cases in the development of the law of special education]

. . . .

It is evident from the legislative history that the characterization of handicapped children as "served" referred to children who were receiving some form of specialized educational services from the States, and that the characterization of children as "unserved" referred to those who were receiving no specialized educational services. . . .

2

Respondents contend that "the goal of the Act is to provide each handicapped child with an equal educational opportunity." We think, however, that the requirement that a State provide specialized educational services to handicapped children generates no additional requirement that the services so provided be sufficient to maximize each child's potential "commensurate with the opportunity provided other children." Respondents and the United States correctly note that Congress sought "to provide assistance to the States in carrying out their responsibilities under . . . the Constitution of the United States to provide equal protection of the laws." But we do not think that such statements imply a congressional intent to achieve strict equality of opportunity or services.

The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending upon a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom. The requirement that States provide "equal" educational opportunities would thus seem to present an entirely unworkable standard requiring impossible measurements and comparisons. Similarly, furnishing handicapped children with only such services as are available to nonhandicapped children would in all probability fall short of the statutory requirement of "free appropriate public education"; to require, on the other hand, the furnishing of every special service necessary to maximize each handicapped child's potential is, we think, further than Congress intended to go. Thus to speak in terms of "equal" services in one instance gives less than what is required by the Act and in another instance more. The theme of the Act is "free appropriate public education," a phrase which is too complex to be captured by the word "equal" whether one is speaking of opportunities or services.

The legislative conception of the requirements of equal protection was undoubtedly informed by the two District Court decisions referred to above. But cases such as *Mills* and *PARC* held simply that handicapped children may not be excluded entirely from public education. In *Mills,* the District Court said: "If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom."

The *PARC* court used similar language, saying "[i]t is the commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity. . . ." The right of access to free public education enunciated by these cases is significantly different from any notion of absolute equality of opportunity regardless of capacity. To the extent that Congress might have looked further than these cases which are mentioned in the legislative history, at the time of enactment of the Act this Court had held at least twice that the Equal Protection Clause of the Fourteenth Amendment does not require States to expend equal financial resources on the education of each child.

In explaining the need for federal legislation, the House Report noted that "no congressional legislation has required a precise guarantee for handicapped children, i.e. a basic floor of opportunity that would bring into compliance all school districts with the constitutional right of equal protection with respect to handicapped children." Assuming that the Act was designed to fill the need identified in the House Report-that is, to provide a "basic floor of opportunity" consistent with equal protection-neither the Act nor its history persuasively demonstrates that Congress thought that equal protection required anything more than equal access. Therefore, Congress' desire to provide specialized educational services, even in furtherance of "equality," cannot be read as imposing any particular substantive educational standard upon the States.

The District Court and the Court of Appeals thus erred when they held that the Act requires New York to maximize the potential of each handicapped child commensurate with the opportunity provided nonhandicapped children. Desirable though that goal might be, it is not the standard that Congress imposed upon States which receive funding under the Act. Rather, Congress sought primarily to identify and evaluate handicapped children, and to provide them with access to a free public education.

3

Implicit in the congressional purpose of providing access to a "free appropriate public education" is the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the handicapped child. It would do little good for Congress to spend millions of dollars in providing access to a public education only to have the handicapped child receive no benefit from that education. The statutory

definition of "free appropriate public education," in addition to requiring that States provide each child with "specially designed instruction," expressly requires the provision of "such . . . supportive services . . . as may be required to assist a handicapped child to benefit from special education." We therefore conclude that the "basic floor of opportunity" provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child.

The determination of when handicapped children are receiving sufficient educational benefits to satisfy the requirements of the Act presents a more difficult problem. The Act requires participating States to educate a wide spectrum of handicapped children, from the marginally hearing-impaired to the profoundly retarded and palsied. It is clear that the benefits obtainable by children at one end of the spectrum will differ dramatically from those obtainable by children at the other end, with infinite variations in between. One child may have little difficulty competing successfully in an academic setting with nonhandicapped children while another child may encounter great difficulty in acquiring even the most basic of self-maintenance skills. We do not attempt today to establish any one test for determining the adequacy of educational benefits conferred upon all children covered by the Act. Because in this case we are presented with a handicapped child who is receiving substantial specialized instruction and related services, and who is performing above average in the regular classrooms of a public school system, we confine our analysis to that situation.

The Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that "mainstreaming" preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child. Regular examinations are administered, grades are awarded, and yearly advancement to higher grade levels is permitted for those children who attain an adequate knowledge of the course material. The grading and advancement system thus constitutes an important factor in determining educational benefit. Children who graduate from our public school systems are considered by our society to have been "educated" at least to the grade level they have completed, and access to an "education" for handicapped children is precisely what Congress sought to provide in the Act.

C

When the language of the Act and its legislative history are considered together, the requirements imposed by Congress become tolerably clear. Insofar as a State is required to provide a handicapped child with a "free appropriate public education," we hold that it satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the State's educational standards, must approximate the grade levels used in the State's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act and, if the child is being educated in the regular classrooms of the public education system, should be reasonably calculated to enable the child to achieve passing marks and advance from grade to grade.

IV

A

. . . the Act permits "[a]ny party aggrieved by the findings and decision" of the state administrative hearings "to bring a civil action" in "any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy." The complaint, and therefore the civil action, may concern "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child." In reviewing the complaint, the Act provides that a court "shall receive the record of the [state] administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate."

The parties disagree sharply over the meaning of these provisions, petitioners contending that courts are given only limited authority to review for state compliance with the Act's procedural requirements and no power to review the substance of the state program, and respondents contending that the Act requires courts to exercise *de novo* review over state educational decisions and policies. We find petitioners' contention unpersuasive, for Congress expressly rejected provisions that would have so severely restricted the role of reviewing courts. In substituting the current language of the

statute for language that would have made state administrative findings conclusive if supported by substantial evidence, the Conference Committee explained that courts were to make "independent decision[s] based on a preponderance of the evidence."

But although we find that this grant of authority is broader than claimed by petitioners, we think the fact that it is found in § 1415, which is entitled "Procedural safeguards," is not without significance. When the elaborate and highly specific procedural safeguards embodied in § 1415 are contrasted with the general and somewhat imprecise substantive admonitions contained in the Act, we think that the importance Congress attached to these procedural safeguards cannot be gainsaid. It seems to us no exaggeration to say that Congress placed every bit as much emphasis upon compliance with procedures giving parents and guardians a large measure of participation at every stage of the administrative process, as it did upon the measurement of the resulting IEP against a substantive standard. We think that the congressional emphasis upon full participation of concerned parties throughout the development of the IEP, as well as the requirements that state and local plans be submitted to the Secretary for approval, demonstrates the legislative conviction that adequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP.

Thus the provision that a reviewing court base its decision on the "preponderance of the evidence" is by no means an invitation to the courts to substitute their own notions of sound educational policy for those of the school authorities which they review. The very importance which Congress has attached to compliance with certain procedures in the preparation of an IEP would be frustrated if a court were permitted simply to set state decisions at nought. The fact that § 1415(e) requires that the reviewing court "receive the records of the [state] administrative proceedings" carries with it the implied requirement that due weight shall be given to these proceedings. And we find nothing in the Act to suggest that merely because Congress was rather sketchy in establishing substantive requirements, as opposed to procedural requirements for the preparation of an IEP, it intended that reviewing courts should have a free hand to impose substantive standards of review which cannot be derived from the Act itself. In short, the statutory authorization to grant "such relief as the court determines is appropriate" cannot be read without reference to the obligations, largely procedural in nature, which are imposed upon recipient States by Congress.

Therefore, a court's inquiry in suits brought under § 1415(e)(2) is twofold. First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? If these requirements are met, the State has complied with the obligations imposed by Congress and the courts can require no more.

B

In assuring that the requirements of the Act have been met, courts must be careful to avoid imposing their view of preferable educational methods upon the States. The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. The Act expressly charges States with the responsibility of "acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and [of] adopting, where appropriate, promising educational practices and materials." § 1413(a)(3). In the face of such a clear statutory directive, it seems highly unlikely that Congress intended courts to overturn a State's choice of appropriate educational theories in a proceeding conducted pursuant to § 1415(e)(2).

We previously have cautioned that courts lack the "specialized knowledge and experience" necessary to resolve "persistent and difficult questions of educational policy." We think that Congress shared that view when it passed the Act. As already demonstrated, Congress' intention was not that the Act displace the primacy of States in the field of education, but that States receive funds to assist them in extending their educational systems to the handicapped. Therefore, once a court determines that the requirements of the Act have been met, questions of methodology are for resolution by the States.

V

Entrusting a child's education to state and local agencies does not leave the child without protection. Congress sought to protect individual children by providing for parental involvement in the development of state plans and policies, and in the formulation of the child's individual educational program. . . .

VI

Applying these principles to the facts of this case, we conclude that the Court of Appeals erred in affirming the decision of the District Court. Neither the District Court nor the Court of Appeals found that petitioners had failed to comply with the procedures of the Act, and the findings of neither court would support a conclusion that Amy's educational program failed to comply with the substantive requirements of the Act. On the contrary, the District Court found that the "evidence firmly establishes that Amy is receiving an 'adequate' education, since she performs better than the average child in her class and is advancing easily from grade to grade." In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the Furnace Woods school administrators to meet her educational needs, the lower courts should not have concluded that the Act requires the provision of a sign-language interpreter. Accordingly, the decision of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Citation: *Board of Education of the Hendrick Hudson Central School District v. Rowley,* 458 U.S. 176 (1982).

Board of Education of Westside Community Schools v. Mergens

In *Board of Education of Westside Community Schools v. Mergens* (1990), the U.S. Supreme Court held that, on its face, the Equal Access Act does not violate the Establishment Clause of the First Amendment. Accordingly, the Court ruled that the school board had to allow and support student-sponsored religious clubs to the same degree as they assisted nonreligious student activities. In sum, *Mergens* stands out as an important decision insofar as it placed noncurricular student clubs on the same footing as other student-organized groups.

Facts of the Case

In *Mergens,* school board officials in Nebraska granted just about the same use of school facilities to a religious club as they did to other student organizations. However, the officials did not grant the religious club all of the rights afforded other student organizations, such as the use of bulletin boards, the public address system, and the school newspaper. Educational officials maintained that they were entitled to disallow full student organization benefits to the religious club, because all of the "fully recognized" student groups were curricular. In other words, the board adopted the position that because it had not created a limited open forum under the act's provisions, it was under no obligation to grant full status to the noncurricular religious club.

The Court's Ruling

At the heart of its analysis in *Mergens,* the Supreme Court defined curriculum-related student groups as those whose intent is directly related to the course(s) currently being taught, or that will soon be taught, within the curriculum. For example, even though the school's mathematics teachers recommended their students participate in the Chess Club to practice logical thinking skills, the Court thought that the intent of the Chess Club was not significantly related to mathematics classes to be considered a curricular club. The Court also asserted that organizations such as the Subsurfers Club and a club that consisted of students who worked with special-needs children lacked a sufficient and direct relationship to the academic curriculum to be considered curricular clubs.

The Court explained that the school board's overly broad interpretation of which student organizations were curricular, and thereby entitled to full student organization rights, and which student groups were noncurricular and not entitled to full student organization rights, allowed officials to deny student organization status based on political, philosophical, religious, or other content speech in violation of the Equal Access Act.

At the same time, the Supreme Court recognized that the school board did have the right to prohibit student organizations that would have materially and substantially interfered with the educational activities of the school. The Court reasoned that had the board permitted only curricular student clubs, or had it

chosen to forgo federal funding, then it would not have been required to meet the requirements of the Equal Access Act. The Court thus upheld the constitutionality of the act on the basis that Congress had the authority to enact such a law

A second point of consideration in *Mergens* was whether the Equal Access Act had the primary effect of promoting religion and thus was in violation of the Establishment Cause. On this point, a plurality of the Supreme Court agreed that because the Equal Access Act is neutral and promotes both secular and religious speech, it did not violate the Establishment Clause violation. In addition, the Court pointed out that incidental benefits to religious organizations under the Equal Access Act were insufficient to violate the Establishment Clause.

The Court next rejected the board's contention that granting full student organizational benefits to a religious organization would have been the imprimatur of religious endorsement while conveying a message that officials endorsed rather than "tolerated" religious activity. The Court responded that Congress specifically determined that high school students were sufficiently mature to discern the difference between during-school activities, which are supported and endorsed by the school board, and after-school activities, which are not.

The Supreme Court added that student organizations should be voluntary, student initiated, and student organized. The Court confirmed that these clubs are not considered to be school board–sponsored if government or agents of the state, more specifically, public school teachers, do not directly control, conduct, or regularly attend the meetings. Therefore, as long as the board did not sponsor the club by providing faculty that promote, direct, control, or regularly attend the religious club meetings, the Court was satisfied that it was not at risk for excessive entanglement. The Court reiterated on several occasions that while faculty may not participate in the religious activities, it is permissible for school employees to be present at religious club meetings for custodial purposes such as to assure student good behavior.

In *Mergens,* the Court did acknowledge the possibility that peer pressure to join a religious group might exist. Even so, the Court was of the opinion that there was little risk of official state endorsement or coercion if no school officials actively participated in the activities. On a final note, the Court assured school boards that the presence of nonparticipating agents of the state at student religious club meetings would not be considered day-to-day surveillance or administration of the religious activity.

Brenda Kallio

See also Equal Access Act; State Aid and the Establishment Clause

Legal Citations

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).
Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*
Good News Club v. Milford Central School, 21 F. Supp. 2d 147 (N.D.N.Y. 1998); *aff'd,* 202 F.3d 502 (2d Cir. 2000, *rev'd*); 533 U.S. 98 (2001).
Hsu v. Roslyn Union Free School District No. 3, 85 F.3d 839 (2d Cir. 1996).

Board of Education of Westside Community Schools v. Mergens (Excerpts)

In Board of Education of Westside Community Schools v. Mergens, *the Supreme Court upheld the Equal Access Act, a federal law that permits student organized prayer and Bible study clubs to meet during non-instructional time as long as officials in public secondary schools receiving federal financial assistance permit other clubs to meet during non-instructional time.*

Supreme Court of the United States
BOARD OF EDUCATION
OF WESTSIDE
COMMUNITY SCHOOLS
v.
MERGENS
496 U.S. 226
Argued Jan. 9, 1990.
Decided June 4, 1990.

Justice O'CONNOR delivered the opinion of the Court, except as to Part III.

This case requires us to decide whether the Equal Access Act prohibits Westside High School from denying a student religious group permission to meet on school premises during noninstructional time, and if so, whether the Act, so construed, violates the Establishment Clause of the First Amendment.

I

Respondents are current and former students at Westside High School, a public secondary school in Omaha, Nebraska. At the time this suit was filed, the school enrolled about 1,450 students and included grades 10 to 12; in the 1987–1988 school year, ninth graders were added. Westside High School is part of the Westside Community Schools system, an independent public school district. Petitioners are the Board of Education of Westside Community Schools (District 66) [and various school officials].

Students at Westside High School are permitted to join various student groups and clubs, all of which meet after school hours on school premises. The students may choose from approximately 30 recognized groups on a voluntary basis. A list of student groups, together with a brief description of each provided by the school, appears in the Appendix to this opinion.

School Board Policy 5610 concerning "Student Clubs and Organizations" recognizes these student clubs as a "vital part of the total education program as a means of developing citizenship, wholesome attitudes, good human relations, knowledge and skills." Board Policy 5610 also provides that each club shall have faculty sponsorship and that "clubs and organizations shall not be sponsored by any political or religious organization, or by any organization which denies membership on the basis of race, color, creed, sex or political belief." Board Policy 6180 on "Recognition of Religious Beliefs and Customs" requires that "[s]tudents adhering to a specific set of religious beliefs or holding to little or no belief shall be alike respected." In addition, Board Policy 5450 recognizes its students' "Freedom of Expression," consistent with the authority of the board.

There is no written school board policy concerning the formation of student clubs. Rather, students wishing to form a club present their request to a school official who determines whether the proposed club's goals and objectives are consistent with school board policies and with the school district's "Mission and Goals"—a broadly worded "blueprint" that expresses the district's commitment to teaching academic, physical, civic, and personal skills and values.

In January 1985, respondent Bridget Mergens met with Westside's Principal, Dr. Findley, and requested permission to form a Christian club at the school. The proposed club would have the same privileges and meet on the same terms and conditions as other Westside student groups, except that the proposed club would not have a faculty sponsor. According to the students' testimony at trial, the club's purpose would have been, among other things, to permit the students to read and discuss the Bible, to have fellowship, and to pray together. Membership would have been voluntary and open to all students regardless of religious affiliation.

Findley denied the request, as did Associate Superintendent Tangdell. In February 1985, Findley and Tangdell informed Mergens that they had discussed the matter with Superintendent Hanson and that he had agreed that her request should be denied. The school officials explained that school policy required all student clubs to have a faculty sponsor, which the proposed religious club would not or could not have, and that a religious club at the school would violate the Establishment Clause. In March 1985, Mergens appealed the denial of her request to the board of education, but the board voted to uphold the denial.

Respondents, by and through their parents as next friends, then brought this suit in the United States District Court for the District of Nebraska seeking declaratory and injunctive relief.

. . . .

The District Court entered judgment for petitioners. The court held that the Act did not apply in this case because Westside did not have a "limited open forum" as defined by the Act—all of Westside's student clubs, the court concluded, were curriculum—related and tied to the educational function of the school. . . .

The United States Court of Appeals for the Eighth Circuit reversed. . . .

We granted certiorari and now affirm.

II

A

In *Widmar v. Vincent, supra,* we invalidated, on free speech grounds, a state university regulation that prohibited student use of school facilities " 'for purposes of

religious worship or religious teaching.'" In doing so, we held that an "equal access" policy would not violate the Establishment Clause under our decision in *Lemon v. Kurtzman*. In particular, we held that such a policy would have a secular purpose, would not have the primary effect of advancing religion, and would not result in excessive entanglement between government and religion. We noted, however, that "[u]niversity students are, of course, young adults. They are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion."

In 1984, Congress extended the reasoning of *Widmar* to public secondary schools. Under the Equal Access Act, a public secondary school with a "limited open forum" is prohibited from discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." Specifically, the Act provides: "It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings."

A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurriculum related student groups to meet on school premises during noninstructional time." "Meeting" is defined to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." "Noninstructional time" is defined to mean "time set aside by the school before actual classroom instruction begins or after actual classroom instruction ends." Thus, even if a public secondary school allows only one "noncurriculum related student group" to meet, the Act's obligations are triggered and the school may not deny other clubs, on the basis of the content of their speech, equal access to meet on school premises during noninstructional time.

The Act further specifies that a school "shall be deemed to offer a fair opportunity to students who wish to conduct a meeting within its limited open forum" if the school uniformly provides that the meetings are voluntary and student-initiated; are not sponsored by the school, the government, or its agents or employees; do not materially and substantially interfere with the orderly conduct of educational activities within the school; and are not directed, controlled, conducted, or regularly attended by "nonschool persons." "Sponsorship" is defined to mean "the act of promoting, leading, or participating in a meeting. The assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes does not constitute sponsorship of the meeting." If the meetings are religious, employees or agents of the school or government may attend only in a "nonparticipatory capacity." Moreover, a State may not influence the form of any religious activity, require any person to participate in such activity, or compel any school agent or employee to attend a meeting if the content of the speech at the meeting is contrary to that person's beliefs.

Finally, the Act does not "authorize the United States to deny or withhold Federal financial assistance to any school" or "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary."

B

The parties agree that Westside High School receives federal financial assistance and is a public secondary school within the meaning of the Act. The Act's obligation to grant equal access to student groups is therefore triggered if Westside maintains a "limited open forum"-*i.e.,* if it permits one or more "noncurriculum related student groups" to meet on campus before or after classes.

Unfortunately, the Act does not define the crucial phrase "noncurriculum related student group." Our immediate task is therefore one of statutory interpretation. We begin, of course, with the language of the statute. The common meaning of the term "curriculum" is "the whole body of courses offered by an educational institution or one of its branches." Any sensible interpretation of "noncurriculum related student group" must therefore be anchored in the notion that such student groups are those that are not related to the body of courses offered by the school. The difficult question is the degree of "unrelatedness to the

curriculum" required for a group to be considered "noncurriculum related."

The Act's definition of the sort of "meeting[s]" that must be accommodated under the statute sheds some light on this question. "The term 'meeting' includes those activities of student groups which are . . . not directly related to the school curriculum." Congress' use of the phrase "directly related" implies that student groups directly related to the subject matter of courses offered by the school do not fall within the "noncurriculum related" category and would therefore be considered "curriculum related."

The logic of the Act also supports this view, namely, that a curriculum-related student group is one that has more than just a tangential or attenuated relationship to courses offered by the school. Because the purpose of granting equal access is to prohibit discrimination between religious or political clubs on the one hand and other noncurriculum-related student groups on the other, the Act is premised on the notion that a religious or political club is itself likely to be a noncurriculum-related student group. It follows, then, that a student group that is "curriculum related" must at least have a more direct relationship to the curriculum than a religious or political club would have.

Although the phrase "noncurriculum related student group" nevertheless remains sufficiently ambiguous that we might normally resort to legislative history, we find the legislative history on this issue less than helpful. . . .

We think it significant, however, that the Act, which was passed by wide, bipartisan majorities in both the House and the Senate, reflects at least some consensus on a broad legislative purpose. The Committee Reports indicate that the Act was intended to address perceived widespread discrimination against religious speech in public schools and, as the language of the Act indicates, its sponsors contemplated that the Act would do more than merely validate the status quo. The Committee Reports also show that the Act was enacted in part in response to two federal appellate court decisions holding that student religious groups could not, consistent with the Establishment Clause, meet on school premises during noninstructional time. A broad reading of the Act would be consistent with the views of those who sought to end discrimination by allowing students to meet and discuss religion before and after classes.

In light of this legislative purpose, we think that the term "noncurriculum related student group" is best interpreted broadly to mean any student group that does not *directly* relate to the body of courses offered by the school. In our view, a student group directly relates to a school's curriculum if the subject matter of the group is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit. We think this limited definition of groups that directly relate to the curriculum is a commonsense interpretation of the Act that is consistent with Congress' intent to provide a low threshold for triggering the Act's requirements.

For example, a French club would directly relate to the curriculum if a school taught French in a regularly offered course or planned to teach the subject in the near future. A school's student government would generally relate directly to the curriculum to the extent that it addresses concerns, solicits opinions, and formulates proposals pertaining to the body of courses offered by the school. . . .

On the other hand, unless a school could show that groups such as a chess club, a stamp collecting club, or a community service club fell within our description of groups that directly relate to the curriculum, such groups would be "noncurriculum related student groups" for purposes of the Act. The existence of such groups would create a "limited open forum" under the Act and would prohibit the school from denying equal access to any other student group on the basis of the content of that group's speech. Whether a specific student group is a "noncurriculum related student group" will therefore depend on a particular school's curriculum, but such determinations would be subject to factual findings well within the competence of trial courts to make.

Petitioners contend that our reading of the Act unduly hinders local control over schools and school activities, but we think that schools and school districts nevertheless retain a significant measure of authority over the type of officially recognized activities in which their students participate. First, schools and school districts maintain their traditional latitude to determine appropriate subjects of instruction. To the extent that a school chooses to structure its course offerings and existing student groups to avoid the Act's obligations, that result is not prohibited by the Act. On matters of

statutory interpretation, "[o]ur task is to apply the text, not to improve on it." Second, the Act expressly does not limit a school's authority to prohibit meetings that would "materially and substantially interfere with the orderly conduct of educational activities within the school." The Act also preserves "the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to assure that attendance of students at meetings is voluntary." Finally, because the Act applies only to public secondary schools that receive federal financial assistance, a school district seeking to escape the statute's obligations could simply forgo federal funding. Although we do not doubt that in some cases this may be an unrealistic option, Congress clearly sought to prohibit schools from discriminating on the basis of the content of a student group's speech, and that obligation is the price a federally funded school must pay if it opens its facilities to noncurriculum-related student groups.

The dissent suggests that "an extracurricular student organization is 'noncurriculum related' if it has as its purpose (or as part of its purpose) the advocacy of partisan theological, political, or ethical views." . . . .

This suggestion is flawed for at least two reasons. First, the Act itself neither uses the phrase "limited public forum" nor so much as hints that that doctrine is somehow "incorporated" into the words of the statute. The operative language of the statute, of course, refers to a "limited open forum," a term that is specifically defined in the next subsection. Congress was presumably aware that "limited public forum," as used by the Court, is a term of art, and had it intended to import that concept into the Act, one would suppose that it would have done so explicitly. Indeed, Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases. . . .

Second, and more significant, the dissent's reliance on the legislative history to support its interpretation of the Act shows just how treacherous that task can be. The dissent appears to agree with our view that the legislative history of the Act, even if relevant, is highly unreliable, see . . . yet the interpretation it suggests rests solely on a few passing, general references by legislators to our decision in *Widmar.* We think that reliance on legislative history is hazardous at best, but where "'not even the sponsors of the bill knew what it meant,'" such reliance cannot form a reasonable basis on which to interpret the text of a statute. For example, the dissent appears to place great reliance on a comment by Senator Levin that the Act extends the rule in *Widmar* to secondary schools, but Senator Levin's understanding of the "rule," expressed in the same breath as the statement on which the dissent relies, fails to support the dissent's reading of the Act. The only thing that can be said with any confidence is that *some* Senators *may* have thought that the obligations of the Act would be triggered only when a school permits advocacy groups to meet on school premises during noninstructional time. That conclusion, of course, cannot bear the weight the dissent places on it.

C

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To the extent that petitioners contend that "curriculum related" means anything remotely related to abstract educational goals, however, we reject that argument. To define "curriculum related" in a way that results in almost no schools having limited open fora, or in a way that permits schools to evade the Act by strategically describing existing student groups, would render the Act merely hortatory. . . .

Rather, we think it clear that Westside's existing student groups include one or more "noncurriculum related student groups." . . . The record therefore supports a finding that Westside has maintained a limited open forum under the Act.

Although our definition of "noncurriculum related student activities" looks to a school's actual practice rather than its stated policy, we note that our conclusion is also supported by the school's own description of its student activities. As reprinted in the Appendix to this opinion, the school states that Band "is included in our regular curriculum"; Choir "is a course offered as part of the curriculum"; . . . These descriptions constitute persuasive evidence that these student clubs directly relate to the curriculum. By inference, however, the fact that the descriptions of student activities such as Subsurfers and chess do not include such references strongly suggests that those clubs do not, by the school's own admission, directly relate to the curriculum. We therefore conclude that Westside permits "one or more noncurriculum related student groups to meet on school premises during noninstructional time." Because Westside maintains a "limited open forum"

under the Act, it is prohibited from discriminating, based on the content of the students' speech, against students who wish to meet on school premises during noninstructional time.

The remaining statutory question is whether petitioners' denial of respondents' request to form a religious group constitutes a denial of "equal access" to the school's limited open forum. Although the school apparently permits respondents to meet informally after school, respondents seek equal access in the form of official recognition by the school. Official recognition allows student clubs to be part of the student activities program and carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair. Given that the Act explicitly prohibits denial of "equal access . . . to . . . any students who wish to conduct a meeting within [the school's] limited open forum" on the basis of the religious content of the speech at such meetings, we hold that Westside's denial of respondents' request to form a Christian club denies them "equal access" under the Act.

Because we rest our conclusion on statutory grounds, we need not decide—and therefore express no opinion on—whether the First Amendment requires the same result.

III

Petitioners contend that even if Westside has created a limited open forum within the meaning of the Act, its denial of official recognition to the proposed Christian club must nevertheless stand because the Act violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment. Specifically, petitioners maintain that because the school's recognized student activities are an integral part of its educational mission, official recognition of respondents' proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students.

We disagree. In *Widmar,* we applied the three-part *Lemon* test to hold that an "equal access" policy, at the university level, does not violate the Establishment Clause. We concluded that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose," and would in fact *avoid* entanglement with religion. We also found that although incidental benefits accrued to religious groups who used university facilities, this result did not amount to an establishment of religion. First, we stated that a university's forum does not "confer any imprimatur of state approval on religious sects or practices." Indeed, the message is one of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. "The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities." Second, we noted that "[t]he [University's] provision of benefits to [a] broad . . . spectrum of groups"—both nonreligious and religious speakers—was "an important index of secular effect."

We think the logic of *Widmar* applies with equal force to the Equal Access Act. As an initial matter, the Act's prohibition of discrimination on the basis of "political, philosophical, or other" speech as well as religious speech is a sufficient basis for meeting the secular purpose prong of the *Lemon* test. Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular. Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law. Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose was not to "'endorse or disapprove of religion.'"

Petitioners' principal contention is that the Act has the primary effect of advancing religion. Specifically, petitioners urge that, because the student religious meetings are held under school aegis, and because the State's compulsory attendance laws bring the students together (and thereby provide a ready-made audience for student evangelists), an objective observer in the position of a secondary school student will perceive official school support for such religious meetings.

We disagree. First, although we have invalidated the use of public funds to pay for teaching state-required subjects at parochial schools, in part because of the risk of creating "a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of impressionable youngsters—the powers of government to the support of the religious denomination operating

the school," there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. The proposition that schools do not endorse everything they fail to censor is not complicated. . . .

Indeed, we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion. Given the deference due "the duly enacted and carefully considered decision of a coequal and representative branch of our Government," we do not lightly second-guess such legislative judgments, particularly where the judgments are based in part on empirical determinations.

Second, we note that the Act expressly limits participation by school officials at meetings of student religious groups, and that any such meetings must be held during "noninstructional time." The Act therefore avoids the problems of "the students' emulation of teachers as role models" and "mandatory attendance requirements." To be sure, the possibility of *student* peer pressure remains, but there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate. Moreover, petitioners' fear of a mistaken inference of endorsement is largely self-imposed, because the school itself has control over any impressions it gives its students. To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.

Third, the broad spectrum of officially recognized student clubs at Westside, and the fact that Westside students are free to initiate and organize additional student clubs counteract any possible message of official endorsement of or preference for religion or a particular religious belief. Although a school may not itself lead or direct a religious club, a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion. Under the Act, a school with a limited open forum may not lawfully deny access to a Jewish students' club, a Young Democrats club, or a philosophy club devoted to the study of Nietzsche. To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not, at least on its face and as applied to Westside, have the primary effect of advancing religion.

Petitioners' final argument is that by complying with the Act's requirements, the school risks excessive entanglement between government and religion. The proposed club, petitioners urge, would be required to have a faculty sponsor who would be charged with actively directing the activities of the group, guiding its leaders, and ensuring balance in the presentation of controversial ideas. Petitioners claim that this influence over the club's religious program would entangle the government in day-to-day surveillance of religion of the type forbidden by the Establishment Clause.

Under the Act, however, faculty monitors may not participate in any religious meetings, and nonschool persons may not direct, control, or regularly attend activities of student groups. Moreover, the Act prohibits school "sponsorship" of any religious meetings which means that school officials may not promote, lead, or participate in any such meeting. Although the Act permits "[t]he assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes," such custodial oversight of the student-initiated religious group, merely to ensure order and good behavior, does not impermissibly entangle government in the day-to-day surveillance or administration of religious activities. Indeed, as the Court noted in *Widmar,* a denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur.

Accordingly, we hold that the Equal Access Act does not on its face contravene the Establishment Clause. Because we hold that petitioners have violated the Act, we do not decide respondents' claims under the Free Speech and Free Exercise Clauses. For the foregoing reasons, the judgment of the Court of Appeals is affirmed.

It is so ordered.

Citation: *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226 (1990).

Board of Education v. Allen

At issue in *Board of Education of Central School District No. 1 v. Allen)* (1968), often simply called *Board of Education v. Allen,* was the constitutionality of the loan of textbooks to students in religiously affiliated nonpublic schools. *Allen* thus dealt with the issue of establishment of religion through the direct use of public funds in relation to religiously affiliated nonpublic schools.

New York education law required local public school authorities to lend textbooks free of charge to all students in grades 7 through 12, including those in private schools. The statute required that the titles of the books be approved by local boards. In *Allen,* the school boards sought to declare this law unconstitutional, to bar the commissioner of education from removing officials from office for failure to comply with the law, and to prevent the use of state funds for the purchase of textbooks to be lent to parochial students.

The U. S. Supreme Court held that the statute did not violate either the Establishment or the Free Exercise Clauses of the First Amendment, relying primarily on the child benefit test. The Court stated that the primary effect of the statute would be the improvement of education for all children. The Court applied the child benefit test, which considers whether actions benefit all children rather than their schools, and found that the loans were acceptable.

Many parochial school personnel interpreted this statement to mean that the state would allow other kinds of support for private schools, such as funding for operations, buildings, and teacher salaries. One of the major results of this case was a flood of bills in state legislatures to provide support for private institutions (*Committee for Public Education and Religious Liberty v. Nyquist, 1973; Sloan v. Lemon, 1973).*

Allen preceded the now famous *Lemon v. Kurtzman* (1971), in which the Court clarified the constitutionality of state acts pertaining to the establishment of religion through a three-part test. This test evaluated the constitutionality of a state statute under the Establishment Clause of the First Amendment using the following three criteria: (1) The statute must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster excessive government entanglement with religion. *Lemon* served as the precedent, but it continued to come under challenge.

According to *Allen,* the government could provide assistance to students in religious schools as long as it provided only for secular services. At the same time, the Court emphasized that "religious books" could not be loaned under the law as construed through the New York courts. *Allen* served as a precedent for challenges that continue to the present day.

Deborah E. Stine

See also Child Benefit Test; *Lemon v. Kurtzman;* State Aid and the Establishment Clause

Legal Citations

Agostini v. Felton, 521 U.S. 203 (1997).
Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968).
Lemon v. Kurtzman, 403 U.S. 602 (1971).

Board of Education v. Allen (Excerpts)

The Supreme Court's opinion in Board of Education v. Allen, *upholding the loans of textbooks for secular subjects regardless of where children went to school, represented the outer limit of aid under the child benefit test until its 1997 decision in* Agostini v. Felton.

Supreme Court of the United States
BOARD OF EDUCATION OF CENTRAL SCHOOL DISTRICT NO. 1
v.
ALLEN
392 U.S. 236
Argued April 22, 1968.
Decided June 10, 1968.

Mr. Justice WHITE delivered the opinion of the Court.

A law of the State of New York requires local public school authorities to lend textbooks free of charge to all students in grades seven through 12; students attending private schools are included. This case presents the question whether this statute is a 'law respecting an establishment of religion, or prohibiting the free exercise thereof,' and so in conflict with the First and Fourteenth Amendments to the Constitution, because it authorizes the loan of textbooks to students attending parochial schools. We hold that the law is not in violation of the Constitution.

Until 1965, s 701 of the Education Law of the State of New York, McKinney's Consol. Laws, c. 16, authorized public school boards to designate textbooks for use in the public schools, to purchase such books with public funds, and to rent or sell the books to public school students. In 1965 the Legislature amended s 701, basing the amendments on findings that the 'public welfare and safety require that the state and local communities give assistance to educational programs which are important to our national defense and the general welfare of the state.' Beginning with the 1966–1967 school year, local school boards were required to purchase textbooks and lend them without charge 'to all children residing in such district who are enrolled in grades seven to twelve of a public or private school which complies with the compulsory education law.' The books now loaned are 'text-books which are designated for use in any public, elementary or secondary schools of the state or are approved by any boards of education,' and which—according to a 1966 amendment—'a pupil is required to use as a text for a semester or more in a particular class in the school he legally attends.

Appellant Board of Education of Central School District No. 1 in Rensselaer and Columbia Counties, brought suit in the New York courts against appellee James Allen. The complaint alleged that s 701 violated both the State and Federal Constitutions; that if appellants, in reliance on their interpretation of the Constitution, failed to lend books to parochial school students within their counties appellee Allen would remove appellants from office; and that to prevent this, appellants were complying with the law and submitting to their constituents a school budget including funds for books to be lent to parochial school pupils. Appellants therefore sought a declaration that s 701 was invalid, an order barring appellee Allen from removing appellants from office for failing to comply with it, and another order restraining him from apportioning state funds to school districts for the purchase of textbooks to be lent to parochial students. After answer, and upon cross-motions for summary judgment, the trial court held the law unconstitutional under the First and Fourteenth Amendments and entered judgment for appellants. The Appellate Division reversed, ordering the complaint dismissed on the ground that appellant school boards had no standing to attack the validity of a state statute. On appeal, the New York Court of Appeals concluded by a 4–3 vote that appellants did have standing but by a different 4–3 vote held that s 701 was not in violation of either the State or the Federal Constitution. The Court of Appeals said that the law's purpose was to benefit all school children, regardless of the type of school they attended, and that only textbooks approved by public school authorities could be loaned. It therefore considered s 701 'completely neutral with respect to religion, merely making available secular textbooks at the request of the individual student and asking no question about what school he attends.' Section 701, the Court of Appeals concluded, is not a law which 'establishes a religion or constitutes the use of public funds to aid religious schools. . . .We noted probable jurisdiction. . . .

Everson v. Board of Education is the case decided by this Court that is most nearly in point for today's problem. New Jersey reimbursed parents for expenses incurred in busing their children to parochial schools. The Court stated that the Establishment Clause bars a State from passing 'laws which aid one religion, aid all religions, or prefer one religion over another,' and bars too any 'tax in any amount, large or small . . . levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.' Nevertheless, said the Court, the Establishment Clause does not prevent a State from extending the benefits of state laws to all citizens without regard for their religious affiliation and does not prohibit 'New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools.' The statute was held to be valid even though one of its results was that 'children are helped to get to church schools' and 'some of the children might not be sent to the church schools if the parents were

compelled to pay their children's bus fares out of their own pockets.' As with public provision of police and fire protection, sewage facilities, and streets and sidewalks, payment of bus fares was of some value to the religious school, but was nevertheless not such support of a religious institution as to be a prohibited establishment of religion within the meaning of the First Amendment.

Everson and later cases have shown that the line between state neutrality to religion and state support of religion is not easy to locate. 'The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree.' Based on *Everson* . . . and other cases, *Abington Tp. School District v. Schempp* fashioned a test subscribed to by eight Justices for distinguishing between forbidden involvements of the State with religion and those contacts which the Establishment Clause permits: 'The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

This test is not easy to apply, but the citation of *Everson* by the *Schempp* Court to support its general standard made clear how the *Schempp* rule would be applied to the facts of *Everson*. The statute upheld in *Everson* would be considered a law having 'a secular legislative purpose and a primary effect that neither advances nor inhibits religion.' We reach the same result with respect to the New York law requiring school books to be loaned free of charge to all students in specified grades. The express purpose of s 701 was stated by the New York Legislature to be furtherance of the educational opportunities available to the young. Appellants have shown us nothing about the necessary effects of the statute that is contrary to its stated purpose. The law merely makes available to all children the benefits of a general program to lend school books free of charge. Books are furnished at the request of the pupil and ownership remains, at least technically, in the State. Thus no funds or books are furnished to parochial schools, and the financial benefit is to parents and children, not the schools. Perhaps free books make it more likely that some children choose to attend a sectarian school, but that was true of the state-paid bus fares in Everson and does not alone demonstrate an unconstitutional degree of support for a religious institution.

It should be noted that the record contains no evidence that any of the private schools in appellants' districts previously provided textbooks for their students. There is some evidence that at least some of the schools did not: intervenor defendants asserted that they had previously purchased all their children's textbooks. . . .

Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common. However, the language of s 701 does not authorize the loan of religious books, and the State claims no right to distribute religious literature. Although the books loaned are those required by the parochial school for use in specific courses, each book loaned must be approved by the public school authorities; only secular books may receive approval. The law was construed by the Court of Appeals of New York as 'merely making available secular textbooks at the request of the individual student,' supra, and the record contains no suggestion that religious books have been loaned. Absent evidence, we cannot assume that school authorities, who constantly face the same problem in selecting textbooks for use in the public schools, are unable to distinguish between secular and religious books or that they will not honestly discharge their duties under the law. In judging the validity of the statute on this record we must proceed on the assumption that books loaned to students are books that are not unsuitable for use in the public schools because of religious content.

The major reason offered by appellants for distinguishing free textbooks from free bus fares is that books, but not buses, are critical to the teaching process, and in a sectarian school that process is employed to teach religion. However, this Court has long recognized that religious schools pursue two goals, religious instruction and secular education. In the leading case of *Pierce v. Society of Sisters,* the Court held that although it would not question Oregon's power to compel school attendance or require that the attendance be at an institution meeting State-imposed requirements as to quality and nature of curriculum, Oregon had not shown that its interest in secular education required that all children attend publicly

operated schools. A premise of this holding was the view that the State's interest in education would be served sufficiently by reliance on the secular teaching that accompanied religious training in the schools maintained by the Society of Sisters. Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction. Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce v. Society of Sisters:* if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran v. Louisiana State Board of Education,* where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a 'public purpose,' and so offended the Fourteenth Amendment. . . .

New York State regulates private schools extensively, especially as to attendance and curriculum. Regents examinations are given to private school students. The basic requirement is that the instruction given in private schools satisfying the compulsory attendance law be 'at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.' . . . .

Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education.

Against this background of judgment and experience, unchallenged in the meager record before us in this case, we cannot agree with appellants either that all teaching in a sectarian school is religious or that the processes of secular and religious training are so intertwined that secular textbooks furnished to students by the public are in fact instrumental in the teaching of religion. This case comes to us after summary judgment entered on the pleadings. Nothing in this record supports the proposition that all textbooks, whether they deal with mathematics, physics, foreign languages, history, or literature, are used by the parochial schools to teach religion. No evidence has been offered about particular schools, particular courses, particular teachers, or particular books. We are unable to hold, based solely on judicial notice, that this statute results in unconstitutional involvement of the State with religious instruction or that s 701, for this or the other reasons urged, is a law respecting the establishment of religion within the meaning of the First Amendment.

Appellants also contend that s 701 offends the Free Exercise Clause of the First Amendment. However, 'it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion,' and appellants have not contended that the New York law in any way coerces them as individuals in the practice of their religion.

The judgment is affirmed.

Citation: *Board of Education of Central School District No. 1 v. Allen,* 392 U.S. 236 (1968).

Board of Regents v. Roth

Board of Regents v. Roth (1972) is a seminal case over the due process rights of educators in public schools who are facing termination or nonrenewal of their employment contracts. When public schools dismiss teachers or choose not to renew their contracts, sometimes they do so without providing the teachers with prior notice or opportunities to be heard. These teachers usually challenge their dismissals under the Due Process Clause of the Fourteenth Amendment, which

requires states to provide procedural due process, meaning notice and opportunities to be heard, before depriving individuals of their substantive due process rights to life, liberty, or property. In *Roth,* the Supreme Court found that nontenured educators have no right to due process if their contracts are not renewed, unless they can prove they have liberty or property interests at stake.

Facts of the Case

In *Roth,* officials at a state university in Wisconsin opted not to renew the contract of a nontenured faculty member at the expiration of his one-year fixed-term contract. Although university officials notified the faculty member of their decision not to renew his contract, they neither provided him with reasons for doing so nor afforded him the opportunity to any form of hearing to challenge their actions.

The faculty member filed suit, alleging that the failure of university officials to give him reasons for the nonrenewal of his contract and an opportunity to be heard violated his right to procedural due process. A federal trial court and the Seventh Circuit entered judgments in favor of the faculty member, but the U.S. Supreme Court reversed in favor of the university.

The Court's Ruling

The Court held that nontenured faculty members have no constitutional rights to a statement of reasons or to a hearing to challenge their termination. *Roth* stands for the rule that persons are entitled to procedural due process rights only if they have substantive due process rights in the nature of life, liberty, or property deprived by government action. In *Roth,* the Court gave examples or guidance for determining what constitutes liberty or property.

According to *Roth,* liberty interests encompass a very broad range of interests that include those in the following nonexhaustive list: the right of persons to enter into contracts, to marry, to raise children, and to enjoy privileges recognized as vital to the pursuit of happiness and to good name, reputation, or integrity. Insofar as the decision not to renew the faculty member's contract in *Roth* was not based on a charge of dishonesty, immorality, or other damaging charges that could have damaged his reputation, good name, integrity, or ability to procure future employment, the Court found that the university officials' action did not implicate his liberty interests. The Court pointed out that because the faculty member's liberty interests were not implicated, he was not constitutionally entitled to a hearing to defend a liberty interest.

Roth also established the rule that property interests under the Due Process Clause are created by contracts, statutes, other rules or regulations, or a clearly implied promise of continued employment, but never by the Constitution. The Court explained that only those interests that persons had already acquired, at the time of the government action depriving them of their interests, in certain benefits pursuant to contracts, statutes, rules, regulations, or clearly implied promises of continued employment, are entitled to protection under the Due Process Clause. The Court noted that sometimes the terms of the property interests are spelled out in the contract or statute.

Roth stands for the proposition that educators who are tenured at the time of the termination of their contracts have property rights to their employment for the terms of the tenure. On the other hand, educators with employment contracts have property rights to their jobs only for the terms of their contracts; once the term expires, as was the case with the plaintiff in *Roth,* their property interest lapses. If, during the term of the tenure or contracts, educators are dismissed, they are constitutionally entitled to prior notice of the reasons for the termination of their employment and hearings, so that they can challenge the proffered reasons. In other words, pursuant to *Roth,* before educators can make claims to constitutional entitlements to notice of reasons for the termination or nonrenewal of their contracts and hearings to challenge those reasons, educators must establish that they had liberty or property interests at stake.

Joseph Oluwole

See also Due Process; Due Process Hearing; Due Process Rights: Teacher Dismissal

Legal Citations

Board of Regents v. Roth, 408 U.S. 564 (1972).
Mathews v. Eldridge, 424 U.S. 319 (1976).
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Bolling v. Sharpe

In *Bolling v. Sharpe* (1954), African American junior high school students challenged the denial of their requests for admission to all-White schools in Washington, D.C. The case was linked to similar cases in the landmark *Brown v. Board of Education of Topeka* (1954) case, but it raised particular issues, because the federal government rather than the states was being accused of discrimination. The Supreme Court ruled that the federal government could not be held to a lesser standard in this important issue of liberty.

Facts of the Case

The schools that the African American students attended were in poor physical condition and lacked adequate educational materials. The students, who were initially led by Thurgood Marshall's mentor Charles Hamilton Houston, disputed the validity of segregation in the public schools of the District of Columbia. When Houston became ill, he was replaced by James Nabrit, a colleague from Howard University.

The students, led by Nabrit, continued their charge that the segregation practiced in the District of Columbia deprived them of due process of law under the Fifth Amendment; because the Fifth, rather than the Fourteenth applies to the federal government, the plaintiffs proceeded under it. School officials barred the African American students' admission to the White public schools solely because of their race.

In their quest to gain admission, the African American students filed suit in the federal trial court for the District of Columbia. After the court dismissed their complaint in light of a recent ruling that segregated schools were constitutional in the District of Columbia, Nabrit filed an appeal. Due to the importance of the constitutional question presented, the Supreme Court granted a writ of certiorari before the Court of Appeals rendered its judgment. The Court was interested in considering the *Bolling* case along with the four other segregation cases already filed. The other segregation cases and *Bolling* were linked in the oral arguments under the now famous *Brown.*

The Court's Ruling

In *Brown,* the Supreme Court held that the Equal Protection Clause of the Fourteenth Amendment prohibits the states from maintaining racially segregated public schools. Yet, the legal question in the District of Columbia was somewhat different, as the Fifth Amendment, which is applicable in the District of Columbia, does not contain an Equal Protection Clause like that of the Fourteenth Amendment. To be sure, the Fourteenth Amendment applies only to the states.

In its analysis, the Supreme Court pointed out that the concepts of equal protection and due process both have foundations in the American ideal of fairness and are not mutually exclusive. In order to avoid future confusion, the High Court definitively stated that these two concepts are not always interchangeable. "That is, 'equal protection of the laws' is a more explicit safeguard of prohibited unfairness than 'due process of law.' But, as this Court recognized, discrimination may be so unjustifiable as to be violative of due process" (p. 499).

The Supreme Court noted that classifications based solely on race must be carefully scrutinized. With respect to this issue, the Court made an interesting reference to, but did not specifically mention, *Plessy* v. *Ferguson* (1896), which not only made popular the principle "separate but equal" but supposedly prohibited discrimination. *Plessy* is viewed as promoting discrimination today even though it was not regarded as such at the time.

To continue the line of reasoning, the Supreme Court noted that the term *liberty* means more than mere freedom from bodily restraint. To this end, the justices were of the opinion that liberty under law extends to the full range of conduct that an individual is free to pursue absent restriction, unless there is a

connection to a proper governmental objective. As segregation in public education is not rationally related to any proper governmental objective, the Court found that it burdened African American students in the District of Columbia in such a way that it constituted an arbitrary deprivation of their liberty in violation of the Due Process Clause.

The Supreme Court concluded that just as the Constitution prohibits the states from maintaining racially segregated public schools, it would be unconscionable for the same Constitution to ask less of the federal government, in this case in its role of administering schools in the District of Columbia. Thus, the Court decided that racial segregation in the public schools of the District of Columbia denied African American students their rights under due process of law as guaranteed by the Fifth Amendment to the United States Constitution.

Mark A. Gooden

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Marshall, Thurgood

Legal Citations

Bolling v. Sharpe, 347 U.S. 497 (1954).
Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Plessy v. Ferguson, 163 U. S. 537 (1896).

Bradley v. School Board of City of Richmond

Bradley v. School Board of City of Richmond involved two different decisions by the Supreme Court of the United States. In *Bradley I* (1973), more properly known as *School Board, City of Richmond v. State Board of Education,* the Court summarily affirmed a decision by the Fourth Circuit, which reversed an early order calling for an interdistrict remedy to eliminate school segregation. In the second case, *Bradley v. School Board of City of Richmond* (1972, 1974), which became known as *Bradley II* when it reached the Supreme Court, the Court upheld an award of attorney fees to the plaintiff parents.

Bradley I

Bradley I was the result of extensive litigation to bring about the desegregation of the schools in Richmond, Virginia. The Fourth Circuit affirmed that an interdistrict remedy was inappropriate. Chesterfield and Henrico counties, which were adjacent to the city of Richmond, challenged a federal trial court's joining them to the suit in order to effectuate a unitary school system.

The Fourth Circuit began by noting that in *Swann v. Charlotte-Mecklenburg Board of Education* (1972), the Supreme Court limited the remedies that the judiciary could use to achieve unitary systems. The court pointed out that previously, the board agreed that its freedom of choice plan to desegregate the schools was insufficient to achieve its goal. In addition, a federal trial court ruled that the third plan, an interdistrict remedy developed by the city, would eliminate racially identifiable schools to the extent possible in the city. Subsequently, the adjoining counties were added to the suit.

As part of its judgment, the Fourth Circuit reviewed research on the percentages of Black and White students in each school that would have indicated the achievement of a unitary system. The court thus observed that joining the neighboring counties to the Richmond district would have been tantamount to imposing a quota by limiting the number of spots at some schools available to minority children. At the same time, the court could not uncover any evidence that the establishment of the school district lines 100 years earlier was racially motivated. Also, the court found no evidence of an interaction among the districts to keep the adjoining school systems White by confining Black students to Richmond.

The Fourth Circuit ruled that requiring the consolidation of the three school systems would have ignored Virginia's history and traditions with regard to the establishment and operation of schools. The court thought that such action would also have invalidated legislative acts that created the public school structure

currently in place in Virginia. If the court were to ignore the history and tradition that created the public school system in Virginia, then the court feared that it would create budgeting and financing nightmares.

Further, the court examined the Tenth Amendment, which reserves to the states the authority to structure their internal governance, including schools. Absent evidence of a constitutional violation in the establishment of the school districts, the Fourth Circuit maintained that remedy was beyond the authority of the trial court. The vestiges of segregation, in the opinion of the circuit court, had been eliminated in the City of Richmond. An equally divided Supreme Court affirmed in a one sentence per curiam order.

Bradley II

Bradley II came about as the result of an award of attorneys' fees. The trial court had awarded the plaintiffs attorney fees for the costs they incurred in the litigation. However, the Fourth Circuit reversed in favor of the school board. While *Bradley II* was pending, Congress enacted Section 718 of the Emergency School Aid Act as part of the Education Amendments of 1972. This amendment allowed the award of attorneys' fees when appropriate in desegregation cases. Under this law, courts can apply the law as it exists at the time that they render judgments, even if infractions occur before relevant statutes come into effect, as long as doing so would not result in injustice or violate the laws involved.

When *Bradley II* reached the Supreme Court, the justices noted that a reading of the act's legislative history seemed to allow an award of attorney fees in this situation. In fact, the Court noted that since 1968, the board had been remiss in its duty to create a unitary school system. To this end, the Court decided that it was pertinent that the board was aware that it could have been liable for attorney fees. Therefore, the Court reasoned that Section 718 allowed the award of attorney fees when it is appropriate to do so pursuant to the entry of a final order in a school desegregation case. The Court explained that fees could be awarded for the services that attorneys provided before the law was enacted where the propriety of a fee award was pending resolution on appeal. The Court added that the award was appropriate, because it was not necessary for a fee award to be made simultaneously with entry of a desegregation order.

Bradley I and *II* illustrate that because it took a long time for school boards to realize that they had a duty to effectuate unitary school systems in an expeditious manner, those that failed to do so were liable to pay the costs of litigation. Aside from the historical interest, it is worth noting that deliberate acts by school boards to delay remedying segregation when complying with known legal requirements can result in the unnecessary expenditure of funds for legal fees and awards of attorney fees.

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Federalism and the Tenth Amendment; Fourteenth Amendment; *Swann v. Charlotte-Mecklenburg Board of Education*

Legal Citations

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1972).

Brennan, William J. (1906–1997)

Many legal scholars consider William Brennan to be one of the greatest Supreme Court justices of the 20th century. Liberals praise him as an architect of social change, a champion of civil liberties, and a protector of minority rights. Conversely, conservatives view Brennan as the epitome of "judicial activism," a justice who extended the power of an overreaching judiciary into matters best left regulated by popularly elected legislative bodies. Yet, both supporters and critics agree that he was one of the most influential

jurists in recent history. This entry summarizes his life, his career, and his impact on the Court.

Early Years

Brennan was born on April 25th, 1906. The son of Irish immigrants, he grew up in a working class family in Newark, New Jersey. Brennan's father was a leader in the labor movement and an advocate of municipal government reform who passed his sense of social responsibility on to his son. Brennan was an outstanding student in high school, and he went on to graduate with honors from the prestigious University of Pennsylvania Wharton School of Finance. He worked his way through Harvard Law School, where he graduated in the top 10% of his class.

After law school, Brennan was hired by a prominent Newark law firm, at which he specialized in labor and employment law. During World War II, Brennan enlisted in the army and served on the staff of the undersecretary of war as a labor relations troubleshooter. He was awarded the Legion of Merit for his distinguished service in the military. At the end of the war, Brennan returned to his old law firm. Not completely satisfied with private practice, Brennan branched out and became actively involved in a campaign to reform the New Jersey state court system. Brennan was appointed as a Superior Court judge, and the attention he attracted as part of the judicial reform movement helped lead to his rapid rise from trial court judge to justice on the state supreme court.

On the Bench

During his tenure as a state court judge, Brennan impressed Arthur T. Vanderbilt, chief justice of the New Jersey Supreme Court and an influential insider in Republican political circles. When Sherman Minton retired from the U.S. Supreme Court in 1956, Vanderbilt and other party leaders recommended to President Dwight Eisenhower that Brennan be nominated to fill the vacancy. During the fall election campaign, Eisenhower nominated Brennan as a "recess" appointment to the Court in what some cynics viewed as an attempt to win the Roman Catholic vote. Brennan was a registered Democrat, but he was not actively involved in party politics. Although he had been an outspoken critic of McCarthyism, Brennan had earned a reputation as a nonpartisan judge. In March 1957, the Senate confirmed his appointment, with Senator Joseph McCarthy casting the sole dissenting vote.

As a new associate justice, Brennan joined the liberal wing of the Warren Court, which for most of the 1950s and 1960s constituted a solid majority. Eisenhower allegedly remarked that the appointments of Earl Warren and William Brennan were two of the biggest mistakes he made as president. However, in many instances, Brennan was more of a centrist than colleagues such as Hugo Black and William O. Douglas, and in his early years, he dissented less than any member of the Court. Chief Justice Warren and Brennan developed a close friendship and working relationship. Some commentators considered Brennan to be Warren's "first lieutenant" and the justice to whom he most often turned to build consensus and maintain a majority in support of the Court's opinions.

Supreme Court Record

Justice Brennan was assigned to write opinions in landmark cases, some of which directly and others indirectly impact on the law of education. His opinion in *Baker v. Carr* (1962), deciding that the issue of legislative reapportionment was not a nonjusticiable political question, paved the way for subsequent decisions establishing the principle of "one person, one vote." In *New York Times v. Sullivan* (1964), he opened the door for more robust criticism of the government by finding that public officials may not recover damages for allegedly defamatory remarks, even if false, unless it can be shown that the statements were made with "actual malice," that is with either knowledge of their falsity or with reckless disregard for the truth.

Brennan was a strong supporter of school desegregation, and he voted against attempts by school boards to maintain racially segregated schools in all of the major decisions post–*Brown v. Board of Education of Topeka* (1954). In *Keyes v. School District No. 1, Denver, Colorado* (1973), he authored an opinion that

declared that a finding of de jure segregation in one part of a school district was presumptive proof that the entire system was unlawfully segregated.

Brennan also was a proponent of affirmative action as a remedy for past racial discrimination. His concurring opinion in *Regents of the University of California v. Bakke* (1978) approved the university's race-conscious policy for admission to its medical school. In *United Steelworkers v. Weber* (1979), he authored the Court's opinion, which upheld the use of voluntary affirmative-action programs in the private sector. In *Metro Broadcasting v. Federal Communications Commission* (1990), he wrote the majority opinion, which permitted federal affirmative-action programs designed to increase minority ownership of broadcast licenses.

Justice Brennan was a passionate advocate of gender equality. He publicly supported passage of the Equal Rights Amendment, and he argued that discriminatory treatment of women should be subject to the same "strict scrutiny" as discrimination on the basis of race. Although he was unsuccessful in convincing a majority of the Court to accept strict scrutiny, he did succeed in the Oklahoma 3.2% beer case of *Craig v. Boren* (1976) in getting the justices to apply a heightened standard of review in gender discrimination cases. The Court adopted the so-called mid-level test, requiring that actions discriminating against women be substantially related to the achievement of important government objectives in order to be upheld.

Religion and Education

In First Amendment Establishment Clause cases, Brennan took a position of strict separation between church and state. He consistently voted against school-sponsored prayer and opposed public government assistance to religiously affiliated nonpublic schools. In two cases that have since been essentially overruled, *Aguilar v. Felton* (1985) and *School District of Grand Rapids v. Ball* (1985), he authored the Court's opinions striking down programs providing for state-supported remedial instruction and shared-time education of students in private schools. In *Edwards v. Aguillard* (1987), he wrote the majority opinion, which maintained that Louisiana's Balanced Treatment Act requiring "equal time" for the teaching of evolution and creation science was unconstitutional.

Justice Brennan voted to uphold the rights of religious minorities in First Amendment Free Exercise Clause cases. In *Sherbert v. Verner* (1963), he penned the Supreme Court's opinion in reasoning that denying unemployment compensation benefits to a woman who refused to work on Saturday violated her right to religious freedom. In so doing, Brennan enunciated the Sherbert balancing test. Under this test, once a claimant establishes that government action has imposed a burden on the free exercise of religion, the burden shifts to the government to demonstrate a compelling state interest sufficient to override the infringement on religion. Although the Court essentially overruled *Sherbert* in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), many members of Congress and legal scholars still believe that it should be the proper standard in First Amendment Free Exercise Clause analysis.

Free Speech

Brennan believed in the principles of freedom of speech and the right to political dissent. In *Keyishian v. Board of Regents* (1967), he struck a blow against loyalty oaths. Writing for the Court, Brennan noted that New York statutes and administrative regulations preventing the employment of "subversive" faculty by state universities, and providing for their dismissal if found guilty of "treasonable or seditious" acts, were unconstitutional.

Brennan maintained that the right to freedom of speech applied to students. He joined the majority in *Tinker v. Des Moines Independent Community School District* (1969), upholding the right of students to wear black armbands protesting the war in Vietnam. He dissented in *Hazelwood School District v. Kuhlmeier* (1988), in which the Court upheld the censorship of an objectionable article in the school newspaper. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico* (1982), Brennan's plurality opinion asserted that the First Amendment imposes limits on the discretion of school boards to remove books that some parents might find to be objectionable from public school libraries.

Other Issues

Justice Brennan generally took an expansive view of the rights of students and teachers with disabilities. In *School Board of Nassau County v. Arline* (1987), he authored the Court's opinion holding that a person suffering from the contagious disease of tuberculosis could be a handicapped person within the meaning of Section 504 of the Rehabilitation Act of 1973 and that the plaintiff, an elementary schoolteacher, was such a person.

In one of his last major majority opinions, *Texas v. Johnson* (1989), Brennan authored the Court's order against an anti–flag-burning statute. He observed that, "We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents" (p. 420).

Legacy

Although Brennan exerted his greatest influence during the Warren Court era, he continued to play an important role in the Burger Court period as well. Yet, as the makeup of the Court changed once William Rehnquist was appointed as chief justice, Brennan became a member of the minority. While he could occasionally pull together a majority through the force of his personality and persuasive skills, as in *Metro Broadcasting,* in his later years on the Court, Brennan frequently played the role of dissenter. Frustrated and in increasingly poor health, Brennan retired from the Court in 1990 and died in 1997.

William Brennan left a lasting legacy on American constitutional law. His view of the Constitution as a "living" document that should evolve through time and be responsive to changing conditions and current needs of America is praised by many who see the document's adaptability as its greatest strength. Others view his career less favorably. Critics view Brennan as a justice who reached decisions based on his own personal policy preferences rather than the literal language of the Constitution or the original intent of the founding fathers. Regardless of how Justice Brennan is viewed ideologically, his jurisprudence, especially in First Amendment free speech and religion cases, significantly shaped modern school law.

Michael Yates

See also Affirmative Action; Burger Court; Creationism, Evolution, and Intelligent Design, Teaching of; Rehnquist Court; Warren Court

Further Readings

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United Steelworkers v. Weber, 443 U.S. 193 (1979).

Breyer, Stephen G. (1938–)

Stephen G. Breyer was President Bill Clinton's second appointment to the U.S. Supreme Court. Breyer brought with him a wealth of experience in government service and as a federal appellate court judge. At this time, he has not authored any landmark school law decisions. However, Breyer has written important concurring and dissenting opinions. Although he is

generally liberal to moderate in his views, his positions are not always predictable, as he occasionally has provided the swing vote in close decisions.

Early Years

Stephen Breyer, born on August 15, 1938, in San Francisco, California, was raised by middle class Jewish parents who emphasized the importance of public service and a good education. His father was an attorney who for years served as legal counsel for the city board of education. Breyer's mother was an active member of her local Democratic Party organization, the League of Women Voters, and a United Nations association. Breyer attended Lowell High School, a prestigious public school, where he excelled academically, was a champion debater, and was voted the member of his class "most likely to succeed."

Deciding to attend Stanford rather than Harvard, Breyer was an outstanding student, earning perfect grades except for one B. After graduation, Breyer received a scholarship to Oxford University in England, where he studied economics and politics, both of which were to influence his future careers. Breyer then returned to the United States and was admitted to Harvard Law School, where he was articles editor for the law review and graduated magna cum laude.

Breyer's outstanding record at Harvard earned him a clerkship at the Supreme Court for Justice Arthur Goldberg. As a clerk, he helped draft Goldberg's concurring opinion in *Griswold v. Connecticut* (1965), which discovered a source for the constitutional right to privacy in the unenumerated rights guaranteed by the Ninth Amendment. On finishing his clerkship, Breyer served as a special assistant to the assistant attorney general in the antitrust division of the Justice Department.

In 1967, Breyer was hired as an assistant professor at Harvard Law School. In 1970, he was promoted to full professor, and he served in that capacity until 1980. During his tenure at Harvard, he frequently returned to government service. For a short time, Breyer worked as an assistant special prosecutor for Archibald Cox in the Watergate investigation. He then served as special counsel to the Senate Judiciary Committee. During this time, Breyer became known as a consensus builder and compromiser. Breyer's most noted accomplishment was helping orchestrate a program for deregulation of the airline industry.

On the Bench

In 1980, President Jimmy Carter nominated Breyer as a judge on the Ninth Circuit. Considering Carter a potential lame duck, Senate Republicans held up many of his appointments but treated Breyer as an exception. Based on their prior dealings with him, both parties held him in high regard, and Breyer became the last Carter judicial appointment confirmed by the Senate.

As a federal appellate court judge, Breyer gained a reputation for hard work, competence, and fairness. Many considered him to be a "judge's judge." In 1985, Breyer was appointed as a member of the U.S. Sentencing Commission. In this capacity, he played a leading role in developing new federal sentencing guidelines.

In 1994, President Clinton nominated Judge Breyer to the U.S. Supreme Court. A year earlier, when Clinton had his first opportunity to fill a vacancy on the Court, Breyer had been the early favorite. However, he was passed over for the position in favor of Judge Ruth Bader Ginsburg, with whom Clinton purportedly felt more comfortable. When a second vacancy opened after the retirement of Justice Harry Blackman, President Clinton reconsidered, and this time Breyer was appointed. With bipartisan support, the Senate easily approved his nomination.

Supreme Court Record

In school law cases, Justice Breyer's voting record has, for the most part, been similar to that of Justice Ginsburg. Yet, he has not always been as predictably liberal. On Establishment Clause issues, Breyer has generally taken a separationist position. In *Agostini v. Felton* (1997), he voted against state funding for public school teachers to provide remedial instruction for students in religious schools. In *Zelman v. Simmons-Harris* (2002), he dissented in the face of the Supreme Court's upholding of school vouchers. Yet, in the

plurality of *Mitchell v. Helms* (2000), unlike Ginsburg, he joined Justice O'Connor's concurring opinion that allowed federal aid to religious schools for educational and library materials as well as computer resources. Further, Breyer dissented in *City of Boerne v. Flores* (1997), holding the Religious Freedom Restoration Act unconstitutional, while Justice Ginsburg joined in the Court's decision.

In cases involving support of religious organizations or activities in public schools, Breyer dissented in *Rosenberger v. Rectors and Visitors of the University of Virginia* (1995), wherein the Supreme Court upheld the constitutionality of funding for the printing of a Christian group's newsletter. Again unpredictable, he concurred in *Good News Club v. Milford Central School* (2001), finding that denying a religious organization access to public school facilities was unconstitutional. In *Santa Fe Independent School District v. Doe* (2000), Breyer joined the Court in striking down student-led prayers on the public address system at high school football games.

Justice Breyer's vote was crucial in the most recent Supreme Court cases dealing with religious displays on public property. In *Van Orden v. Perry* (2005), he concurred with the Court's decision that a state-sponsored display of the Ten Commandments at the Texas state capitol, surrounded by numerous other monuments and historical markers, was constitutional because it conveyed a historic and social meaning rather than an intrusive religious endorsement. However, in *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005), he joined in the Court's finding that the display of the Ten Commandments in a court in Kentucky lacked a primarily secular purpose, in violation of the Establishment Clause. In the two suits involving drug testing of students, *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 Pottawatomie County v. Earls* (2002), Breyer departed from his liberal colleagues in voting to uphold testing.

Breyer's votes in the two University of Michigan affirmative-action cases, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), were not predictably liberal. Generally supportive of policies considering race as a factor in the admission of minority students, Breyer voted to uphold the University of Michigan Law School's admission program. However, he joined the Court's opinion striking down the undergraduate admissions policy awarding designated points in the application process to minority students.

One of Justice Breyer's best-known opinions in the area of education law was his strongly worded dissent in *United States v. Lopez* (1995), wherein the Supreme Court reasoned that the Gun-Free School Zones Act was unconstitutional because it was not significantly related to the regulation of interstate commerce. Justice Breyer argued that the Court should have deferred to congressional findings that guns disrupted schools to a degree that affected education's impact on interstate commerce.

It may be that Justice Breyer's greatest impact on education law is yet to come. Even so, considering the Supreme Court's apparent conservative shift to the right, Breyer's influence, barring a change in his own judicial philosophy or in the makeup of the Court, is likely to be in the form of concurrences and/or dissents rather than majority opinions.

Michael Yates

See also Rehnquist Court; Roberts Court

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Brown v. Board of Education of Topeka

Brown v. Board of Education of Topeka (1954) is the U.S. Supreme Court's most significant ruling on equal educational opportunities and race in American history. *Brown I* served as the catalyst that led to far-reaching changes not only in schooling—culminating with legislative changes safeguarding the educational rights of women and students with disabilities, among others—but also in the area of civil rights.

In *Brown I* (1954), the Court held that de jure segregation in public schools due solely to race deprived minority children of equal educational opportunities in violation of the Equal Protection Clause of the Fourteenth Amendment. On the same day that it announced its judgment in *Brown I,* the Court struck down segregation in the public schools of Washington, D.C., reasoning that the practice violated the Due Process Clause of the Fifth Amendment, which applies to the federal government (*Bolling v. Sharpe,* 1954). A year later, in *Brown II* (1955), the Court initiated long overdue steps to dismantle segregated public school systems, calling for the creation of so-called unitary systems wherein children were no longer segregated based on race.

Facts of the Case

At issue in *Brown I* was the pernicious doctrine of "separate but equal," a doctrine that the Supreme Court espoused in *Plessy v. Ferguson* (1896), a case from Louisiana dealing with discrimination in public railway accommodations. The concept traces its origins to a dispute wherein the Supreme Judicial Court of Massachusetts in *Roberts v. City of Boston* (1850) denied an African American student the opportunity to attend a school for White children that was closer to her home. Three years after *Plessy,* in *Cumming v. County Board of Education* of Richmond County (1899), the Court went even further in upholding laws that established separate schools for Whites, even though no comparable schools were available for students who were African American. The Court explicitly extended "separate but equal" to K–12 education in *Gong Lum v. Rice* (1927), a dispute from Mississippi in which it upheld the exclusion of a student of Chinese descent from a public school for White children.

Brown I was a consolidation of four class action lawsuits on behalf of African American students who had been denied admission to schools attended by White children. State laws in Clarendon County (South Carolina), Prince Edward County (Virginia), and New Castle County (Delaware) required racial segregation; it was permitted by law in Kansas. After being unable to reach a decision during its 1952–1953 term, the Supreme Court took the unusual step of rehearing oral arguments in December of 1953. The Court handed down its monumental ruling on May 17, 1954.

The Court's Ruling

In an opinion written by the recently appointed Chief Justice Earl Warren, the Supreme Court unanimously struck down de jure segregation in public schools. At the beginning of the Court's written opinion, Warren acknowledged that "Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society (p. 493)." Applying the principles enunciated in *Sweatt v. Painter* (1950) and *McClaurin v. Oklahoma State Regents for Higher Education* (1950), companion cases that prohibited interschool and intraschool segregation, respectively, in higher education in Missouri and Oklahoma on the basis of tangible and intangible inequities to elementary and secondary schools, the Court focused on the detrimental psychological effects of segregation on African American students. Then, writing for the Court, Chief Justice Warren framed the issue thus: "Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other

'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities?" (p. 493) Warren succinctly answered, "We believe that it does" (p. 493).

In one of the earliest instances of its doing so, the Court relied in part on data from the social sciences, in evidence presented by psychologist Dr. Kenneth B. Clark, who testified about the deleterious effect that segregation had on African American children. Relying on data in what may be the most important footnote in American judicial history (p. 495, note 11), which refers to these deleterious effects, the justices held "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" (p. 495).

As important as *Brown I* was, and remains, for unequivocally repudiating the doctrine of "separate but equal" that it enunciated in *Plessy,* the Supreme Court did not address remedies for segregated schooling. Instead, the Court ordered further arguments on how to redress segregation in public education.

In *Brown II,* rendered on May 31, 1955, another unanimous opinion written by Chief Justice Warren, the Supreme Court neither mandated an immediate end to nor set a timetable for eliminating school segregation. However, in calling for the end of segregated schooling "with all deliberate speed" (p. 301), a promise that it did not deliver, *Brown II* did offer general guidance to the lower courts, directing them to fashion their decrees on equitable principles characterized by flexibility. Moreover, aware of the far-reaching impact of its decision, involving such matters as administration, school transportation, personnel, admissions policies, and changes in local laws, the Court reasoned that once progress was under way, the lower courts could grant more time to implement its ruling.

Brown I, coupled with the limited scope of remedies ordered in *Brown II,* represents a compromise that attempted to steer a middle course. On the one hand, the Supreme Court recognized that it could not permit segregated schooling to remain in place indefinitely. Yet, on the other, the Court sought to avoid lecturing and even more conflict in what it presciently perceived would be a recalcitrant and resentful South. An unfortunate and unforeseen consequence of *Brown I* and *II* was that in attempting to limit conflict by easing equality in, the Court inadvertently may have strengthened the resolve of opponents who heightened their resistance. If, as opponents of *Brown I* and *II* might have argued, equal educational opportunities were as important as the Court, and others, insisted, then it was unclear why the justices did not order an immediate end to segregated schooling. As witnessed by the struggles to implement *Brown I* and *II* as well as their judicial progeny, the defiance that these monumental cases spawned had led to creation of inequalities that continue to plague many American public schools.

Charles J. Russo

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment; Segregation, De Facto; Segregation, De Jure; Social Sciences and the Law; Warren Court; Warren, Earl

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Brown v. Board of Education of Topeka and Equal Educational Opportunities

In May 1954, the U.S. Supreme Court, in *Brown v. Board of Education of Topeka,* ushered in an era that would end the rights of states to mandate the separation

of the races in public education. While the Court's original ruling in *Brown* did not end segregated schooling, it afforded plaintiffs in segregated schools the right to seek an end to segregation in the more than 2,200 school districts that operated so-called dual systems. In dual or segregated systems, boards essentially operated two systems side-by-side, one for Whites, the other, usually of inferior quality, for Blacks. In ruling that segregation in public schools based on race violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, the Court essentially repudiated its earlier holding in *Plessy v. Ferguson* (1896) that states could meet the requirements of the Equal Protection Clause by affording each racial group "separate but equal" facilities.In so doing, the Court ruled that the Fourteenth Amendment applied the Bill of Rights to the States.

After *Brown,* public school desegregation was slow to come for Black children due to racially segregated housing patterns, the difficulty of processing thousands of individual cases in federal trial courts on a district by district basis, and often entrenched resistance by Whites. The legal process proved expensive and costly to Black plaintiffs. In many major cities, segregation between Black and White children grew sharply. In Milwaukee, for example, one study found that Black children made up 61% of the public school population in 2000, up from 46% in 1990. "White flight," the exit from racially mixed urban public schools that began with *Brown,* continues to the present. From 1987 to 1996, White enrollment in urban public schools declined in 238 metropolitan areas. This pattern began immediately after *Brown* in small and large urban communities.

Nevertheless, *Brown* stands out as the most significant Supreme Court case on education and is perhaps its most important decision of all time. *Brown* has had a far-reaching impact; it began an era of equal educational opportunities for all children that culminated in later developments advancing the rights of female students and children with disabilities. This essay reviews *Brown's* legal history and related developments.

Leading Up to *Brown*

Prior to *Brown,* the National Association for the Advancement of Colored People (NAACP) and its independent legal arm, the NAACP Legal Defense Fund (LDF), set the stage for an attack on *Plessy v. Ferguson,* which held that the states may satisfy the Equal Protection Clause of the Fourteenth Amendment by providing "equal but separate" public facilities for Black and White citizens.

In *Missouri ex rel. Gaines v. Canada* (1938), the NAACP defended a Black male student who sought admission to the state's White law school. State officials offered to pay his tuition at an out-of-state law school. However, the Supreme Court found that this offer denied the student his legal right to enjoy the same privilege the state offered its White citizens and that paying his tuition in another state would not have ended the discrimination.

In 1948, when the NAACP represented a Black applicant who sought to attend the White law school at the University of Oklahoma, officials established a separate law school for Blacks (*Sipuel v. University of Oklahoma,* 1948*).* In response to being sued, the state argued that the applicant had sought the relief offered (Flemming, 1976). The Court recognized that the Black student could not be expected to wait until a law school for Blacks was established and recommended her admission. The state admitted the applicant but segregated the Black student from White students in the classroom, library, and cafeteria. Pursuant to this action, the NAACP petitioned the Court for a correction of this form of segregation (*McLaurin v. Oklahoma State Regents,* 1950). The Court reasoned that insofar as this arrangement handicapped Black students, officials had to discontinue the practice. On that same day, the Court decided a case in favor of a Black male student who sought admission to the University of Texas School of Law in *Sweatt v. Painter* (1950).

At issue in *Sweatt* was the refusal of public officials to admit a Black student to the University of Texas School of Law; instead, it, too, established a separate law school for Blacks. Handing down a judgment in favor of the student, the Court explained that the separate law school for Blacks could not provide

equal protection under the laws while emphasizing the "intangibles" that make educational institutions equal. In its rationale, the Court pointed out that the new Black law school excluded 85% of the population prepared to be lawyers in the state and could not equal the University of Texas School of Law. Four years later, in *Brown,* the Court held that the Equal Protection Clause of the Fourteenth Amendment enumerated in *Sweatt* and *McLaurin* "appl[ies] with added force to children in grade schools and high schools" (Flemming, 1976, p. 5).

Brown v. Board of Education of Topeka

In the litigation surrounding *Brown,* the Supreme Court addressed five cases attacking state enforced school segregation. The cases came from segregated school systems in Delaware, Kansas, South Carolina, and Virginia. The fifth case argued on the same day, *Bolling v. Sharpe* (1954), arose in Washington, D.C.

Brown was a class action suit brought on behalf of all Black children in the affected states. As part of the strategy, the plaintiffs required lawyers for the segregated school systems to make their cases for desegregation in federal trial courts, where they would have to argue based on the U.S. Constitution rather than the constitutions and laws of their own states.

Once *Brown* was appealed to the Supreme Court, a variety of parties on both sides filed amicus curiae (friend of the court) briefs trying to influence its outcome. In addition, the United States solicitor general submitted a brief, in the early stages of *Brown* for President Truman, who gave *Brown* strong support. In the later stages, the solicitor general filed a brief on behalf of President Eisenhower, even though he offered only lukewarm support (Davis & Graham, 1995, p.117). Further, the attorney general's office published a 600-page analysis of the Fourteenth Amendment (Davis & Clark, 1994, pp.168–169).

Along with the amicus briefs, the Supreme Court commissioned its own study of the Fourteenth Amendment without informing the parties. At oral arguments before the Court, each state's attorney general argued for his or her state, while lawyers from the NAACP argued each of the *Brown* cases for the plaintiffs. Even so, the major focus was placed on Thurgood Marshall for the NAACP and on John Davis, who argued the South Carolina case that began as *Briggs v. Elliot, Members of Board of Trustees of School District No. 22, Clarendon County* (1952). Davis, a Wall Street lawyer and a native of South Carolina, like Marshall, argued many cases before the high Court. Davis had been solicitor general, ambassador to England, and a presidential candidate for the Democratic Party in 1924 (Berman, 1966, pp. 71–72).

At the end of its 1953 term, because the Court was unable to render judgment, it called for further arguments that fall. The Court set the *Brown* cases for reargument on questions relating to relief that should be granted in the event that the plaintiffs prevailed and segregation was declared unconstitutional (Motley, 1998, p. 106). In what became a major development before the Court could act in *Brown,* Chief Justice Vinson died, and President Eisenhower appointed Earl Warren, eventual author of the Court's opinion in *Brown,* as his replacement in the fall of 1953. After *Brown,* John Marshall Harlan replaced Justice Jackson, who died, and John Davis became ill and could not reargue for the South Carolina case in *Brown v. Board of Education of Topeka II* (1955), a subsequent case in which the Court provided guidelines for the implementation of *Brown* (Berman, 1966, p. 17).

The Evidence

During oral arguments, the NAACP's task was to convince the Supreme Court that *Plessy* was wrongly decided and to prove that even where facilities were equal, segregation had harmful psychological effects on the ability of Black children to be educated. Psychologist Kenneth Clark provided evidence on the harmful effects of segregation on Black children. This evidence was developed in the *Briggs* case.

Clark's work on the psychological effects of segregation on Black children in a Clarendon County elementary school provided the negative effects of segregated education on Black children (Motley, 1998). Clark's study, which was cited in *Brown,* became known as the "doll study" after he used Black

and White dolls to study the self-image of Black children, arguing that a poor self-image caused great harm to Black children and adults.

Among the harms that some of the adults who brought the case suffered as a result were that the leader, J. A. DeLaine, was dismissed from his job as a teacher; Levi Pearson's crops rotted in the field because he could not get credit for machines to harvest them; and Harry Briggs, the named plaintiff, was fired as a gas-station attendant, while his wife was dismissed from her job as a motel maid. Twenty years, later the public schools in Clarendon County enrolled 3,000 Black children and one White child. DeLaine lived in exile for the remainder of his life.

The NAACP developed its strategy to attack public school segregation by purposefully selecting the school district in South Carolina that was involved in the *Briggs* case. The South Carolina case reached the Court first, but, exercising their discretion, the justices placed the Kansas case at the head of the list. Thus, the litigation became known as *Brown v. Board of Education of Topeka* instead of *Briggs.* Even so, the Court's opinion used most of the information in the *Briggs* brief rather than information from Kansas. During the oral arguments, each case was argued separately before the Supreme Court. Thurgood Marshall's assistant counsel, Robert L. Carter, represented the *Brown* plaintiffs in oral arguments before the Court. Marshall and Davis, the lead counsels for the plaintiffs and defendants, respectively, argued *Briggs.*

The Ruling

In reaching its monumental decision striking down segregation based on race, the Supreme Court ruled that "segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities" (p. 493). As important as *Brown* was in striking down school desegregation, the Court did not address remedies. Instead, the Court ordered further oral arguments on the question of remedies.

The Supreme Court's order in *Brown II,* calling for an end to segregated schooling "with all deliberate speed" (p. 301), offered guidance to federal trial courts to eliminate dual public school systems and to monitor how well their directives were being followed. The Court also gave local school officials and state authorities the responsibility for implementing decisions of federal district courts, and established a schedule for the lower courts to implement *Brown.*

Post-*Brown* Developments

The requirement for implementation with "all deliberate speed" of *Brown II* met with resistance from those who wished to retain segregated schools. In the first 25 years after *Brown,* the Supreme Court handed down more than 30 decisions involving desegregation of public schools. Yet, the Court has played a diminishing role in ensuring educational equity, resolving only six cases since then. The Court's action, or more properly, inaction in the first 25 years, contributed to many school boards' failure to implement *Brown.*

The First Decade

In 1964, in the 11 states that had formed the Confederate States of America during the Civil War, only 1.17% of Black children attended school with White children. Yet, the 1964 Civil Rights Act authorized the U.S. Department of Justice to pursue legal actions against segregated school systems. Prior to 1964, it was difficult in these states to secure plaintiffs or attorneys who were willing to represent litigants (a requirement in all states) in segregated school systems. Moreover, as reflected in *Briggs,* Black plaintiffs and their attorneys could suffer great personal and economic harm by opponents of school desegregation. Consequently, five years after the 1964 act, federal courts ordered more than 500 segregated schools to desegregate (Brown, 2004a; Motley, 1998, p. 86).

Another significant aspect of the 1964 act was that it allowed successful plaintiffs in school desegregation litigation to collect legal fees from offending school boards. These fees covered costs for proceedings from trial courts all the way to the Supreme Court and, typically, on remand for implementation, a costly process. In these instances, trial courts typically issued specific orders for achieving unitary school systems based on the six factors that the Supreme Court enunciated in *Green v. County School Board of New Kent County* (1968), namely the composition of the student body,

faculty, staff, transportation, extracurricular activities, and facilities. Trial courts then ordinarily appointed court masters who served either as full- or part-time employees of the school boards to oversee the implementation of the plans that they approved and who reported back to the judges. Under this approach, many school systems were under judicial supervision for as long as 30 years and may have worked with several Court masters and judges.

Early resistance by state governments and local school systems to *Brown* included procedural delays and transfer plans. In 1963, in *McNeese v. Board of Education,* the Supreme Court decided that the plaintiffs challenging the misconduct of school boards that denied minority students equal protection did not need to exhaust administrative remedies under state law before filing suit in federal courts. In *Goss v. Board of Education* (1963), the Court struck down a school desegregation plan that allowed students, solely on the basis of their own race and racial composition of their assigned schools, to transfer on request from a school where they would be in racial minority back to their former segregated schools where their race was in the majority. The Court found the transfer plan unconstitutional, because making race the only criterion for the transfers tended to perpetuate segregation.

In *Griffin v. County School Board of Prince Edward County* (1964), the Supreme Court struck down a board's refusal to keep the public schools open to obey a court order to desegregate. The Court ordered the board to reopen public schools after five years. In *Rogers v. Paul* (1965), the Court invalidated a plan that desegregated only one grade per year and left Black high school students assigned to a segregated school, which left them unable to take courses offered only in the White high school. The Court explained that such delays in desegregating schools were unacceptable. In *Raney v. Board of Education* (1968) and *Monroe v. Board of Commissioners* (1968), the Court struck down freedom-of-choice plans. *Raney* involved two formerly segregated school districts that combined elementary and high schools. The Court found that the plan that permitted enrollment in either school was inadequate for conversion to a unitary school district, because after three years, not one White child had enrolled in a Black school. In *Monroe,* the Court struck down a transfer plan in which, after three years, one junior high school continued to have all Black students because no White students living in its attendance zone chose to remain in it. At the same time, only seven Black students had enrolled in the formerly all White junior high schools.

In *Green,* the Supreme Court began to end freedom-of-choice plans while fashioning remedies to move segregated school systems toward unitary status. The Court ordered the school board to terminate the use of a transfer plan that permitted students to transfer between segregated schools where not a single White student had transferred to a Black school. The Court listed six factors, identified earlier, that continue to be applied for dismantling dual school systems in a manner originally suggested in *Brown.*

The 1970s: Retreat Begins

The Supreme Court's support for desegregation began to wane with the retirement of Chief Justice Earl Warren in 1970. The upshot was that by 1978, most supporters of *Brown* had departed the Court. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the Court imposed a limit on the use of mathematical ratios of White to Black students for unitary systems. At the same time, the Court upheld the pairing and grouping of noncontiguous school zones as a desegregation tool while allowing the use of busing in assigning students to schools by race.

After *Swann,* in *Wright v. Council of the City of Emporia* (1972) and *United States v. Scotland Neck City Board of Education* (1972), the Supreme Court prohibited two cities that had been part of segregated county school systems from withdrawing from the county and establishing separate school systems. In *Keyes v. School District No. 1, Denver, Colorado* (1973), the Court addressed its first de facto desegregation case outside of the South in a dispute involving Mexican American and Black students. In *Keyes,* the Court concluded that segregation can occur in the absence of a dually operated school system. The Court added that racial segregation can occur when boards build schools and set attendance boundaries to maintain White schools.

Milliken v. Bradley (1974) was the first major defeat for the forces of school desegregation. In *Milliken,* the Supreme Court maintained that unless the petitioner, the Detroit Board of Education, could

demonstrate that the White suburbs contributed to segregating its schools, it was not entitled to the interdistrict remedies that it sought.

Following *Milliken,* the number and frequency of desegregation cases diminished. After 1974, the Court rendered few decisions wherein it called for the dismantling of segregated public school systems (*Columbus v. Penick,* 1979; *Dayton Board of Education v. Brinkman II,* 1979; *Milliken v. Bradley II,* 1977). Instead, the Court mostly limited its review to questions about the appropriate boundaries of control for trial courts in desegregation cases, as in *Pasadena City Board of Education v. Spangler* (1976). In *Pasadena,* the Court upheld a trial court's refusal to effect a change in a desegregation order once a school board had achieved unitary status. The Court was of the opinion that where changes to the neutral system of assigning students that it approved came about due to changes in residential patterns due to people relocating within the school system, and not because of the actions of educational officials, it did not have to act. The justices were satisfied that the trial court was correct in refusing to alter its desegregation order to require readjustment of the attendance zones.

The 1980s and 1990s

In the 1980s, the Court resolved two desegregation cases, *Washington v. Seattle School District No. 1* (1982) and *Crawford v. Board of Education of the City of Los Angeles* (1982), on the legality of state-approved voter initiatives. In the case from Washington, the Court struck down a statewide initiative passed by voters that prohibited school boards from requiring students to attend schools other than those nearest to the student's place of residence. The Court indicated that voters could not do this on the basis of race as stated in the initiative. In the dispute from Los Angeles, the Court upheld an amendment to the state constitution's equal protection provision. This initiative prohibited state courts from ordering mandatory pupil assignments via transportation unless ordered by federal courts. The Court noted that because the state had no obligation to have a higher standard than the federal constitution, voters could repeal a provision.

The Supreme Court heard only four desegregation cases in the 1990s. In 1990 the Court agreed to review the long-running *Missouri v. Jenkins I* (1990). A divided Court upheld the authority of a federal trial court judge to increase local taxes to pay for desegregating Kansas City's public schools. However, the Court was less favorable to desegregation plans in two other cases in this decade, *Board of Education of the Oklahoma City Public Schools v. Dowell* (1991) and *Freeman v. Pitts* (1992), and *Missouri v. Jenkins II* (1995).

In *Dowell,* the Supreme Court found that because desegregation orders are not meant to operate in perpetuity, lower courts had to consider whether a school board had acted in good faith in trying to eliminate the vestiges of past discrimination as far as practicable in light of the *Green* factors. In *Freeman,* the Court also examined the *Green* factors in declaring that school systems could be declared unitary incrementally. In *Jenkins II,* the Court revisited the litigation in Kansas City in reversing an earlier decision in favor of the plaintiffs. The Court ruled that the trial court exceeded its discretion in calling for a desegregation remedy that required the state to pay for salary increases for all personnel to improve the quality of education programs in Kansas City, because student achievement levels were still below national norms at many grade levels.

A New Century

The Supreme Court's 2007 decision in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007) reveals that it has largely stopped enforcing *Brown* except in districts already under district courts' supervision. In *Parents,* the Court ended the practice of allowing schools to use race in assigning students, essentially overturning *Swann's* allowance of such measures in assigning students to schools.

Parents included voluntary racial desegregation plans by the public schools in Seattle and Louisville, even though neither school system was under a federal court order to desegregate. Further, Seattle had never operated under de jure segregation rules, and the Louisville schools were released from judicial supervision in 2000 after achieving unitary status. *Parents* means that more than 1000 school systems

using race to make school assignment plans must discontinue this practice. While the plurality opinion asserted that it was faithful to *Brown,* Robert L. Carter, who argued *Brown* before the Court, disagreed. Moreover, Jack Greenberg, another member of the *Brown* legal team, called this comparison to *Brown* the Court's resistance to school desegregation.

In light of the Supreme Court's refusal to hear an appeal in a case that began as *Belk v. Charlotte-Mecklenburg Board of Education* (2002), the outcome in *Parents* could have been anticipated. In *Belk* (2000), the Court allowed a judgment of the Fourth Circuit to remain in place that terminated the judicial oversight that it upheld in *Swann;* this judgment permitted the use of race in assigning students to schools. The plurality in *Parents* ruled that voluntary race-based student assignment plans by public schools was unconstitutional. Justice Kennedy's concurrence left the door open for the possible future use of race-based assignments if school boards could prove that diversity is a compelling educational goal.

The Decision's Impact

American public schools are more segregated today than they were in the late 1960s at the beginning of massive implementation of *Brown.* Moreover, insofar as the schools are more segregated today than at any time in the past 20 years, this trend is likely to increase unless the Supreme Court intervenes. Nevertheless, *Brown* has had widespread impact, both within and outside the area of education.

Outcomes for Schools

One lesson from *Brown* is that most efforts to secure equality in the United States sooner or later run into some form of de facto segregation that no American court is likely to strike down. The net result is that this could leave public schools segregated by social class. Yet, in the 1970s, the Court refused to require states to bring about equity in the funding of local school districts under the federal constitution (*San Antonio Independent School District v. Rodriguez,* 1973) or to approve metropolitan school desegregation remedies (*Milliken*).

There was massive resistance to *Brown* at every level of government from its inception. After *Brown,* Topeka, Kansas, adopted a neighborhood school policy that produced three all Black elementary schools in a district with less than a 10% Black population. In 1979, *Brown* was reopened, and in 1992, the Tenth Circuit concluded that the district was still racially segregated. By 1986, only 3% of White children were enrolled in the nation's 25 largest city school systems, and most were enrolled mainly with other White children in gifted and talented within-school programs. In America, because parents select schools based on the racial and socioeconomic composition of student bodies, they rate the schools that their children might attend as good or poor based on these characteristics.

Many, not just in the United States, consider *Brown* to be the greatest legal decision of the 20th century, because it promoted racial equality. The Supreme Court's ruling in *Parents,* banning voluntary school desegregation plans, is likely to produce a return to neighborhood schools while increasing racial and ethnic segregation in public schools. When the Court refused to intervene in the race-based school assignments case from the Fourth Circuit (*Belk,* 2000), racial segregation increased immediately.

Shortly after the Fourth Circuit banned race-based pupil assignments, some school boards sought alternative means of achieving racial diversity. One technique that educators used was to assign students to programs and schools based on family income. Nationwide, approximately 40 school systems with about 2.5 million students—among them Baltimore, San Francisco, Wake County (North Carolina) and Clark County (Nevada)—use "social economic status" to diversify their student bodies. Even so, this technique is not accepted by many parents.

The goal is quality education for all children. Thus, the question arises in this post-*Brown* era: How can the nation produce quality education for all children? The use of family income in assigning students to schools is one method, but it faces stiff resistance from many middle class parents. Further, equal funding across school districts cannot be enforced based on federal statutes (*San Antonio v. Rodriguez*), and efforts to use the equal protection clauses of the states' constitutions over the past 40 years have not yielded good results.

Judicial restraint limits the courts in enforcing constitutional statutes, and even if a court determines that violations have occurred, remedies are limited.

Other Educational Remedies

In light of *Parents,* it remains to be seen what the options are for improving educational opportunities for minority children. Equal funding across school systems within states does not appear to be a viable option in federal or state courts. The remaining viable option is to seek equal funding within each individual school district (*Hobson v. Hansen,* 1967). Other options include school choice plans, magnet schools, charter schools, homeschooling, vouchers, and gifted programs—all of which began as a part of President Richard Nixon's southern strategy to get around *Brown*—will be less favored under a return to favoring neighborhood schools. Further, *Milliken* forces educators to conclude that the desegregation of large urban school districts with largely minority school populations cannot be changed without a change in residential patterns. Yet, *Milliken* prohibits the federal courts from merging city and suburban school systems.

Wider Impact

Brown began a serious debate about equal educational opportunities for racial and ethnic minorities that may not have achieved its level of intensity if *Brown* had not existed. This debate also helped this country move forward in the area of race relations. *Brown* was the primary motivating force for the passage of the Twenty-Fourth Amendment to the Constitution in 1964, which outlawed the poll tax and literacy tests for voting. The Civil Rights Act of 1964 was designed to enforce the Fourteenth Amendment, which was enacted in 1868. The 1964 Civil Rights Act also attacked segregation in public accommodations, employment, and education. Shortly thereafter, Congress enacted the Fair Housing Act in 1968. Without *Brown,* social justice in the United States of America would be decades behind where it is today.

The late Supreme Court Justice Lewis F. Powell maintained that busing to achieve school integration was wrong, because it would never achieve its goal. Instead, he believed that some Whites would stay out of city schools rather than submit to busing, while others would place their children in private schools or move to the suburbs. Unfortunately, Justice Powell's knowledge of his fellow citizens nationwide proved true as reflected in the phenomenon of White flight, whereby Whites left the inner cities for the suburbs (Coons & Sugarman, 1979; Pereira, 2007). However, the history and experience of *Brown* should give the nation a better future. Finally, *Brown* is of paramount importance, because in ending racial segregation in education, it paved the way for the end of segregation in many other areas of public life.

Frank Brown

See also *Bolling v. Sharpe; Brown v. Board of Education of Topeka; Dowell v. Board of Education of Oklahoma City Public Schools;* Equal Protection Analysis; *Freeman v. Pitts; Green v. County School Board of New Kent County; Griffin v. County School Board of Prince Edward County; Keyes v. School District No. 1, Denver, Colorado; McLaurin v. Oklahoma State Regents for Higher Education; Milliken v. Bradley; Missouri v. Jenkins; Pasadena City Board of Education v. Spangler; Plessy v. Ferguson;* Segregation, De Facto; Segregation, De Jure; *Swann v. Charlotte-Mecklenburg Board of Education; Sweatt v. Painter;* White Flight

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Brown v. Board of Education of Topeka I (Excerpts)

Brown v. Board of Education of Topeka I *stands out as perhaps the most important Education Law case of all time in recognition of the fact that the Supreme Court's striking down racial segregation in schools was destined to impact the lives of all Americans.*

Supreme Court of the United States

BROWN

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS

347 U.S. 483

Reargued Dec. 7, 8, 9, 1953.

Decided May 17, 1954.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases come to us from the States of Kansas, South Carolina, Virginia, and Delaware. They are premised on different facts and different local conditions, but a common legal question justifies their consideration together in this consolidated opinion.

In the South Carolina case, *Briggs v. Elliott,* the plaintiffs are Negro children of both elementary and high school age residing in Clarendon County. They brought this action in the United States District Court for the Eastern District of South Carolina to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. The three-judge District Court . . . denied the requested relief. The court found that the Negro schools were inferior to the white schools and ordered the defendants to begin immediately to equalize the facilities. But the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. This Court vacated the District Court's judgment and remanded the case for the purpose of obtaining the court's views on a report filed by the defendants concerning the progress made in the equalization program. On remand, the District Court found that substantial equality had been achieved except for buildings and that the defendants were proceeding to rectify this inequality as well.

In the Virginia case, *Davis v. County School Board,* the plaintiffs are Negro children of high school age residing in Prince Edward County. They brought this action in the United States District Court for the Eastern District of Virginia to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. The three-judge District Court . . . denied the requested relief. The court found the Negro school inferior in physical plant, curricula, and transportation, and ordered the defendants forthwith to provide substantially equal curricula and transportation and to 'proceed with all reasonable diligence and dispatch to remove' the inequality in physical plant. But, as in the South Carolina case, the court sustained the validity of the contested provisions and denied the plaintiffs admission to the white schools during the equalization program. The case is here on direct appeal . . . .

In the Delaware case, *Gebhart v. Belton,* the plaintiffs are Negro children of both elementary and high school age residing in New Castle County. They brought this action in the Delaware Court of Chancery to enjoin enforcement of provisions in the state constitution and statutory code which require the segregation of Negroes and whites in public schools. The Chancellor gave judgment for the plaintiffs and ordered their immediate admission to schools previously attended only by white children, on the ground that the Negro schools were inferior with respect to teacher training, pupil-teacher ratio, extracurricular activities, physical plant, and time and distance involved in travel. The Chancellor also found that segregation itself results in an inferior education for Negro children, but did not rest his decision on that ground. The Chancellor's decree was affirmed by the Supreme Court of Delaware, which intimated, however, that the defendants might be able to obtain a modification of the decree after equalization of the Negro and white schools had been accomplished. The defendants, contending only that the Delaware courts had erred in ordering the immediate admission of the Negro plaintiffs to the white schools, applied to this Court for *certiorari.* The writ was granted. The plaintiffs, who were successful below, did not submit a cross-petition.

In each of the cases, minors of the Negro race, through their legal representatives, seek the aid of the courts in obtaining admission to the public schools of their community on a nonsegregated basis. In each instance, they have been denied admission to schools attended by white children under laws requiring or

permitting segregation according to race. This segregation was alleged to deprive the plaintiffs of the equal protection of the laws under the Fourteenth Amendment. In each of the cases other than the Delaware case, a three-judge federal district court denied relief to the plaintiffs on the so-called 'separate but equal' doctrine announced by this Court in *Plessy v. Ferguson.* Under that doctrine, equality of treatment is accorded when the races are provided substantially equal facilities, even though these facilities be separate. In the Delaware case, the Supreme Court of Delaware adhered to that doctrine, but ordered that the plaintiffs be admitted to the white schools because of their superiority to the Negro schools.

The plaintiffs contend that segregated public schools are not 'equal' and cannot be made 'equal,' and that hence they are deprived of the equal protection of the laws. Because of the obvious importance of the question presented, the Court took jurisdiction. Argument was heard in the 1952 Term, and reargument was heard this Term on certain questions propounded by the Court.

Reargument was largely devoted to the circumstances surrounding the adoption of the Fourteenth Amendment in 1868. It covered exhaustively consideration of the Amendment in Congress, ratification by the states, then existing practices in racial segregation, and the views of proponents and opponents of the Amendment. This discussion and our own investigation convince us that, although these sources cast some light, it is not enough to resolve the problem with which we are faced. At best, they are inconclusive. The most avid proponents of the post-War Amendments undoubtedly intended them to remove all legal distinctions among 'all persons born or naturalized in the United States.' Their opponents, just as certainly, were antagonistic to both the letter and the spirit of the Amendments and wished them to have the most limited effect. What others in Congress and the state legislatures had in mind cannot be determined with any degree of certainty.

An additional reason for the inconclusive nature of the Amendment's history, with respect to segregated schools, is the status of public education at that time. In the South, the movement toward free common schools, supported by general taxation, had not yet taken hold. Education of white children was largely in the hands of private groups. Education of Negroes was almost nonexistent, and practically all of the race were illiterate. In fact, any education of Negroes was forbidden by law in some states. Today, in contrast, many Negroes have achieved outstanding success in the arts and sciences as well as in the business and professional world. It is true that public school education at the time of the Amendment had advanced further in the North, but the effect of the Amendment on Northern States was generally ignored in the congressional debates. Even in the North, the conditions of public education did not approximate those existing today. The curriculum was usually rudimentary; ungraded schools were common in rural areas; the school term was but three months a year in many states; and compulsory school attendance was virtually unknown. As a consequence, it is not surprising that there should be so little in the history of the Fourteenth Amendment relating to its intended effect on public education.

In the first cases in this Court construing the Fourteenth Amendment, decided shortly after its adoption, the Court interpreted it as proscribing all state-imposed discriminations against the Negro race. The doctrine of "separate but equal" did not make its appearance in this court until 1896 in the case of *Plessy v. Ferguson* involving not education but transportation. American courts have since labored with the doctrine for over half a century. In this Court, there have been six cases involving the 'separate but equal' doctrine in the field of public education. In *Cumming v. Board of Education of Richmond County,* and *Gong Lum v. Rice,* the validity of the doctrine itself was not challenged. In more recent cases, all on the graduate school level, inequality was found in that specific benefits enjoyed by white students were denied to Negro students of the same educational qualifications. *State of Missouri ex rel. Gaines v. Canada; Sipuel v. Board of Regents of University of Oklahoma; Sweatt v. Painter; McLaurin v. Oklahoma State Regents.* In none of these cases was it necessary to re-examine the doctrine to grant relief to the Negro plaintiff. And in *Sweatt v. Painter,* the Court expressly reserved decision on the question whether *Plessy v. Ferguson* should be held inapplicable to public education.

In the instant cases, that question is directly presented. Here, unlike *Sweatt v. Painter,* there are findings below that the Negro and white schools involved have been equalized, or are being equalized, with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation itself on public education.

In approaching this problem, we cannot turn the clock back to 1868 when the Amendment was adopted, or even to 1896 when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

We come then to the question presented: Does segregation of children in public schools solely on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does.

In *Sweatt v. Painter,* in finding that a segregated law school for Negroes could not provide them equal educational opportunities, this Court relied in large part on 'those qualities which are incapable of objective measurement but which make for greatness in a law school.' In *McLaurin v. Oklahoma State Regents,* the Court, in requiring that a Negro admitted to a white graduate school be treated like all other students, again resorted to intangible considerations: . . . his ability to study, to engage in discussions and exchange views with other students, and, in general, to learn his profession.' Such considerations apply with added force to children in grade and high schools. To separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. The effect of this separation on their educational opportunities was well stated by a finding in the Kansas case by a court which nevertheless felt compelled to rule against the Negro plaintiffs:

'Segregation of white and colored children in public schools has a detrimental effect upon the colored children. The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group. A sense of inferiority affects the motivation of a child to learn. Segregation with the sanction of law, therefore, has a tendency to (retard) the educational and mental development of Negro children and to deprive them of some of the benefits they would receive in a racial(ly) integrated school system.'

Whatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson,* this finding is amply supported by modern authority. Any language in *Plessy v. Ferguson* contrary to this finding is rejected.

We conclude that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal. Therefore, we hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment. This disposition makes unnecessary any discussion whether such segregation also violates the Due Process Clause of the Fourteenth Amendment.

Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education. We have now announced that such segregation is a denial of the equal protection of the laws. In order that we may have the full assistance of the parties in formulating decrees, the cases will be restored to the docket, and the parties are requested to present further argument on Questions 4 and 5 previously propounded by the Court for the reargument this Term. The Attorney General of the United States is again invited to participate. The Attorneys General of the states requiring or permitting segregation in public education will also be permitted to appear as amici curiae upon request to do so by September 15, 1954, and submission of briefs by October 1, 1954.

It is so ordered.

Cases ordered restored to docket for further argument on question of appropriate decrees.

Citation: *Brown v. Board of Education of Topeka I,* 347 U.S. 483 (1954).

Brown v. Board of Education of Topeka II (Excerpts)

In Brown v. Board of Education of Topeka II *the Supreme Court began the task of dismantling de jure segregation, directing lower courts to act "with all deliberate speed."*

Supreme Court of the United States

BROWN

v.

BOARD OF EDUCATION OF TOPEKA, SHAWNEE COUNTY, KANSAS

349 U.S. 294

Argued April 11, 12, 13 and 14, 1955.

Decided May 31, 1955.

Mr. Chief Justice WARREN delivered the opinion of the Court.

These cases were decided on May 17, 1954. The opinions of that date, declaring the fundamental principle that racial discrimination in public education is unconstitutional, are incorporated herein by reference. All provisions of federal, state, or local law requiring or permitting such discrimination must yield to this principle. There remains for consideration the manner in which relief is to be accorded.

Because these cases arose under different local conditions and their disposition will involve a variety of local problems, we requested further argument on the question of relief. In view of the nationwide importance of the decision, we invited the Attorney General of the United States and the Attorneys General of all states requiring or permitting racial discrimination in public education to present their views on that question. The parties, the United States, and the States of Florida, North Carolina, Arkansas, Oklahoma, Maryland, and Texas filed briefs and participated in the oral argument.

These presentations were informative and helpful to the Court in its consideration of the complexities arising from the transition to a system of public education freed of racial discrimination. The presentations also demonstrated that substantial steps to eliminate racial discrimination in public schools have already been taken, not only in some of the communities in which these cases arose, but in some of the states appearing as amici curiae, and in other states as well. Substantial progress has been made in the District of Columbia and in the communities in Kansas and Delaware involved in this litigation. The defendants in the cases coming to us from South Carolina and Virginia are awaiting the decision of this Court concerning relief.

Full implementation of these constitutional principles may require solution of varied local school problems. School authorities have the primary responsibility for elucidating, assessing, and solving these problems; courts will have to consider whether the action of school authorities constitutes good faith implementation of the governing constitutional principles. Because of their proximity to local conditions and the possible need for further hearings, the courts which originally heard these cases can best perform this judicial appraisal. Accordingly, we believe it appropriate to remand the cases to those courts.

In fashioning and effectuating the decrees, the courts will be guided by equitable principles. Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs. These cases call for the exercise of these traditional attributes of equity power. At stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis. To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with the constitutional principles set forth in our May 17, 1954, decision. Courts of equity may properly take into account the public interest in the elimination of such obstacles in a systematic and effective manner. But it should go without saying that the vitality of these constitutional principles cannot be allowed to yield simply because of disagreement with them.

While giving weight to these public and private considerations, the courts will require that the defendants make a prompt and reasonable start toward full compliance with our May 17, 1954, ruling. Once such a start has been made, the courts may find that additional time is necessary to carry out the ruling in an effective manner. The burden rests upon the defendants to establish that such time is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date. To that end, the courts may consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school

districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system. During this period of transition, the courts will retain jurisdiction of these cases.

The judgments below, except that in the Delaware case, are accordingly reversed and the cases are remanded to the District Courts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases. The judgment in the Delaware case—ordering the immediate admission of the plaintiffs to schools previously attended only by white children—is affirmed on the basis of the principles stated in our May 17, 1954, opinion, but the case is remanded to the Supreme Court of Delaware for such further proceedings as that Court may deem necessary in light of this opinion.

It is so ordered.

Judgments, except that in case No. 5, reversed and cases remanded with directions; judgment in case No. 5 affirmed and case remanded with directions.

Citation: *Brown v. Board of Education of Topeka II,* 349 U.S. 294 (1955).

Bullying

Bullying can be defined as long-standing physical or psychological violence carried out both repeatedly and over time, by either individuals or groups, that targets individuals who are unable to defend themselves. It is both conscious and deliberate; the bully intends to inflict harm on the victim. Bullying, then, is not merely a rite of passage; rather, it is a particularly cruel set of behaviors that can have long-term consequences for both the bully and the victim. This entry describes bullying and some remedies in the school setting.

What Constitutes Bullying?

There are three elements that mark all bullying. First is an imbalance of power. This imbalance can be owing to the bully's physical strength or size, or it may be that the bully is perceived to be mentally or socially superior to the victim. In the case of group bullying, the number of people involved renders the victim powerless. Second, there is intent to harm. In other words, the bully is fully aware that his or her action will inflict physical and emotional pain, and he or she derives satisfaction from seeing the anguish imposed. Third, there exists a threat of further aggression, as all parties involved understand that the bullying can and most likely will occur again. In addition to these three elements, if bullying continues unimpeded, a sense of terror is inflicted. Here, the victim not only feels powerless to fight back but also believes that peers or adults are either unwilling or unable to stop the bullying.

Bullying can take the form of verbal, physical, or relational abuse. Verbal bullying is the most common form, mainly because it is less likely to be noticed by adults or mistaken as simple teasing. Unlike teasing, verbal bullying involves intent to harm through humiliating, cruel, bigoted, or demeaning comments. Verbal bulling is not limited to individuals. Groups can engage in bullying through the use of malicious gossip. Both girls and boys engage in verbal bullying.

Physical bullying is the form most commonly associated with the term bullying. However, while it is the most visible form, physical bullying accounts for only about one third of reported incidents. This form of bullying not only includes hitting, shoving, spitting, kicking, and other forms of physical contact; it also includes destroying of property or clothing. While girls do engage in physical bullying, the majority of incidents involve boys.

Relational bullying is the intentional ignoring, excluding, isolating, or shunning of a child from

group activities. This is the most insidious form of bullying, as it is not as easily detected as physical or verbal forms. Additionally, victims of relational bullying tend to either hide the pain or disguise it through bravado. It appears that mostly females engage in this form of bullying.

In addition, bullying can take place online; this is known as cyberbullying and combines elements of all three of the other kinds of bullying. All forms of bullying can also be either racist or sexual in nature. Minority children and those who are recent immigrants are most commonly victims of racial bullying. Females, because their physical maturity is apparent earlier than males', and, due to their sexuality, lesbian, gay, bisexual, and transsexual children are most commonly targets of sexual bullying.

Bullying is a complex phenomenon. As a behavior, bullying is not the act of an angry child. Rather, it is based on contempt toward individuals whom the bully perceives as weak, inferior, different, or worthless. Bullies often exhibit a sense of entitlement, an intolerance toward differences, and an authority to exclude those they perceive as undeserving. Children who are the target of bullying are often chosen simply because they are seen as different from the accepted norm.

In addition to bullies and their targets, bystanders are an important component in the behavior. This group includes active and passive supporters of the bully, disengaged spectators, those who are too afraid to defend the victim, and defenders.

School is the place where most bullying takes place; however, in many cases it occurs without adult intervention. The basis for this nonintervention can be teachers' beliefs that bullying is a normal part of school, or the subtle and covert nature of bullying, which prevents it from being noticed by adults; or the fear of victims and bystanders, which prevents them from reporting incidents. Left unchecked, bullying can promote an atmosphere of fear and intimidation in schools and escalate to harassment and violence. Further, by not intervening in bullying, teachers and administrators imply a tacit acceptance. Finally, research demonstrates that school bullies are more likely to continue antisocial behavior as adults, and victims can be driven to commit acts of violence.

Remedies

In reaction to the shootings at Columbine High School, states have instituted antibullying legislation. Unfortunately, the effectiveness of either tort- or speech-based legislation is unclear. Under the Supreme Court's guidance in *Davis v. Monroe County Board of Education* (1999), an argument can be made that bullying would have to be severe enough to deprive victims of educational access. Pursuant to *Tinker v. Des Moines Independent Community School District* (1969), *Bethel School District No. 403 v. Fraser* (1986), and *Hazelwood School District v. Kuhlmeier* (1988), substantial disruption of educational process would most likely have to involve physical disturbance. Either way, both tort- and speech-based legislation require events to escalate to a palpable level of disorder before they can be treated as bullying. Moreover, in each of these definitions, school officials need to be aware of bullying incidents, which is often not the case. Finally, these remedies focus only on bullies and their victims, typically disregarding the essential role of bystanders, effectively rendering such remedies incapable of lasting effects.

Research shows that the best means of reducing bullying is through comprehensive whole-school intervention programs that target bullies, victims, and bystanders. Additionally, programs require educators, parents, and students to work together to create climates in which all are valued members of school communities. In these school communities, it is a basic human right not to be subjected to oppression or humiliation. Programs do not require legislators and courts to choose between school safety and speech rights. Instead, they are designed to promote safe environments wherein all students can be free to learn.

Patricia Ehrensal

See also *Bethel School District No. 403 v. Fraser;* Cyberbullying; *Davis v. Monroe County Board of Education;* Gangs; *Hazelwood School District v. Kuhlmeier;* Hazing; *Tinker v. Des Moines Independent Community School District;* Zero Tolerance

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Bureaucracy

Public bureaucracies were created historically to implement legislation through delegated power in all types of political regimes, whether democratic, monarchic, republican, or dictatorial. Beginning with the large bureaucracies of ancient Egypt and China, and typical of all subsequent bureaucracies, such as those of imperial Rome, the bureaucracy of Charlemagne that consolidated and centralized France, and the modern bureaucracies of nation-states, they have been structured and charged with the tasks of carrying out law through direct provision of services or their funding and/or regulation, including providing educational programs or varying degrees of funding and regulation of private schools and homeschooling.

Characteristics of Bureaucracy

Bureaucracies have taken a number of forms. The Anglo-Saxon tradition (represented by Westminster systems and the United States) follows a more pragmatic style of public administration, whereas many Western European jurisdictions have developed a legalistic style of bureaucratic practice, and the former Soviet bloc uses a command system. One of the most significant features differentiating these traditions is the qualification of legal training in the Western European states, where the vast majority of higher bureaucratic ranks require a law degree.

Legal characteristics are embedded in the most influential model of bureaucracy, that of Max Weber (1864–1920). Based on individual value orientations—the affective, traditional, higher-order valuational, and instrumental—types of social action collectively produce group and organizational forms. The instrumental value orientation produces a legal-rationalism that in turn creates the bureaucratic style of organization as an analytic, or ideal, type that is used to examine empirical cases. Where this type of value dominates social action, organizations take on a dominant bureaucratic ethos and mentality.

Its seven characteristics are typical of modern legal practice:

1. Fixed and official jurisdictional areas are ordered by rules, that is, laws and administrative regulations.
2. Hierarchy and a formal division of responsibility produce levels of graded authority where lower offices are supervised by higher ones, generating stratified relations of obedience that are governed by rights of supervision and appeal.
3. Management is based on official documents, that is, written records.
4. Officials qualify through thorough and expert training and are assigned to specialized areas of labor delimited by competence.
5. Full-time, salaried work of officials leads to a lifetime career.
6. Management follows rules, which produces legal accountability and standardized procedures.
7. Duties are based on impersonal criteria.

While an official must exercise judgment and skills, duty requires that these are placed at the service of a higher authority, and responsibility lies only in the impartial execution of assigned tasks; personal judgment should be sacrificed if it runs counter to duties.

Educational Bureaucracy

The educational public bureaucracy includes many levels of government and local agencies, depending

upon national configurations of the educational system, extending directly from federal departments of education to provincial or state departments and on through regional and local levels to the individual school. Each is charged with areas of legal responsibility over education from preschool to postsecondary education. Among the areas in which school officials are required to take a bureaucratic approach to making schools operate more efficiently as environments wherein children can learn better are reporting cases of suspected child abuse, seeking to eliminate sexual harassment whether by school personnel or peers, providing special education for eligible children, and working within the parameters of the Fourth Amendment when engaged in searches of students and their property.

Less direct governmental activity is carried out by central agencies, such as finance departments, treasury board staff, and presidential or prime ministerial offices that establish legislative provisions and policy directions or determine levels of funding in the educational sector. Included in the bureaucratic landscape are also agencies that provide research funding, professional unions or associations, and government auditing offices.

Indirect public services that complement educational activities are policing, the judiciary, social services, and health services. In addition, political and social values, such as equality and freedom from discrimination, are enforced through constitutional and other legislative provisions, and there are special provisions for students with disabilities; these are administered through bureaucratic agencies, often creating an expansion, complexity, and centralization of bureaucracy.

An important feature of the educational system in its bureaucratic form is that loose coupling becomes greater the further one descends down the hierarchy, leading to greater degrees of administrative discretion and the role of the informal organization. Loose coupling was introduced by Weick as a concept describing the relationships among actors and between individual schools and their superordinate organization as less coordinated and less regulated than in higher levels of the educational bureaucracy and other sectors, in part due to the professionalism of teaching staff. With loose coupling, many approaches or means can achieve the same effect.

While these organizational characteristics can make bureaucratic systems in schools more difficult to change, at the same time, they provide the advantage for greater stability, adaptability to changing conditions, and responsiveness to the environment, as well as greater self-determination by school actors. These greater degrees of freedom also express educational values that are contrary to the bureaucratic, primarily emotional, and higher-order values. To some extent, loose coupling has been reduced through accountability systems that were introduced through the New Public Management regime in Western public sector systems. This has introduced practices from the economic and business realm, leading to a commodification of education that many call the corporatization and commercialization of education. In most cases, legislative change was required to allow schools to operate on a revenue generation basis.

Related Problems

The critique of bureaucracy as it is relates to education law includes a number of concerns, beginning with Weber's theories of disenchantment (*Entzauberung*) and the iron cage (*stahlhartes Gehäuse*), which are regarded as problems of modernity. Disenchantment occurs when a materialization of the mind expressed through bureaucratization results in its control and the coercion of everyday life, producing the dead machine of bureaucracy. The result is the iron cage of modernity, where the purely technically good becomes the ultimate and unique value, operating through a legal-rational, bureaucratic administration and welfare system, exacerbated by high degrees of technologization.

What was of most practical significance to Weber in evaluating the consequences of a fully technically rationalized world is whether utter dehumanization, a loss of freedom (*Freiheitsverlust*), and a loss of meaning (*Sinnverlust*) are the end result. Through an examination of the historical development of mass society, Weber was concerned about the inherent dilemmas of bureaucratization and democratization, which are opposed processes in terms of values, exacerbated by

an intensification of systems of rationality through science and technology. Bureaucratization results in the perversion of means and ends so that means become ends in themselves, and the greater good is lost sight of, resulting in bureaucracies that become increasingly self-serving and corrupt, rather than serving society.

Through the bureaucratization of social institutions such as education, individual freedom, creativity, and responsibility may become constricted and even replaced by impersonal, repetitive, anonymous practices characteristic of legal-rational thinking. This general concern was formulated by Weber as a question about the fate of liberty in conditions of advanced capitalism; the question is pursued in his political writings as a problem of preserving conditions for individual freedom where large-scale organizations dominate: How can this by reconciled with the political franchise of excluded groups, and how can the quality of political leadership be ensured?

The greatest problems for education and its legal requirements probably lie in the field of bureaupathology, which encompasses a broad range of dysfunctions on individual, structural, and functional levels, typical of bureaucratic-style organizations. Individual limitations include employing a functionalist mentality that treats others as impersonal objects, suspending common sense and moral judgment to conform to written policies and procedures, and developing overspecialization and an obsessive concern for technical details at the expense of overall values and goals. Structural problems of a bureaucracy most commonly are overly complex hierarchies that inhibit action, such as red tape; lack of coordination; inherent contradictions; and the omission of some offices in the decision-making process. On a functional level, calcification can take the form of rigidity in procedures, delaying or even blocking decision making; an inability to adapt old procedures to new circumstances; a disregard for dissenting opinions; and groupthink. Related problems include corruption, nepotism, and responsibility avoidance.

Overbureaucratization has the effect of replacing administrator and professional judgment, taking up time, and reducing professional creativity. It also absorbs financial resources and stands in the way of removing ineffective or incompetent staff by overcomplicating the disciplinary process. Debureaucratization, most associated recently with the New Public Management ideology popular since the early 1980s, has been attempted in the educational sector by such measures as reducing preparation for inspections and removing multiple bidding processes for funding, postinspection plans, and requirements for annual reports and meetings.

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See also Disabled Persons, Rights of; Fourteenth Amendment; Sexual Harassment

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Burger, Warren E. (1907–1995)

To many observers, the appointment of Warren E. Burger to chief justice of the U.S. Supreme Court by President Richard Nixon signified a conservative counterresponse to the oft-characterized liberal judicial activism of the Court when it was led by Chief Justice Earl Warren. In light of the Warren court's record of supporting individual rights in criminal cases, school prayer, and desegregation, Nixon was committed to appointing a chief justice who supported judicial restraint, the belief that the

Supreme Court should not leverage its power to influence economic and social policy development and that state legislatures and local governments were best suited to deal with such matters. To Nixon, Warren Burger, a former circuit court justice for the United States Court of Appeals for the District of Columbia, epitomized the prudent conservatism and conscientious judicial leadership style the Court lacked. Yet, as some observers suggest, Burger as chief justice will likely never be characterized as a figurehead in a new age of post-Warren legal reasoning.

Even as he sought administrative reform and office improvements for the Court, Burger believed he carried an obligation to represent or speak on behalf of the entire legal community. Modernizing the décor of the Supreme Court facilities, issuing calls for lawyer preparation reform, and advocating for greater professional benefits for federal judges were a few of his notable contributions in this regard. As to his legal impact, Burger faced the formidable task of uniting and introducing change to a court composed of competing judicial philosophies and political backgrounds. In fact, several justices during Burger's first term had served under Earl Warren and were well accustomed to socially progressive agendas. Although Burger preached restraint, the actual degree to which this attitude permeated the Court's position on education issues seems moderate when one accounts for the Burger court's rulings in school desegregation, the place and role of religion in schools, and rights of the disadvantaged.

Unscrupulous acts of evasion and avoidance of desegregation mandates extended many years beyond the Supreme Court's monumental decision in *Brown v. Board of Education of Topeka* (1954) and beyond the Warren era as well. *Alexander v. Holmes County Board of Education* in 1969 signified one of the first real opportunities for Burger to display his resolve and leadership. With the Fifth Circuit willing to oblige schools' further delay in the implementation of desegregation plans, the Court was forced to decide whether such postponement was allowable.

The Nixon administration firmly supported additional time for schools in the South to comply with the practical elements of the desegregation mandates. For Burger, the practicalities in creating a unitary system were daunting and complex, but not all his fellow justices echoed the same sentiment. Justice Hugo Black for one was willing to file a separate dissent unless the court sent a stern ultimatum that all schools be desegregated at once without delay. While it had become routine for desegregation cases to be ruled upon unanimously so it would not appear that the Court was divided, Justice Burger was faced with the real possibility of a split desegregation opinion.

In the end, Burger and others made concessions and allowances in crafting a per curiam opinion that would in effect relay the totality of the message Justice Black was imploring the Court to convey: further delays would no longer be tolerated. Inasmuch as Nixon supporters in the South were dealt a sizable blow, the case to a considerable degree seemed to reaffirm the Court's role and influence in state and local policy in a manner no different from that of the Warren court—a notion antithetical to judicial restraint.

While it may have proved his ability to resolve conflict and vote in opposition to the wishes of the president, opinions in later desegregation cases such as *Wright v. Council of the City of Emporia* (1972), where Burger in dissent argued that the creation of a separate neighboring school system does not necessarily have the primary effect of perpetuating a dual school system, would eventually reveal a more critical analysis of the feasibility of these mandates. Moreover, the addition of Justice William Rehnquist to the bench would also alter the dynamic in this regard.

Some of Burger's opinions in other constitutional domains were notable in that they implicitly conveyed that the Court served a vital role in safeguarding individual civil liberties. For instance, Burger, writing for the majority in *Lemon v. Kurtzman* (1971), the Supreme Court's most significant opinion on church-state relations, held that state law permitting financial state support of sectarian schools by way of teacher salary supplements, textbooks, and materials violated the Establishment Clause of the First Amendment and thus amounted to an illegal government endorsement of religion.

Burger also authored another landmark majority opinion in *Wisconsin v. Yoder* (1972), invalidating Wisconsin state law forcing Amish children to attend

school beyond their eighth grade year. In Yoder, the Court was of the opinion that the state's insistence that Amish families abide by its compulsory attendance laws beyond the eighth grade threatened the Amish religious way of life in violation of the Free Exercise Clause of the First Amendment and Equal Protection Clause of the Fourteenth Amendment. While these opinions clearly reveal another dimension to Burger's jurisprudence, the consummate legacy of Chief Justice Burger will likely be forever remembered more by the impact of his Court collectively rather than by his individual deeds.

Mario S. Torres, Jr.

See also Burger Court

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Burger Court

The Burger Court is defined by the years that Warren Earl Burger presided as chief justice of the U.S. Supreme Court. Richard Nixon nominated Warren Burger as chief justice in 1969, replacing Chief Justice Earl Warren. Chief Justice Burger's appointment to the Court came at a time when the criminal justice system was in the national spotlight. Burger had a reputation for "law and order," and President Nixon thought that he would be more of a strict constructionist than his predecessor. In other words, President Nixon thought Burger would be a judge who would apply the law as it was written rather than legislating from the bench. Conservatives also hoped that the Burger Court would chip away at some of the liberal precedent set by the Warren Court.

The composition of the Burger Court changed several times during Chief Justice Burger's tenure. Justices John Marshall Harlan, Hugo L. Black, William O. Douglas, William J. Brennan, Thurgood Marshall, Potter Stewart, Byron R. White, Sandra Day O'Connor, Harry A. Blackmun, Lewis F. Powell, John Paul Stevens, and William R. Rehnquist were members of the Burger Court at various times. The Burger Court generally had a solid six-member conservative majority.

Chief Justice Burger was considered a very conservative member of the Court, voting against civil liberty claims the majority of the time. Although the Burger Court was conservative, it was not conservative in all areas. The cases discussed below highlight some of the better known cases involving education that were decided by the Burger Court. Not all of these cases adhere to conservative principles.

Issues of Race and Disability

The Burger Court was involved with several racial discrimination cases focused on affirmative action, de facto segregation, and institutional racism. In *Swann v. Charlotte-Mecklenburg Board of Education* (1971), the justices permitted court-ordered busing to combat segregated schools. In addition, the Burger Court found a school busing program to be constitutional in *Keyes v. School District No. 1, Denver, Colorado* (1973). However, in *Milliken v. Bradley* (1974), the Court limited its remedial power in desegregation cases when it found multidistrict remedies to be unconstitutional.

In addition to segregation cases, the Court decided a high-profile affirmative action case. In *Regents of the University of California v. Bakke* (1978), the Court held that affirmative action in university admissions can be justified by the importance of classroom diversity but set limits on how it could be implemented. In another higher education case, the Burger Court upheld the Internal Revenue Service's plan to deny tax-exempt status to private schools that practiced

racial discrimination in student admissions plans (*Bob Jones University v. United States,* 1983).

Additionally, the Burger Court authored opinions involving race and equal employment opportunity law that have been relied upon in some education-related arguments. In *Griggs v. Duke Power Co.* (1971) and in *Fullilove v. Klutznick* (1980), the Court affirmed that Congress could use racial and ethnic criteria, as long as these criteria were used in a limited way, in a federal grant program.

The Court decided two important special education cases. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), the Court ruled that a free appropriate education requires school boards to provide individualized instruction with adequate support services to ensure that every child receives an "educational benefit" from the program. In *Irving Independent School District v. Tatro* (1984), the Court was of the opinion that public school boards must provide catheterization because it fell within the definition of related services.

Issues of Religion

A few other key education cases that the Burger Court decided include issues related to instruction and education as a fundamental right. In *Wisconsin v. Yoder* (1972), the Court permitted Amish studesspnts to stop attending public schools after the eighth grade based on religious grounds. In *San Antonio School District v. Rodriguez* (1973), the Court refused to declare education a fundamental right under the federal constitution.

The Burger Court also resolved important religion cases. In *Lemon v. Kurtzman* (1971), the Court constructed the leading Establishment Clause test, which outlined the three factors to be used in evaluating whether government action constituted an impermissible establishment of religion. A year earlier, in *Walz v. Tax Commission of New York City* (1970), the Court upheld the New York practice of providing state property tax exemptions for church property that is used in worship services; this analysis became part of the tripartite *Lemon* test. Yet, in *Mueller v. Allen* (1983), the Court upheld the constitutionality of a statute from Minnesota that granted all parents state income tax deductions for the actual costs of tuition, textbooks, and transportation associated with sending their children to elementary or secondary schools. However, in *Aguilar v. Felton* (1985), the Court indicated that a program that provided federal funds to public employees who taught in religiously affiliated nonpublic schools was unconstitutional.

Further, the doctrine of separation of church and state survived the Burger Court with narrow margins. In *Wallace v. Jaffree* (1985), the Court concluded that a state statute authorizing public schools to have a moment of silent prayer was unconstitutional.

The Burger Court was more conservative than the Warren Court. Even so, many of the liberties granted under the Warren Court remained intact. When Chief Justice Burger retired, President Reagan appointed Justice William Rehnquist to the chief justice position and selected Antonin Scalia as a new associate justice. Some would argue that the Supreme Court became even more conservative after Chief Justice Burger's departure.

Suzanne E. Eckes

See also Burger, Warren E.; Rehnquist Court; U.S. Supreme Court Cases in Education; Warren Court

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Wisconsin v. Yoder, 406 U.S. 205 (1972).

Burlington Industries v. Ellerth

Burlington Industries v. Ellerth (1998) addressed sexual harassment in the workplace, with the Supreme Court establishing guidelines for employers who hope to make an affirmative defense against such complaints. Specifically, under *Burlington,* employers must show that they exercised reasonable care in creating and putting policies and procedures into effect along with promptly remedying any sexually harassing behavior; they must also show that employees did not take reasonable steps to use the available procedures to address the situations or otherwise avoid the harms.

Burlington is noteworthy for school systems, because it encourages employers to create, disseminate, and enforce effective policies and procedures against sexual harassment in the workplace insofar as it allows them to escape responsibility for a supervisor's sexually discriminatory actions under certain circumstances.

Facts of the Case

In *Burlington,* a female salesperson in Illinois alleged that a midlevel manager to whom her supervisor reported made repeated offensive remarks and gestures that led to her quitting the job. Although the salesperson was promoted at work, she said that she was forced to quit, in a situation known as constructive discharge, due to the manager's unwelcome comments that referred to her breasts, her buttocks and legs, and how her job would be easier if she "loosened up" and wore shorter skirts.

The Court's Ruling

On further review of a judgment in favor of the plaintiff, the Supreme Court affirmed that she had a claim for sexual harassment under these circumstances. The Court remanded the dispute to allow the parties to present more evidence about the alleged harassment and the company's actions in remedying it. In remanding, the Court directed the trial judge to fully weigh the evidence and evaluate whether the employer should have been liable for the manager's actions.

Burlington (1998) and its companion case of *Faragher v. City of Boca Raton* (1998) modified the circumstances under which employers can be responsible for sexual harassment under Title VII of the Civil Rights Act of 1964. Earlier cases placed sexual harassment claims into two categories: quid pro quo and hostile environment. Quid pro quo describes situations where an employment decision such as discharge, demotion, or undesirable reassignment is based on an employee's response to requests that the employee engage in sexual conduct. Employers continue to be found strictly or automatically liable in quid pro quo cases. A hostile environment is present where there is unwelcome sexual conduct that unreasonably interferes with an employee's work environment or creates an intimidating, hostile, or offensive working environment. Most courts do not hold an employer automatically liable for this type of discrimination. While the *Burlington* Court reasoned that these categories are still helpful in analyzing the claims, particularly for the threshold question of whether sexual harassment occurred, these conditions are not required.

Instead, in *Burlington* the Court established strict employer liability for all circumstances of supervisor sexual harassment, but it gave the employer an opportunity, though an affirmative defense, to show that it should not be held responsible when the employee suffered no tangible adverse employment impact such as a firing, failure to promote, reassignment with significantly different responsibilities, or a significant change in benefits. In order to utilize the defense and avoid liability for the harassment, the Court explained that an employer must prove two things. First, the Court maintained that an employer must exercise reasonable care to prevent and promptly correct any sexually harassing behavior. Second, the Court pointed out that it is necessary to consider whether an employee unreasonably fails to take advantage of any preventative or corrective opportunities that an employer provides to avoid harm.

Under the first part of this defense, the Court noted that evidence regarding the employer's antiharassment

policy and the available complaint process are relevant. The Court added that the second part of the test involves an investigation into actions an employee took in notifying an employer of the unwelcome behavior, including an examination of the employee's utilization of the employer's complaint procedures.

Regina R. Umpstead

See also Civil Rights Act of 1964; Sexual Harassment; Sexual Harassment, Peer-to-Peer; Sexual Harassment, Quid Pro Quo

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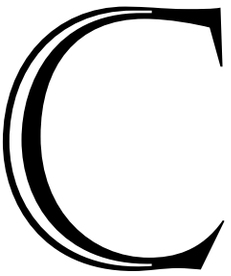

Canadian Charter of Rights and Freedoms

In 1982, the Parliament of the United Kingdom, at the request of the Dominion of Canada, renamed the *British North America Act, 1867* as the *Constitution Act, 1867,* and at the same time passed the *Canada Act of 1982,* attaching to the latter Schedule A, the *Canadian Charter of Rights and Freedoms* (the *Charter*). Prior to the existence of the *Charter,* citizens' rights and freedoms were derived through statute or common law, which was subject to the supremacy of the provincial legislatures to make laws with respect to education. The *Charter* provides Canadian school boards, teachers, students, and parents with the opportunity to use the *Charter*'s constitutional rights as both a sword and shield in civil litigation, notwithstanding provincial legislation or common law which appear to preclude a legal challenge. This entry reviews the key rights of the *Charter* as well as their interpretation, their general application to education, and available judicial remedies; it also provides examples of their application.

Rights, Freedoms, and Procedural Fairness

The *Charter,* which became part of the written portion of the constitution of Canada in 1982, enshrined, among other things, various categories of rights. The two important categories for Canadian education are those covering fundamental freedoms and legal rights in addition to Section 23 (minority language educational rights), Section 25 (aboriginal treaty rights), and Section 29 (denominational school rights).

All of these rights are subject to Section 1 of the *Charter,* which states that a restriction of rights is allowed if that breach is within the "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." Moreover, the Parliament of Canada or a provincial legislature may invoke Section 33, which provides that a particular "Act or a provision thereof shall operate notwithstanding a provision included in Section 2 (freedoms of conscience, religion, thought, belief, opinion, expression, assembly, and association) and Sections 7 to 15 (amongst which are the "right to life, liberty and security of the person," and the "right not to be arbitrarily detained or imprisoned") may be temporarily suspended. Of particular note is that Section 7 of the *Charter* provides for fundamental fairness or procedural due process for decisions made by statutorily created bodies, such as school boards or their agents, when a person's "right to life, liberty and security of the person" are at issue.

Application of the *Charter*

The *Charter* applies to actions of the government and the Parliament of Canada as well as the governments and legislative assemblies of the provinces. Hence, statutorily created bodies, such as school boards and community colleges, are subject to the *Charter.* Although they are also created by statute, universities are not subject to the *Charter,* because they historically

act independently of their provincial governments. Individuals in their relationships with other individuals or with nongovernmental bodies are not subject to the *Charter.* However, where a provincial government establishes legislation that protects a group of citizens from discrimination by other citizens or a private institution, yet fails to include a subcategory of individuals protected from discrimination under the *Charter* (for example, persons of a particular sexual orientation), the courts will extend that legislative protection to any persons included in the *Charter.*

One interesting note is that Catholic schools in three provinces—Ontario, Alberta, and Saskatchewan—are publicly funded and constitutionally protected, and thus the *Charter* rights must be interpreted according to the rights that Catholic schools enjoyed before 1867 in Ontario and before 1905 in Alberta and Saskatchewan, pursuant to Section 29 of the *Charter.*

The *Charter*'s rights and freedoms are interpreted by the courts by the *purposive method,* which takes into account the purpose and rationale of the freedom or right in question within the context of the *Charter* as a whole, the Canadian legal and political tradition, and the changing needs of Canadian society.

Application to Education

The Supreme Court of Canada determined that although the *Charter* applies to school boards and hence to school administrators' actions in relation to teachers and students, and to teachers' actions in relation to students, some conditions must be met before an individual's *Charter* rights are legally permitted.

Initially, the legal onus is upon the party claiming to have been negatively affected by a breach. Once the breach has been established, school boards must show that the restrictions are, pursuant to Section 1 of the *Charter,* "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." This is a two-step analysis in that the restriction must be "prescribed by law"—interpreted as being school board policy or school policy that is directly or indirectly authorized through statute or the common law—and the restriction must be demonstrably justifiable in a free and democratic society. The latter requires that (a) the policy must be important enough to override the *Charter* right, (b) there must be a rational connection to the limitation of the right sought and the objective of the policy, (c) the impairment of the right must be the minimum required to achieve the objective, and (d) there must be a reasonable *proportionality* between the negative effect of the impairment and the positive results sought.

Should parts one and two of the above test be met, the restrictions on the *Charter* rights of students or teachers will be upheld by the courts, notwithstanding that the effect of those restrictions resulted in a breach of those rights.

Charter Remedies

Charter remedies are of three kinds: (1) the exclusion of evidence at trial, (2) the power to strike down parts of or a complete statute, and (3) "such remedy as the court considers appropriate and just in the circumstances" (s. 24(1)). The last section is most frequently used to attain an injunction, or temporary order from the court, before a trial.

Generally, there are two categories of concerns that involve schools in Canada and the *Charter.* Category 1 deals with the assertion of a teacher's or student's rights to freedom of conscience, religion, thought, belief, opinion, expression, assembly, and association. Category 2 deals with the offended party's assertion of a violation of her or his legal rights to counsel, freedom from unreasonable search and seizure, security of the person, and the right not to be deprived thereof except in accord with the principles of fundamental justice.

In the first category, the courts have established that school boards may use the *Charter* to circumscribe students' and teachers' rights when to do so is in the best interests of the school in terms of safety, order, and discipline—and, in the case of publicly funded and constitutionally protected Catholic schools, when there are reasonable denominational reasons for doing so—and when the school board meets the requirements of Section 1, especially proportionality. Students have successfully challenged public school boards that attempted to impose a single religion's course of study, to restrict the bringing of a traditional religious knife (the *kirpan*) to schools, to

remove a special needs child from a regular classroom, and to prohibit materials depicting gay and lesbian families from being used in schools.

In other areas, students have successfully challenged school administrative polices that, in effect, may be characterized as making school authorities agents of the police by allowing dragnet searchers of schools or allowing the police to use the school for police purposes and acting in concert with an investigation.

In general, the free speech (and other) rights of teachers in schools are not as well protected under the *Charter* as those of students. This may be because of the vulnerability of students, and the primary purpose of education is to serve their best interests, particularly with such rights as are circumscribed in Section 1 of the *Charter.* Interestingly, recently, the Supreme Court of Canada has, notwithstanding some international opprobrium, held that under Section 43 of Canada's *Criminal Code,* the use of force by way of correction is not prohibited by the *Charter.*

Many of the *Charter*'s articulated rights are new to Canadian jurisprudence. They and the C*harter* will continue to develop in relation to educational law directly and indirectly as the rights and freedoms of Canadians of all ages are articulated by the courts.

J. Kent Donlevy

See also Denominational Schools; Due Process

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Cannon v. University of Chicago

At issue in *Cannon v. University of Chicago* was whether a private right of action existed under Title IX of the Education Amendments of 1972 in a suit where a woman claimed that she was denied admission to a medical school on the basis of her sex. The 1979 case of *Cannon* is important, because in ruling for the woman, the Court firmly established the methodology for evaluating whether a private right of action exists in a remedial federal statute such as Title IX.

The petitioner in *Cannon* was a woman who unsuccessfully filed suit alleging that she was discriminated against on the basis of sex, in violation of Title IX, when she was denied admission to two medical schools. After a federal trial court in Illinois dismissed the woman's claim, the Seventh Circuit affirmed in favor of the university on the ground that she lacked a private right of action under Title IX.

On further review, the Supreme Court reversed in favor of the woman. In an opinion written by Justice Stevens, the Court addressed the question of whether Title IX contains an implied right of action that allows private litigants to bring claims of sex discrimination in federal court, rather than having to depend on the federal government to intervene on their behalf. The Court held that while Title IX does not expressly provide a private right of action, it implies such a right for individuals who file suit against educational institutions that receive federal financial assistance when such individuals believe they have been discriminated against on the basis of gender.

In its analysis, the Supreme Court employed its own precedent as contained in the four-part test from *Cort v. Ash* (1975) to determine whether Title IX provides, by implication, a private right of action. This four-part test asks (1) whether the statute was enacted for the benefit of a special class and whether the plaintiff was a member of that class; (2) whether the law's legislative history indicates a legislative intent, explicit or implicit, either to create or to deny such a remedy; (3) whether the recognition of an implied private right of action is consistent with the underlying purpose of the legislation; and (4) whether the cause of action is one that is traditionally relegated to state

law, in an area of basic concern to the states, such that it would be inappropriate to infer a cause of action based only on federal law.

On the first of the four *Cort* questions, the Supreme Court noted that Title IX was written with "an unmistakable focus on the benefited class" (p. 691). Consequently, the Court was convinced that Title IX explicitly conferred a benefit upon persons discriminated against on the basis of sex and that the petitioner was clearly a member of the class for whose special benefit Title IX was enacted.

Turning to the second question, with regard to the legislative history of Title IX, the Supreme Court found that Title IX had been patterned after Title VI of the Civil Rights Act of 1964. According to the Court, while both statutes include mechanisms for terminating federal funding for institutions that engage in prohibited discrimination, neither explicitly provides for a private right of action. However, the Court pointed out that when Title IX was enacted in 1972, a private right of action had already been construed for Title VI, and Congress did nothing to alter this interpretation. At the same time, the Court acknowledged that there was express language in the Education Amendments of 1972 authorizing federal courts to award attorney's fees to prevailing parties, other than the federal government, in private actions brought against public and private educational institutions to enforce Title IX. To this end, the Court interpreted congressional intent as demonstrating the assumption that Title VI provided a private right of action and that it did nothing to alter this interpretation in enacting Title IX.

As to the third question, the Supreme Court was of the opinion that Title IX had two express purposes: to avoid using federal funds to support discriminatory practices and to provide individual citizens with effective protection against those practices. As such, the Court decided that a private remedy did not thwart these purposes.

On the fourth question, the Court observed that because the federal government and courts have the primary duty to protect citizens against discrimination, the case should have been permitted to proceed. The Court thus concluded that an implied right of action existed under Title IX to seek redress for discrimination based on gender.

Cannon is noteworthy insofar as it established that a private right of action exists for individuals who believe they have been discriminated against under Title IX, thereby opening the door for monetary damages under *Franklin v. Gwinnett County Public Schools* (1992), a case wherein the Court reasoned that a female student could file suit under Title IX after she was sexually harassed by a male high school teacher.

David L. Dagley

See also *Franklin v. Gwinnett County Public Schools;* Title IX and Sexual Harassment

Legal Citations

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Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
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Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Cantwell v. Connecticut

Cantwell v. Connecticut (1940) was a U.S. Supreme Court case involving door-to-door religious solicitations. In a dispute that would have a major impact on the role of religion in public education, the Court held that the Free Exercise Clause of the First Amendment applied to the states through the Fourteenth Amendment, rendering the states subject to the same restrictions regarding religion that are placed on Congress.

Facts of the Case

The plaintiffs, Newton, Jesse, and Russell Cantwell, were Jehovah's Witnesses who were arrested in Connecticut for violating a state statute that required that religious solicitors register with the secretary of the public welfare council. The Cantwells were arrested as they were going door to door with religious pamphlets, records, and a record player. Each record contained a description of a book, one of which was entitled *Enemies,* a tome that included an attack on the Roman

Catholic religion. Two men who listened to this record became so incensed they were tempted to strike Jesse Cantwell, although they were able to refrain from doing so. The Cantwells were then charged with, and convicted of, inciting others to breach of the peace in addition to violating the licensing statute.

The Cantwells said they did not get a license because they believed their activities were not covered by the statute insofar as they were only distributing pamphlets and books. The Supreme Court of Connecticut was of the opinion that because the Cantwells asked for monetary donations to cover the cost of the pamphlets, this solicitation was enough for their actions to be within the scope of the act. Further, the court pointed out that the legislation was constitutional, because the state was attempting to protect its people against fraud through solicitation of funds purported to be for a charitable or religious purpose. The Cantwells argued that the act violated the Due Process Clause of the Fourteenth Amendment and the Free Exercise Clause of the First Amendment, because it denied them their rights to religious freedom and to speak freely.

The Court's Ruling

In a unanimous opinion authored by Justice Owen Roberts, the Supreme Court agreed with the Cantwells. The Court maintained that the First Amendment prohibited Congress from making laws regarding religion or preventing free exercise of any religion and that the Fourteenth Amendment placed the same prohibitions on state legislatures. The Court explained that the First Amendment embraces two concepts: It gives citizens both the right to believe and the right to act. While the first is absolute, the second, the Court observed, is subject to regulations to protect society. According to the Court, states may make laws regulating the time, place, and manner of solicitations, but they may not enact legislation that wholly prohibits individuals from their right to preach their religious views. To the extent that the act required individuals to apply for certificates to engage in solicitations and were expressly forbidden from doing so without such certificates, the Court reasoned that the law went too far in regulating religious solicitations.

The Supreme Court also took issue with the fact that religious solicitors were required to apply to the secretary of the public welfare council. The Court held that this requirement went too far, because it allowed one person to determine whether something was a religious cause. The Court noted the possibility that a corrupt secretary could further hinder the rights of those who wished to conduct religious solicitations. Insofar as the secretary was allowed to examine facts and use his own judgment, rather than simply issue certificates to anyone who applied for one, the Court concluded that the process amounted to censorship in violation of the First Amendment as it applied within the protection of the Fourteenth Amendment.

Megan L. Rehberg

See also First Amendment; Fourteenth Amendment

Legal Citations

Cantwell v. Connecticut, 310 U.S. 296 (1940).
Everson v. Board of Education of Ewing Township, 303 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).

Carey v. Piphus

May school officials be sued for monetary damages if they violate a student's right to due process? Is the violation of due process inherently harmful for the student (i.e., does it always lead to physical or emotional injury)? If damages are to be awarded, under what conditions should the damages be small (nominal) or large (substantial)? In *Carey v. Piphus* (1978), the Supreme Court found that school officials can be financially liable for violating a student's procedural due process rights, but deprivation of such rights does not necessarily always lead to injury. According to the Court, absent proof of actual injury, school officials may only be liable for small damages, not to exceed one dollar.

Carey involved two students, one from a public elementary school and another from a public high school, who were removed from school for violations of disciplinary regulations; this action was taken without a

hearing or other form of procedural due process. The students sued their school board, arguing that their Fourteenth Amendment right to due process had been violated and that they were entitled to monetary damages according to civil rights law.

Carey is often cited as setting a precedent specific to the financial liability of school officials for violation of students' protected rights and to the amount of damages that can be awarded when such deprivation of rights occurs. The Court held that consistent with previous cases such as *Wood v. Strickland* (1975), school officials can be financially liable for deprivation of students' protected rights, and the facts of this case clearly supported the notion that school officials did indeed violate students' right to due process. Further, in acknowledging the critical importance of citizens observing and abiding by federally protected rights, the Court ruled that a violation of the due process rights of students per se is sufficient to entitle them to awards for damages.

At the same time, the Supreme Court decided that a violation of due process, absent actual injury, was not sufficient to award *substantial* damages. When due process has been violated in the context of student discipline, but without proof of actual injury resulting from this violation, the Court explained that students are entitled to only nominal damages. The Court stated that substantial damages may be awarded only when students are able to show that their removal from school was unlawful or unjustified. To this end, the Court was of the opinion that the students in this case were entitled to damages because their due process rights were violated, but if the students could not prove that their removal from school was unlawful or unjustified, they were entitled to only one dollar from school officials.

Carey has also been cited as setting a precedent for when substantial damages might be awarded in school disciplinary cases. Such criteria include proof that an injury occurred and that the injury was caused by the violation of due process specifically. It is the student's responsibility to prove that such an injury occurred. The Supreme Court interpreted civil rights laws at the time as meaning that the intent of substantial damages awards is to compensate people for injuries sustained as a result of violation of protected rights, rather than the violation of rights per se. Thus, one requirement for substantial damages is proof of injury.

Further, the Court reasoned that injury must be due to the deprivation of due process and not to other justifiable factors. It is possible, for example, that when a student proves that he or she has suffered harm from being removed from school, such harm may be caused by two factors: the violation of due process *or* the lawful and justified removal from school. If a student suffers emotional distress because he or she was suspended or expelled for legitimate and justified reasons without procedural due process, substantial damages will not be awarded, because the cause of the distress was a lawful removal from school. Given the uncertainty of the cause of injury, the Court added that the student bringing suit bears the burden of proof of injury and the burden of proving that such injury is due to the violation of due process.

M. Karega Rausch

See also Due Process; Immunity; *Wood v. Strickland*

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Catholic Schools

Long a major force in American education, new Roman Catholic elementary and secondary schools continue to open in such geographically diverse locations as Atlanta, Minneapolis, and Orlando. At the same time, schools in such places as the Diocese of Brooklyn, the only all-urban diocese in the United States and home to some of the oldest Catholic schools in the nation, continue to close. As a result, the Catholic schools' share of the nonpublic school population has declined from 53% of all students during the 1991–1992 school year to 46.2% of the total during the 2006–2007 year. Yet, even in light of this steady decline, Catholic schools remain the largest nonpublic school "systems" in the United States. In

reality, however, Catholic schools are not so much a system as a loosely linked collection of independent schools. Even as the number of Catholic schools and their market share of the population has declined over the past 40 years, these schools continue to offer an array of options for children from a variety of socioeconomic and ethnic backgrounds.

Amid a growing tide of anti-Catholic sentiment, American Catholic bishops, at the Third Plenary Council of Baltimore in 1884, issued a declaration that had a dramatic impact on the face of education in the United States. In an effort to combat anti-Catholic prejudice, the bishops decreed that within the next two years, a parish school should be built near every church and maintained in perpetuity. The council further ordered all Catholic parents to send their children to the parish school, unless adequate religious training was provided in their schools or elsewhere, or unless alternative schooling was approved by the bishop.

Following the council's dictate, Catholic education embarked on a period of remarkable growth as the rapidly increasing Catholic immigrant population was augmented by a seemingly endless supply of priests, brothers, and nuns to staff the schools. This growth is reflected in the fact that the group of 200 American Catholic schools that existed in 1860 grew to more than 1,300 in the 1870s. By the turn of the 20th century, there were almost 5,000 Catholic schools in the United States.

In the midst of their growth spurt, Catholic and other nonpublic schools received a major boost from the decision in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925). In *Pierce,* the U.S. Supreme Court struck down as unconstitutional a statute from Oregon that would have required parents to satisfy the requirements of the state's compulsory education law by sending their children to public schools, on the basis that the statute deprived the operators of the schools of their right to due process. The *Pierce* Court further reasoned that while states may oversee such important features as health, safety, and teacher qualifications relating to the operation of nonpublic schools, they could not do so to an extent greater than they did for public schools. The Court also ruled that the law was unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control" (268 U.S. 510 at 534–535). *Pierce* thus served as kind of Magna Carta that protected the right of nonpublic schools to serve the needs of children.

The growth of Catholic education in the United States peaked in 1965, at which time there were 14,296 schools in operation. By 1970, enrollment in Catholic schools totaled 5,253,000 students. However, Catholic schools then entered into a period of steady decline as they experienced a loss of almost 3,000,000 students. As of 2006–2007, their enrollment stands at 2,320,651. As enrollments have declined, Catholic schools have attracted an increasingly smaller market share of Catholic students. This decline can be attributed to a variety of interrelated factors, such as the sharply diminished birth rate, movements of Catholic families to locations where Catholic schools are unavailable, increasing costs of tuition and fees at Catholic schools, greater acceptance by Catholic parents of the public schools, the desire of Catholics to enter the mainstream of society by eschewing Catholic schools, and changing social attitudes.

The decline of Catholic schools can be seen in the fact that as of the 2003–2004 academic year, only 7,955 schools remained in existence. Further, as noted, 22 more Catholic schools in New York's City's Brooklyn diocese closed in the fall of 2005, and there were additional unheralded closures in other American dioceses. Moreover, national statistics reveal that while 32 elementary and 4 secondary schools opened in the 2006–2007 year, this gain was more than offset as 202 elementary and 10 secondary schools either consolidated or closed. Also contributing to the decline in the number of Catholic schools is the fact that as of 2006–2007, 13.8% of their students were not members of the Catholic faith, creating a situation that raises questions about how the schools can maintain their religious identities and mission insofar as so many children do not share the Catholic faith.

A closely related major factor that had a significant impact on the decline of the number of Catholic schools that began in the late 1960s was the sharp drop-off in the number of women and men who entered the religious life. The dramatic drop in the members of religious orders was accompanied by a

necessary increase in the percentage of lay faculty and administrators in Catholic schools. This change had a profound impact on American Catholic education, both financially and in presenting a challenge to the ability of individual schools to maintain their Catholic identities.

From the time of its inception in the United States until the late 1960s, Catholic education was all but the exclusive mission of members of religious orders because of two closely related factors. First, education was a traditional ministry of Catholic religious communities. Teaching orders migrated from Europe to the United States in the 19th century to staff the burgeoning number of Catholic schools. Further, a growing number of religious communities that were established in the United States also focused on teaching as their primary work. Second, given the rapid growth of Catholic education, it would have been all but impossible to have provided appropriate compensation for lay staff. Not surprisingly, the economic necessity presented little alternative but for the religious to continue to staff and operate Catholic schools. This problem was exacerbated by virtue of the fact that Catholic schools continued to charge minimal tuition, did not devise long-term plans for their financial well-being, and did not adjust their plans for such costs until the steady, virtually irreversible, decline was well underway.

Until the mid-20th century, a steady supply of American Roman Catholics entered the religious life. Unfortunately, from the point of view of the schools, this seemingly endless supply of vocations to the religious life began to run dry at the end of World War II. The noted Catholic historian Harold Beutow maintains that the post-1945 decline in the number of women and men who entered the religious life can be attributed to the low birth rate that occurred during the Depression coupled with the toll taken by World War II on religious staff in Catholic schools. In light of the amount of time and education needed to meet the upgraded standards of teacher education, there was an unavoidable lapse of time before the declining ranks of properly prepared religious teachers joined the faculties of Catholic schools. At the same time as members of religious orders were given greater freedom to pursue opportunities of their own interest within the religious life, fewer and fewer turned to education, preferring to work in a variety of other fields involving the social sciences.

The predominance of religious staff members in Catholic schools is reflected in the fact that in 1920, 92% of teachers in Catholic schools were members of religious orders. By 1940, this figure had declined only to 91.2%. There was little appreciable change over the next decade, as the percentage of religious stood at 90.1% in 1950. However, dramatic change was in the offing, as the percentage of lay teachers rose to 26.2% in 1960, 51.6% in 1970, 71.0% in 1980, and 85.4% in 1990. By 2006–2007, lay teachers accounted for 95.6% of teachers in Catholic schools.

Four major challenges, the first three of which are closely intertwined, confront Catholic education as it stands at the dawn of the 21st century. First, Catholic school leaders must address the steady decline that they have experienced in enrollments since the mid-1960s. To date, educational leaders have taken tentative steps to resolving the enrollment crisis by seeking to attract increasing numbers of students from diverse economic, cultural, religious, ethnic, and racial backgrounds, including the disabled. In fact, in 2006–2007, minority children accounted for 18.8% of the Catholic school population, up from 10.8% in 1970.

A second issue for Catholic schools is to define their Catholic character so as to maintain their unique identity at a time when increasing numbers of their students are not active members of the Catholic Church. This is an especially challenging task for the many Catholic schools located in inner-city neighborhoods where populations are largely not Roman Catholic.

Third, Catholic schools must find a way to remain a financially viable option for parents at a time of rising costs associated with operating schools. In 2006–2007, the average tuition was $2,607 in Catholic elementary schools (with actual costs of $4,268). Further, the first- year tuition in Catholic secondary schools in 2006–2007 of $6,906 (with actual costs of $8,743) is undoubtedly daunting for many families. On the one hand, Catholic schools maintain a commitment to serving the poor, many of whom cannot afford to pay tuition. On the other hand, as staff in Catholic schools seek to earn living wages, educational leaders must seek to find ways of raising sufficient funds without driving the cost so high that even more families leave Catholic schools.

In light of the lack of qualified educators, a fourth challenge for Catholic school leaders is identifying and preparing a new generation of staff for their schools. As salaries remain low and the hours relatively long, leaders must find ways of ensuring a steady supply of qualified and dedicated educators who can staff the schools.

Having had a successful past, Catholic schools face something of an uncertain future. However, even as they face uncertainties, it is likely that they will continue to make meaningful contributions to American education for many years into the future.

Charles J. Russo

See also Nonpublic Schools; *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary;* State Aid and the Establishment Clause

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Cedar Rapids Community School District v. Garret F.

In *Cedar Rapids Community School District v. Garret F.* (1999), the U.S. Supreme Court ruled that the Individuals with Disabilities Education Act (IDEA) requires school boards to provide full-time nursing services to students with disabilities who need them during the school day. The decision ended a controversy that existed among the federal appeals circuits. This entry describes the case and the court's ruling.

Facts of the Case

The student in *Cedar Rapids,* Garret F., was a quadriplegic who was ventilator-dependent due to his spinal column being severed in a severe motorcycle accident when he was 4 years old. During the school day, he required a personal attendant within hearing distance to see to his health care needs. He required urinary bladder catheterization, suctioning of his tracheostomy, observation for respiratory distress, and other assistance. He attended regular classes in a typical school program and was successful academically.

While he was in kindergarten through grade 4, his family provided the personal attendant. When he was in the fifth grade, his mother requested that the school board provide the needed nursing services, but the board refused. After the parent requested an administrative due process hearing under the IDEA, an administrative law judge decided that the school board was responsible for this service. A federal trial court in Iowa affirmed, concluding that such services did not fall within the medical exclusion clause of the IDEA's related services provision. The school board appealed.

The Eighth Circuit affirmed that because the required services were provided by a nurse, not a physician, they fell under the umbrella of school health or supportive services rather than medical services. The appellate court noted that the Supreme Court's earlier opinion in *Irving Independent School District v. Tatro* (1984) established a bright line test, whereby the services of a physician are exempted, but services that can be provided in the school setting by a nurse or qualified layperson are not. Again, the school board appealed, and the Supreme Court agreed to hear the case.

The Court's Ruling

In a 7-to-2 decision, the Supreme Court affirmed the Eighth Circuit's ruling. Writing for the majority,

Justice Stevens noted that the IDEA's definition of related services, the Court's own decision in *Tatro,* and the overall statutory scheme all supported the appellate court's decision. Stevens wrote that the related services definition broadly encompassed those supportive services that may be required to assist a student with disabilities to benefit from special education. The Court recognized that the cost of the services and the competence of school staff were justifications for drawing a line between the services of a physician and other services, but it stated that its own endorsement of that line was unmistakable.

The majority was of the opinion that it was settled that the phrase *medical services* in the IDEA did not embrace all forms of care that might loosely be described as medical in other contexts. Justice Stevens commented that while they might be more extensive, the services required by the student in *Cedar Rapids* were no more medical than the care required by the student in *Tatro.* Further, Stevens asserted that the continuous character of certain services associated with Garret F.'s ventilator dependency had no apparent relationship to medical services, much less a relationship of equivalence. Although continuous services, such as those required by Garret, may be more costly and may require additional school personnel, the Court did not see that these factors made them more medical.

Insofar as the IDEA does not use cost in its definition of related services or excluded medical services, the Court specifically rejected accepting a cost-based standard, as had been suggested by the school board, as the sole test for determining the scope of the provision. The Court thought that doing so would have required it to engage in judicial lawmaking without any congressional guidance. In the Court's view, Congress intended to open the door of public education to all qualified students with disabilities and require school boards to educate those students with students who were not disabled whenever possible. Under the IDEA and the Court's own precedent, the majority insisted that a school board must fund such related services to help guarantee that students such as Garret were integrated into the public schools.

Justices Thomas and Kennedy dissented, in essence because they disagreed with the Court's application of *Tatro,* which had been decided before they joined the Court. Writing the dissent, Thomas said that *Tatro* could not be squared with the text of the IDEA, and thus should not have been adhered to in *Cedar Rapids.* Thomas noted that the IDEA regulations require school boards to provide disabled students with health-related services that school nurses can perform as part of their normal duties, but unlike the service at issue in *Tatro* (clean intermittent catheterization), a school nurse could not provide the services Garret needed and continue to perform her normal duties. Instead, Thomas observed, because Garret required continuous one-to-one care throughout the school day, the school board was required to hire an additional employee to attend to his needs.

Allan G. Osborne, Jr.

See also Disabled Persons, Rights of; *Irving Independent School District v. Tatro;* Related Services

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Charter Schools

Charter schools are publicly funded, tuition-free schools of choice that have greater autonomy than traditional public schools. In exchange for this increased autonomy, charter schools are held accountable for improving student achievement and meeting other provisions of their charters. Charter schools are most

often new schools that were not in existence before the charter was granted; it is also common for a traditional public or private school to convert to charter school status. This entry describes the relatively recent origin of charter schools and their operational characteristics and offers a brief discussion of their record so far.

Origin and Operation

There are significant variations in charter schools across states, because the state laws that dictate most aspects of charter schools, including funding, student and staff recruitment, and charter attainment status, differ. Although the details vary by state, some generalizations can be made about charter schools. For example, charter schools are not typically confined to the constraints of traditional public school requirements such as certain bureaucratic and union rules. In some states, such flexibility includes the freedom to hire teachers, typically those lacking state certification, based on their own standards and to adopt specific curricula. Some charter schools may even create their own calendars or length of school days.

The first charter school law was passed in 1991 in Minnesota, and the first charter school was established there in 1992. By 1995, an addition 18 states had passed charter school legislation. From 1991 to the present, the charter school movement has experienced tremendous growth. Today, it is estimated that there are nearly 3,600 charter schools, which enroll about 1.75% of public school students. There are currently over 1 million students attending charter schools. While 40 states, the District of Columbia, and Puerto Rico have adopted charter school legislation, Arizona, California, Florida, Michigan, and Texas have more than half of all charter schools. States with no charter school laws include Alabama, Kentucky, Maine, Montana, Nebraska, North Dakota, South Dakota, Vermont, Washington, and West Virginia. The median enrollment for a charter school is 242 students, while the median for traditional public schools is 539 students. Charter schools must have an open admissions process, and when more students apply than can be accommodated, officials typically rely on lotteries to select students randomly.

Functioning as public schools, operators of charter schools receive charters from public agencies, usually state or local school boards. Charters are performance contracts that establish each school while containing provisions related to financial plans, curriculum, and governance. The entities that issue charters, usually referred to as sponsors or authorizers, hold the charter school accountable for their performance. Charters are issued for defined limited terms of operation, usually from three to five years. As a result, if charter schools fail to meet the provisions of their charters, the sponsor may take steps to close them down. Indeed, it is much easier for sponsors to revoke the charters of charter schools than it is for authorities to close traditional public schools. Surprisingly, though, few charter school authorizers have revoked charters due to poor student achievement. Rather, closures have generally resulted from fiscal or managerial problems in the schools.

Charter schools vary greatly in terms of student achievement. This range in charter school quality can be explained by the lack of a uniform design among the large number of schools in operation. Nevertheless, the threat of competition from traditional public schools and other charter schools forces charter school sponsors and organizers to maintain high standards of accountability. While student achievement is a major accountability measure, there are few comprehensive studies involving student achievement in charter schools, and the data that do exist are both contradictory and inconclusive. Indeed, the political climate regarding charter schools is highly charged, making objective understanding of the research difficult.

Rationale and Outcomes

One of the main reasons for founding charter schools was to seek an alternative vision of schooling that could not be realized in the traditional public schools. The market metaphor for choice and competition has become an essential part of the charter school discussion. Free market advocates rationalize that charter schools will either stimulate weaker public schools to improve or will drive them out of the education arena through the process of market-based accountability. In so doing, charter schools may encourage systemic

change by providing more educational choices, creating competitive market forces.

Some view the charter school movement as an answer to the nation's education problems. Yet, others argue that charter schools will damage the public school system by diverting resources. While there is controversy surrounding the charter school movement, charter schools have attracted bipartisan support. Both Republicans and Democrats have backed the federal government in approving financial support for establishing charter schools and for acquiring operational facilities. Former President Clinton called for the creation of 3,000 charter schools by 2002. In 2002, Bush requested $200 million to support charter schools.

There is still much to be learned about charter schools. Charter schools are a fairly recent phenomenon; therefore, they are still in their early stages of implementation. As charter schools mature, current findings will be challenged and new questions will emerge. As such, at this time it is difficult to determine the impact charter schools have had on student achievement, equity, and other areas. Although charter schools are not necessarily the panacea that some had hoped for, they have had a significant impact on education, and future evolutions of the movement should continue to do so.

Suzanne E. Eckes

See also School Choice; Vouchers

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Cheating

Cheating is usually defined as deliberately engaging in dishonest or fraudulent behavior for one's own gain. When applied to academic dishonesty, cheating often falls into the category of plagiarism, that is, the use of another's work without giving appropriate attribution. Sometimes the plagiarism is characterized as a breach of copyright or an infringement upon another's intellectual property rights. In all cases, cheating and or plagiarism are breaches of expected norms of academic behavior in both the K–12 setting and the university setting.

In law, cheating, although it is fraudulent behavior and academically dishonest, does not rise to the level of a legal cause of action. Most litigation pertaining to cheating and plagiarism is brought because of procedural violations when bringing the cheater to task or for claims of retaliation for other misdoings.

A study of law school students and plagiarism, perhaps the most common form of cheating, concluded that one should consider why students cheat and plagiarize. There are several compelling reasons. For example, law school students, for whom competition is extremely keen, cheat to maintain high academic standings. In an ongoing national study of undergraduate students by the Center for Academic Integrity at Rutgers University, nearly 50,000 undergraduate students at 60 institutions were surveyed over a period of over four years. The results are cause for concern. Of the nearly 50,000 students who participated, 70% admitted to some cheating. Further investigation revealed that those institutions that have strong honor codes have far fewer reported incidents of student cheating. Longitudinally, over a period of nine years, these studies show that honor codes and engaging students in resolving affairs of academic dishonesty decreased serious cheating by one fourth to one third.

Some cheating via plagiarism seems to occur because students are not familiar with the arts of note taking, topic organization, and writing. These students are careless, which results in unintentional plagiarism. A prime example would be the student who incorporated material into his or her work but failed to mention where the material was acquired. In addition, procrastination and poor organizational skills sometimes lead to ill-fated attempts to write papers quickly by cutting and pasting. The practice of cutting and pasting from the Internet, an increasingly common phenomenon on homework assignments, is a problem, because many students do not know to what

extent material *may* be copied. Absent clear instructions, most students have concluded that this is not a serious issue. Some students tend to weave sentences from different sources on the Internet into their term papers without appropriate citations. In 1999, only 10% admitted to this practice, while that number rose to nearly 40% in 2005. Unfortunately, today, a majority of students do not believe that this method of cheating is a serious issue.

Most incidents of cheating that involve plagiarism involve students who have not learned proper writing skills. Students who repeatedly demonstrate an inability to use quotation marks properly, to indent large quotes, or even to use proper attribution where due may merely give a general citation at the beginning and/or the end of their entire written thought.

Finally, some students knowingly engage in cheating, whether plagiarism or looking at the examinations and papers of others, despite their understanding that the behavior is dishonest. They are willing to run the risk of getting caught or taking a chance that the faculty will not report them to the school administration or academic honors committees. Data from the Rutgers study showed that students were more likely to engage in plagiarism and cheating in those classes where they knew that the faculty would not report them.

Cheating in one's work, or plagiarism, usually takes the form of the traditional misuse of another's intellectual property. Yet, today, there is also the problem with "cybercheating" or "cyberplagiarism." This act is not limited to materials inappropriately taken from the Internet but also includes using high technology to cheat in the classroom setting. Cell phones and PDAs are now the instruments of choice for students to transmit text messages to each other during a test, to "photocopy" tests and to share them with other students who will take the exams in later periods, and to email students not in the exam setting to obtain answers on the exams. This is all a deliberate form of cheating in the classroom.

The solution to cybercheating is not an easy one, because the technology is changing more quickly than most educators can change their testing practices. One solution is, however, maintaining and publishing well-written but simple school policies on academic honesty, ethical behavior, codes of conduct, and academic integrity. This is a positive approach to the problem—to explain expectations. Beyond that, policies must be prominently published containing broad definitions of plagiarism and cheating, descriptions of inappropriate uses of electronic devices, and consequences for ignoring breaches of expected conduct regarding the intellectual property of others. It may even be appropriate to require all entering students to participate in a workshop on academic honesty and to have them sign a statement of understanding so that they know the expectations and the consequences of breaches in honest academic behavior.

Marilyn J. Bartlett

See also Plagiarism

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Chicago Teachers Union, Local No. 1 v. Hudson

Chicago Teachers Union, Local No. 1 v. Hudson (1986) was significant for school labor relations, because in it the U.S. Supreme Court found that a union's process for accommodating nonmember teachers, sometimes referred to as "free-riders," who had money automatically deducted from their paychecks to cover the union's costs associated with collective bargaining, did not sufficiently ensure the protection of the First Amendment rights of nonmembers. The Court reasoned that the union's procedures for collecting these fees were unacceptable, because

the monies that they collected from nonunion teachers could possibly have been used for political activities that the nonunion teachers did not support.

Facts of the Case

The Chicago Teachers Union (CTU) had represented about 95% of the faculty and staff of Chicago's public schools in negotiations over pay and benefits since the late 1960s. The CTU was the sole organization allowed to bargain collectively such that all teachers in Chicago's public schools received the same salary increases and other incentives that it negotiated, regardless of whether they were members. As the teaching ranks grew in size, more and more nonunion teachers benefited from its activities. From the union's perspective, this was unjust, because the nonunion teachers were not contributing portions of their salary to support its activities associated with bargaining. In attempting to remedy this situation, the union and the Chicago Board of Education agreed that the union could demand "proportionate share payments" or "fair-share fees" that would be taken out of the nonunion teachers' wages.

The CTU knew that implementing de facto mandatory union membership would have been controversial and that further administrative procedures would have been needed to ensure that the nonmembers would have had ways to challenge the withholding of salary to support its activities. The first step the CTU took was to ask nonmembers to contribute only 95% of the standard union dues. The CTU rounded this reduction up from the actual cost of collective bargaining for nonmembers and related union activities. The CTU also developed a process by which nonmembers could object to the "proportionate share payments" by contacting its president in writing. The complaints of the nonmember would then have initiated a multistep process to judge their objections.

The first part of the process would have been for the union's executive committee to take up the merits of the objection and to notify the nonmember of the outcome of such discussion within 30 days. If nonmembers were not satisfied with the initial response, their next step was to appeal to the union's executive board within 30 days. If the nonmembers were still dissatisfied with the response to their appeal, the union president would pick an arbitrator to make a final judgment on the matter.

The nonmembers of the CTU sought judicial relief from this procedure, claiming that it was unconstitutional, because it contravened the First and Fourteenth amendments. In addition, the nonmembers held that the CTU was proposing using the deducted monies for activities that were not permitted under the law. A federal trial court in Illinois was satisfied that the procedure passed constitutional muster. However, on appeal, the Seventh Circuit reversed and remanded on the grounds that the inadequate procedures violated the First Amendment rights of the nonunion teachers.

The Court's Ruling

On further review, the Supreme Court affirmed the Seventh Circuit's order, identifying three main points in its rationale. First, the Court observed that a balance had to be struck between the nonmembers' right not to have salary deductions used in ideological union activities and the union's right to compel nonmembers to provide financial support for its collective bargaining activities. To this end, the Court noted that the CTU was required to have a process in place to minimize the encroachment on nonmembers' First Amendment rights.

Second, the Court was of the opinion that the CTU had to take up nonmembers' objections to the deductions in a timely fashion. Third, even though the CTU attempted to remedy the nonunion teachers' concerns by using escrow accounts for the deductions during the administrative procedures, the Court thought that this was an inadequate solution, because union officials failed to explain why the salary deduction had to occur and why the CTU did not provide a process for objection by an objective and independent arbitrator.

Hudson stands out as one of four Supreme Court cases on the rights of nonunion members who are asked to help unions to pay for the cost of collective bargaining. As in *Abood v. Detroit Board of Education,* (1977), *Lehnert v. Ferris Faculty Association* (1991)—a case set in higher education—and *Davenport v. Washington Education Association* (2007), the Court ruled that unions could collect fair share fees from

nonmembers only if adequate safeguards were in place to protect their First Amendment rights not to have to pay for activities with which they disagreed.

Aaron Cooley

See also *Abood v. Detroit Board of Education;* Collective Bargaining; *Davenport v. Washington Education Association;* First Amendment; Political Activities and Speech of Teachers; Teacher Rights; Unions

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Child Abuse

Child abuse is a major problem in the United States. Researchers began calling attention to the issue in the 1970s, and today all 50 states have laws in place that require educators to report suspected child abuse or neglect to law enforcement officials or child protection agencies. In addition, sexual abuse of children in school settings is now recognized as a serious and recurring problem. Child victims have sued school boards under a variety of theories for sexual abuse perpetuated by teachers or other school employees. This entry looks at both kinds of abuse as related to education.

Scope and Nature

It is impossible to know how many children are victims of sexual or physical abuse, because definitions of abuse vary somewhat from state to state, a large number of incidents go unreported, and not all reported cases are investigated or substantiated. According to the National Child Abuse and Neglect Data System (NCANDS), child protective service agencies and other social service agencies received approximately 3 million referrals of child abuse or neglect in 2004. These agencies confirmed that 872,000 of these referrals involved victims of actual abuse or neglect. NCANDS data indicated that almost four out of five perpetrators were parents.

Medical experts agree that many who are sexually abused as children experience serious health consequences that can last a lifetime. Long-term injuries include anxiety, depression, impaired cognitive functions, suicidal ideations, low self-esteem, and post-traumatic stress disorder. In her book *Trauma and Recovery,* psychiatrist Judith Herman wrote that children who are abused by caregivers sometimes develop destructive attachments to their abusers that prevent them from reporting the abuse. In fact, when questioned about possible abuse, victims may lie to protect their abusers. In school settings, this phenomenon makes it difficult for educational authorities to investigate their suspicions of child abuse.

Child Abuse Reporting

California enacted the first child abuse reporting law in 1967. In 1974, Congress passed the Child Abuse Prevention and Treatment Act (CAPTA), establishing the National Center on Child Abuse and Neglect while providing financial incentives for states to develop programs to identify and prevent child abuse and neglect. Partly due to CAPTA, all states now have laws in place requiring certain individuals to report suspected child abuse or neglect.

Even though child abuse reporting laws differ from state to state, all of them protect child-abuse reporters from civil liability for making reports in good faith. All states provide civil or criminal penalties for persons who are mandated to report child abuse and neglect but knowingly fail to do so. Persons who are mandated reporters under these laws include health care workers, educators, and mental health professionals. In most states, child abuse reporting requirements take

precedence over various legally recognized privileges of confidential communications. Accordingly, school counselors may be required to report suspected child abuse or neglect that they learn about in otherwise privileged conversations with clients. In every state, teachers, principals, and other school board professional employees are required to report suspicions of child abuse and neglect that they come across in the course of their professional duties.

In spite of the child abuse reporting laws and the legal penalties in place for failing to report, researchers have documented that mandated reporters—including teachers—do not report all the child abuse that they suspect. Teachers are more likely to report their suspicions of physical abuse rather than sexual abuse, perhaps because the indications of physical abuse are more readily apparent than the signs of sexual abuse. Motives for failing to report are varied and include concern about disrupting relationships with the families of children, lack of faith in investigative agencies, fear of litigation, and pressure from peers and supervisors not to report.

In most states, laws direct reporters to contact their child protection agencies if the abuse takes place in homes. Abuse by persons outside of homes is generally reported to law enforcement authorities. Most states have laws protecting the confidentiality of child abuse reports.

School District Liability for Sexual Abuse

It is now universally recognized that sexual predators may be school employees who use their positions to get access to children for purposes of sexual abuse. Estimates of the prevalence of sexual abuse in schools vary widely. In a report commissioned by the U.S. Department of Education, Charol Shakeshaft noted that teachers whose job description includes time with individual students, such as music teachers and coaches, are more likely to sexually abuse students than other teachers.

Increasingly, the student victims of school-employed sexual predators are suing school boards and their supervisory employees. Until the 1990s, almost all of these suits were brought in state courts with victims alleging negligent hiring or negligent supervision of the abusive employee. Sometimes plaintiffs sued under agency principles, charging school boards with vicarious liability for the conduct of their employees. In many states, boards enjoy statutory immunity from these suits. In some jurisdictions, courts have ruled that boards cannot be vicariously liable for sexual misconduct of their employees with children, because such acts are outside the scope of the employee's employment.

Due to the difficulty of prevailing in state courts under common-law negligence theories, some plaintiffs have elected to sue school systems in federal court, alleging constitutional violations based on the sexual misconduct of school employees. At least two federal circuit courts recognized a constitutional cause of action against school boards in these situations. In *Stoneking v. Bradford Area School District* (1989), the Third Circuit ruled that students have a constitutional right to be free from sexual molestation by teachers. Here a female high school student alleged that she was the victim of sexual abuse by the school's band director over a period of several years. In addition, the student claimed that school administrators knew about the band director's conduct yet failed to act. The Third Circuit reasoned that the student's allegations, if true, were actionable as a violation of her constitutional rights.

In 1994, in *Doe v. Taylor Independent School District,* the Fifth Circuit reached a similar outcome. At issue was the allegation that a school principal acted with deliberate indifference to numerous indications that a teacher was sexually involved with a 14-year-old female student. The court reasoned that the student had a well-established constitutional right to bodily integrity and that sexual molestation by a teacher is a violation of that right. The court concluded that the principal could be personally liable if it were found that he had acted with deliberate indifference to his subordinate's violation of the student's constitutional rights.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational institutions that receive federal funds. Based on judicial interpretations of the law, it is now well established that sexual abuse of a student by a public school employee is a violation of Title IX. In *Franklin v. Gwinnett County*

Public Schools (1992), the U.S. Supreme Court ruled that a victim of sexual harassment could sue a school board for money damages. Not surprisingly, litigation in this area has increased in its wake. In *Gebser v. Lago Vista Independent School District* (1998), the Court clarified the standard for assessing Title IX liability against school boards when their employees sexually molest children. Boards are not liable for such acts, the Supreme Court decided, unless school officials with supervisory authority have actual knowledge of the abuse and respond with deliberate indifference.

Many states now require school boards to conduct criminal background checks of job applicants in order to identify convicted child abusers who seek school employment. Some states require school officials to notify their state teacher-licensing agencies of any child abuse allegations that are made against teachers.

Educators are becoming increasingly aware of the "mobile molester," school employees who resign their positions under allegations of child abuse and later obtain employment in other districts. Often, school officials aid these mobile molesters by writing good letters of recommendation on the condition that the accused employees resign from their positions. In *Randi W. v. Muroc Joint Unified School District* (1997), the Supreme Court of California ruled that a student victim of a vice principal's sexual abuse could sue the perpetrator's previous school board employer for negligent representation and fraud based on allegations that officials wrote positive letters of recommendation on his behalf while knowing that he was dangerous to children.

Claims against school boards arising from the sexual abuse of children by school employees are on the increase. Yet, school systems often escape liability, because plaintiffs find it difficult to prove that school authorities knew that employees were molesting children. For this reason, courts are often reluctant to render educational officials and boards liable for the aberrant behavior of sexual deviants who happen to be school employees.

Richard Fossey

See also *Franklin v. Gwinnett County Public Schools; Gebser v. Lago Vista Independent School District;* Negligence; Title IX and Sexual Harassment

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Child Benefit Test

The child benefit test is a judicially constructed legal fiction that justifies government extension of benefits to religious schools via the rationale of supporting parent choice. Thus, pursuant to the child benefit test, students and their religiously affiliated nonpublic schools can receive some forms of public aid without violating the Establishment Clause's prohibition against the government enacting laws "respecting an establishment of religion." The test was originally framed as a conduit to support services to religious schools where students were the direct beneficiaries.

Later, it was expanded to rationalize providing services or funds where parents have made choices. In the process, the concept of the child as a beneficiary has become subordinated to a more expansive rationale supporting government assistance so long as a child's presence in a religious school can be attributed to some factor other than a government's decision to place the child there. This entry looks at the origin and elaboration of this theory in Supreme Court decisions.

The Beginning

The test owes its origin to a Supreme Court decision, *Cochran v. Louisiana State Board of Education* (1930), that predated the application of the Establishment Clause to states as part of the Fourteenth Amendment's requirement that "no State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law" (Fourteenth Amendment, Section 1). In *Cochran,* the Supreme Court held that a state's provision of free textbooks to both public and nonpublic school students did not violate Article I, Section 4 of the Constitution's guarantee of a republican form of government because "the school children and the state alone [not the public] schools [were] the beneficiaries" (p. 375).

Then, in *Everson v. Board of Education of Ewing Township* (1947), the Supreme Court for the first time applied the Establishment Clause to a state statute authorizing local school boards to enter into contracts for transporting students to school. Because of the difficulty in arranging its own transportation system, the school board at issue in *Everson* chose to reimburse parents for money expended by them in having their children transported to both public and nonpublic (including religious) schools using regular busses operated by the city's public transportation system. Part of this reimbursement money went to parents whose children were transported to Catholic schools, hence the Establishment Clause challenge.

Citing *Cochran,* the *Everson* Court observed, "It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose" (*Everson,* p. 7). Rejecting the claim that the reimbursement amounted to support of religious schools in violation of the Establishment Clause, the Supreme Court found, rather, that the state statute did "no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" (*Everson,* p. 18).

Thus was born the notion that assisting students, as opposed to the schools they attended, did not constitute a violation of the Establishment Clause under what came to be known as the *child benefit test.*

A Textbook Case

Twenty-one years later, the Supreme Court revisited the child benefit test in *Board of Education of Central School District v. Allen* (1968), where the Court considered the validity of a New York statute requiring school boards to purchase and loan textbooks to students enrolled in public and private, including parochial, schools. The Allen decision upholding the loan of textbooks was made even more interesting because the Court had invalidated schoolwide prayer and Bible reading five years earlier in *Engel v. Vitale* (1962) and *Abington Township School District v. Schempp* (1963). Nonetheless, the *Allen* Court found that the New York statute had a secular purpose and effect under the Establishment Clause in that "the law merely makes available to all children the benefits of a general program to lend school books free of charge" (*Allen,* p. 243).

Insofar as the New York statute specified that loaned textbooks could only be those "designated for use in any public, elementary or secondary schools of the state" (*Allen,* p. 239), the Supreme Court in *Allen,* for purposes of compliance with the Establishment Clause, assumed "that books loaned to students are books that are not unsuitable for use in the public schools because of religious content" (*Allen,* p. 246). While the Court recognized that "perhaps free books make it more likely that some children choose to attend a sectarian school," the Court concluded that "the financial benefit is to parents and children, not [to] schools" (*Allen,* p. 244).

Explicit in both *Everson* and *Allen* is the awareness that while transportation and textbooks provide a benefit to children, they also benefit the parents of children. Including parents within the child benefit

test was consistent with the Supreme Court's judgment in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), upholding the Fourteenth Amendment's Liberty Clause right of parents to direct the education of their children.

Following *Allen,* the child benefit test experienced a hiatus during the 1970s, when many state efforts to provide assistance to religious schools were considered violations of the Establishment Clause (see, e.g., *Lemon v. Kurtzman* (1971)), but the test began a resurgence in *Mueller v. Allen* (1983). In *Mueller,* the Court upheld a statute from Minnesota permitting parents to deduct from their incomes, for state income tax purposes, tuition, textbook, and transportation expenses associated with their children's attendance at public or nonpublic (including religious) schools. Relying on *Everson* and *Allen,* the *Mueller* Court decided that the statute was constitutional under the Establishment Clause, because it "permit[ted] all parents—whether their children attend public school or private—to deduct their children's educational expenses" (*Mueller,* p. 398).

More pointedly with reference to the child benefit test, the Court observed that "by channeling whatever assistance it may provide to parochial schools through individual parents, Minnesota has reduced the Establishment Clause objections to which its action is subject" (*Mueller,* p. 399).

Expanding the Test

A series of subsequent cases seized on this notion of the beneficiary to uphold the provision of financial assistance and services. In *Witters v. Washington Department of Services for the Blind I* (*Witters I,* 1986), the Supreme Court held that the State of Washington's providing vocational assistance to a blind student attending a Bible college did not violate the Establishment Clause where the student, not the religious college, was considered to be the direct beneficiary. Relying on child benefit test–type rationale, the Court in *Witters I* observed that "any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices of aid recipients" (p. 488).

Witters I is a good example with which to emphasize that the child benefit test is very much a federal doctrine attached to the Establishment Clause and is not binding on states. *Witters I* was remanded to the state for interpretation under its state constitutional provision regarding assistance to religious institutions. On remand, the Supreme Court of Washington, in *Witters v. State Commission for the Blind,* relying on the state's more narrowly permissive language concerning assistance to religious institutions, invalidated the provision of financial assistance for students at religious colleges (Constitution of Washington, Article I, § 11). The Supreme Court denied certiorari of the state supreme court decision.

Even so, it is worth noting that other states interpret their state constitutional religion clauses as being similar to that of the federal Constitution, so that state court decisions look very much the same as those of federal courts relying on the child benefit test (see, e.g., *Minnesota Federation of Teachers v. Mammenga,* 1993).

Seven years after *Witters I,* in *Zobrest v. Catalina Foothills School District* (1993), the Supreme Court held that a public school board's providing a sign language interpreter, pursuant to the federal Individuals with Disabilities Education Act (IDEA), to a student on-site at a religious school did not violate the Establishment Clause. In *Zobrest,* the Court used a rationale reminiscent of *Mueller* and *Witters I* in finding that "by according parents freedom to select a school of their choice, the [IDEA] ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents" (p. 10). In reflecting more broadly on the purpose of the IDEA, the Court reasoned that "disabled children, not sectarian schools, are the primary beneficiaries of the IDEA; to the extent sectarian schools benefit at all from the IDEA, they are only incidental beneficiaries" (p. 12).

More recently, the Supreme Court, in *Mitchell v. Helms* (2000) and *Zelman v. Simmons-Harris* (2002), used a child benefit test approach to validate federal and state programs providing assistance to nonpublic (including religious) schools. In upholding the federal government's loaning of a wide range of materials to nonpublic (including religious) schools, in *Helms* the Court held that if aid to schools

> is neutrally available and, before reaching or benefiting any religious school, first passes through the hands (literally or figuratively) of numerous private citizens who are free to direct the aid elsewhere, the government has not provided any support of religion. (p. 816)

In *Zelman,* the Court upheld Cleveland, Ohio's state-authorized voucher program for urban students to attend nonpublic schools of their parental choice, most of which were religious in nature. Relying on the parent choice theme developed in *Mueller, Witters I,* and *Zobrest,* the Supreme Court found the voucher program to be "a program of true private choice" (*Zelman,* p. 653). In circumventing the Establishment Clause, the Court observed that

> any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general. (p. 655)

Ralph D. Mawdsley

See also *Board of Education v. Allen; Cantwell v. Connecticut; Everson v. Board of Education of Ewing Township; Lemon v. Kurtzman; Mitchell v. Helms; Mueller v. Allen; Pierce v. Society of Sisters of the Holy Names of Jesus and Mary;* State Aid and the Establishment Clause; *Zelman v. Simmons-Harris; Zobrest v. Catalina Foothills School District*

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Child Protection

In 2005, more than 3.3 million reports of suspected child abuse or neglect were reported to state child protection agencies in the United States. Those reports led to a finding of substantiated maltreatment involving nearly 900,000 children, or about 12 per thousand, including 1,400 child fatalities, according to the U.S. Department of Health and Human Services. This entry reviews the general legal definition of abuse and neglect, the evolution of the role of the state in protecting children from maltreatment at the hands of their parents or caregivers, and the contribution of federal statutes to the shaping of state child protection policies. The entry concludes by highlighting the responsibilities state laws place on schools and educators to report suspected child abuse and neglect.

Definition and Forms of Maltreatment

There is no single, authoritative definition of child abuse and neglect. Both federal and state laws define child abuse and neglect, with federal law providing a general definition that states tend to elaborate on in their civil and criminal codes. The federal definition, found in the Child Abuse Prevention and Treatment Act of 1974, provides that child abuse and neglect includes, as to a child under 18 years of age: "Any recent act or failure to act on the part of a parent or caretaker which results in death, serious physical or emotional harm, sexual abuse or exploitation" or "an act or failure to act which presents an imminent risk of serious harm."

State laws aimed at protecting children provide greater definitional detail. They commonly enumerate and define what constitutes each of several forms of child maltreatment. These forms include neglect, physical abuse, sexual abuse, and emotional abuse. Insofar as each state's definition may differ, it is important for educators to consult the provisions found in their state codes in order to appreciate the scope of child protection provisions applicable in their jurisdiction.

Evolution of the Role of the State

The legal status of children has varied dramatically over time and across cultures. Historically, in many cultures, children enjoyed no independent legal recognition from their parents or the family. In such times and cultures, the actions of parents with respect to their offspring were largely unchecked by societal authority, as evidenced in the extreme by the legally sanctioned practice of infanticide.

Over time, children in many societies have come to be legally recognized as individuals with interests separate and distinct from those of their parents. In such societies, including the United States, the government or state has not only accorded children independent legal status, but also moved, under the doctrine of *parens patriae,* to pierce family boundaries and interpose itself between the parent and child where the child's welfare is threatened by the action or omission of the parents.

While extreme forms of maltreatment have long been prohibited in the United States, significant changes in the legal status and level of protection afforded children began to emerge in the late 19th century with the introduction of juvenile courts, and they grew throughout the 20th century with the first White House Conference on Children in 1909 and the creation of a national Children's Bureau in 1912, followed a decade later by congressional action encouraging the formation of similar bureaus at the state level. As concern about the welfare of children grew, the rights of parents with respect to their offspring were being moderated.

Even though the Supreme Court's opinion in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) agreed that parents have certain Fourteenth Amendment liberty interests in making decisions regarding the education and upbringing of their children, it upheld those interests only insofar as the state interference was considered arbitrary or unreasonable. In its 1944 judgment in *Prince v. Massachusetts,* the Court upheld, against challenges under the First and Fourteenth amendments, the prerogative of states to enforce laws regulating child labor by sanctioning anyone, including parents, who provided a minor with items to sell or distribute on the streets or in public places.

The independent legal status of children also gained stature in the ensuing decades. The Supreme Court extended legal protections in the form of assurances of procedural due process to minors in juvenile court proceedings in *In re Gault* (1967) and to secondary students in school disciplinary proceedings leading to suspension in a 1975 case, *Goss v. Lopez.* Within the same 10-year period, the Court, in a First Amendment case, *Tinker v. Des Moines Independent Community School District* (1969), declared students to be "citizens" for the purposes of the Constitution.

During the same period, new insights were beginning to emerge with respect to the phenomena of child abuse and neglect. A national survey of emergency room physicians by C. Henry Kempe, a Denver physician, led in the early 1960s to the identification of the "battered child-syndrome" as an alternative explanation regarding what brought certain children to the emergency rooms with multiple skeletal injuries in different stages of healing. This explanation was soon to replace the "accident-prone child" thesis previously prominent in the medical literature.

As often happens when a problem gains public recognition, federal policymakers respond. In 1974, Congress enacted the Child Abuse Prevention and Treatment Act providing grants to encourage states to strengthen their then rudimentary policies with respect to the identification of children who are abused and neglected and with respect to the provision of services to help families overcome maltreating practices or behaviors. That act served initially to establish a set of minimum standards for state child protection policies and agencies. Successive reauthorizations and amendments to that legislation, most recently in the form of the Keeping Children and

Families Safe Act of 2003, have raised those standards while continuing to permit some state flexibility in the delineation and definition of various types of child maltreatment and in state responses to maltreatment. These reauthorizations and amendments have also recognized that competing values are associated with the importance of preserving the family as a social unit and with the need to ensure the safety of children in the short term and the permanency of alternative care arrangements in the long term should they be necessary.

At a minimum, though, statutes or administrative rules in virtually all states designate a department or agency responsible for child protection and prescribe its duties as well as procedures governing report screening and investigations, case assessment and substantiation, central registry maintenance, agency interventions and services, and court petitions for supervision, the removal of children, and termination of parental rights. The presence of common elements, if not common provisions, can be traced in substantial measure to federal inducements and capacity-building grants to the states.

The Role and Responsibilities of the Schools and Educators

Particularly relevant to educational officials are the reporting responsibilities of educators under state child protection policies. In virtually all states, educators as well as a host of other child-serving professionals, both inside and outside of schools, are designated as mandated reporters. This legally compels them, on forming a "reasonable suspicion" of abuse or neglect in virtually all states, as well as suspicion of an imminent threat to the safety and well-being of the child in other jurisdictions, to make an immediate report to the state child protection agency in the locality where the child is found or resides.

While the precise terminology used to trigger a report varies somewhat, state policies uniformly establish a low threshold similar to "reasonable suspicion" for requiring a report. State policies also encourage the making of reports by almost universally insulating mandated reporters from civil liability should their reported suspicions prove to be unsubstantiated after investigation by the child protection agency. This qualified immunity shields educators in all situations except where reports are made in bad faith, recklessly, or where the reporter knows the report is false. On the other hand, most states expressly impose criminal sanctions or civil penalties on mandated reporters who fail to file required reports where they actually knew of or should have suspected abuse or neglect based on the exercise of ordinary diligence. The failure to report may also result in civil liability for educators, who can be held responsible in most jurisdictions for injuries sustained by the child as the proximate cause of their failure to carry out their duty as mandated reporters.

Charles B. Vergon

See also Child Abuse; Children's Internet Protection Act; *Goss v. Lopez; In re Gault; Pierce v. Society of Sisters of the Holy Names of Jesus and Mary;* Parens Patriae; *Tinker v. Des Moines Independent Community School District*

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Children's Internet Protection Act

The development of the Internet accelerated the impact of technology on the services and information that schools and libraries provide to students and patrons. By using the Internet, students and library patrons are now able to access a seemingly endless collection of Web sites including information and scenes that range from innocent and scholarly to pornographic. Many educators and others found it disconcerting that Internet content can be seen and left on computer screens for others to view, especially when the depictions were inappropriate for children. Federal legislation in the form of the Children's Internet Protection Act (CIPA) was the outcome of these concerns.

What the Law Says

In an attempt to regulate the Internet in schools and libraries, Senators John McCain and Ernest "Fritz" Hollings introduced a bill in 1999 that imposed requirements on schools and libraries regarding Internet access by students and patrons. The bill was added to an appropriations act in 2000 and signed into law on December 15, 2000, by President Clinton. The Children's Internet Protection Act (CIPA), which is incorporated in numerous sections of the United States Code, went into effect on April 20, 2001.

CIPA requires schools and libraries that receive federal funds to adopt and implement filtering systems to block specified sites. School systems and libraries must have their Internet policy and filtering systems in place before becoming eligible to receive the "e-rate" (a subsidy for the cost of certain services) provided by Section 254 of the Telecom Act of 1996. The e-rate program is administered by the Universal Service Administrative Company (USAC), which has established a set of procedures so that the schools and libraries can meet all requirements for the discount. USAC operates under the direction of the Federal Communications Commission. The discounted services are telecommunications, Internet access, and internal communications. Another major source of funds for schools and libraries is Section 224 of the Museum and Library Services Act of 1996.

As part of its extensive provisions, CIPA requires schools and libraries to enact Internet safety policies that address

> (1) access by minors to inappropriate matter on the Internet and World Wide Web; (2) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (3) unauthorized access, including so-called hacking, and other unlawful activities by minors online; (4) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (5) measures designed to restrict minors' access to materials harmful to minors. (47 U.S.C. § 254(l)(1)(A)

At the same time, CIPA requires schools and libraries to have specific technology in place to block or filter access to the Internet. The technology protection measures (TPM) must prevent adults or minors from accessing depictions that are obscene, contain child pornography, or may be considered inappropriate for children. Authorized persons may disable filtering devices for use by adults in order to engage in legitimate research or for other lawful purposes. There is no tracking of Internet use by adults. According to CIPA, adults are persons who are at least 17 years old; this means that schools are likely to have many students who could request to use computers that have the filter disabled. CIPA also directs school and library officials to conduct public meetings on the Internet filtering to be used in their facilities in order to inform students and patrons.

Related Court Rulings

The American Library Association, the American Civil Liberties Union, and other groups challenged CIPA, alleging that it violated the First Amendment. Yet, the law is clear that no one has constitutional protection to view obscene images and child pornography. The plaintiffs also claimed that CIPA was an erratic and ineffective way to block inappropriate sites, contending that CIPA was contrary to the mission of public libraries and, finally, that it would widen the digital divide.

After a three-judge panel in Pennsylvania struck down several sections of CIPA as unconstitutional,

the U.S. Supreme Court reversed and remanded in *United States et al. v. American Library Association* (2003). The Court decided that the government could establish limits for programs that it funds. The Court addressed the public forum issue, which involved when and where the Internet could be used in public, in reasoning that

> Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather a library provides such access for the same reason it offers other library resources: to facilitate research, learning and recreational pursuits by furnishing material of requisite and appropriate quality. (p. 195)

As part of its rationale in limiting Internet access, the Supreme Court acknowledged that "Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion" (p. 208). Previously, the Court established a three-prong test for obscenity in *Miller v. California* (1973). The first test asks whether an average person using community standards finds a work appealing to a prurient interest. The second test considers whether a work is patently offensive. The third test inquires whether a work lacks serious literary, artistic, or political value. Certainly, this test can be used in evaluating the content of the Internet, especially as it is used in educational settings.

School boards typically adopt policies that require parents, students, and even faculty to use forms before accessing the Internet on school computers. Moreover, boards ordinarily create specific rules for student use of the Internet.

In sum, insofar as the Internet has become a, if not the, major source of information for students, library patrons, and researchers, it has raised a host of legal questions that present novel issues. In an attempt to protect students, CIPA provides school and library officials with technology protection measures to regulate user access to unacceptable sites. Needless to say, as users continue to attempt to circumvent Internet filters, the development of new and improved protection measures is likely to lead to additional litigation in this emerging area of education law.

Robert J. Safransky

See also Acceptable Use Policies; Internet Content Filtering; Technology and the Law; *United States v. American Library Association;* Web Sites, Use by School Districts and Boards

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City of Boerne v. Flores

At issue in *City of Boerne v. Flores* (1997) was the constitutionality of the Religious Freedom Restoration Act (RFRA), which was passed by Congress in 1993. Congress had passed the act in response to an earlier Supreme Court decision rejecting state employees' appeal of their dismissal for smoking a controlled substance as part of their religious practice. In *Flores,* the Court found that this legislation, according to which the government had to demonstrate a compelling reason to interfere with religious practice, could be applied to federal actions but not to the states. *Flores* raised the question of whether receiving federal funds may trigger the protections of the RFRA in disputes involving school districts.

Facts of the Case

The city of Boerne adopted an ordinance designed to preserve its historic district. The congregation of the

local Catholic church, a traditional adobe-style building, had outgrown the facilities. When the archbishop applied for a permit to enlarge the church, the city council denied the permit. The archbishop filed suit in a federal trial court in Texas, claiming that the denial of the permit violated the RFRA.

The RFRA was passed in reaction to the Supreme Court's decision in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990). In that case, members of the Native American Church had been fired and subsequently denied employment benefits because they ingested peyote for sacramental purposes. The Court opted not to apply a test that required that the practice of the government had to substantially burden a person's religious practice. Rather, the Court applied a lesser standard and ruled against the employees. The employees were disciplined for breaking the rules of the employer against the use of alcohol and other drugs. The Court explained that laws that are officially neutral with respect to religion may be applied by the government. Under *Smith,* a compelling, substantial reason is not required before the government places a burden on a person's religious practices.

Congress then passed the RFRA, which required that the state must have a compelling interest before it could burden a person's religious practice. Congress believed that even neutral laws could place a burden on a person's religious practices. According to the law, when the government applies a rule with general applicability, it must also show that it used the least restrictive means to advance the compelling interest. Congress based the RFRA on the Fourteenth Amendment to the Constitution, which made the Bill of Rights (the first ten amendments), applicable to the states. Congress believed that Section 5 of the Fourteenth Amendment gave it the power to enforce the provisions of the Fourteenth Amendment. The amendment requires due process before depriving any person of life, liberty, or property, and equal protection under the law.

In *Flores,* the trial court held that the RFRA was unconstitutional, but the Fifth Circuit reversed in finding it constitutional. On further review, the U.S. Supreme Court held that the RFRA was unconstitutional as applied to the states.

The Court's Ruling

The Court held that Congress does not have unfettered discretion to enact laws under Section 5 of the Fourteenth Amendment. Congress has the power only to enforce the provisions, the Court decided, but may not change the right that it is enforcing. In effect, Congress has remedial power to prevent abuses under the Fourteenth Amendment.

Following its customary practice in such cases, the Court reviewed the legislative history of the RFRA, which was clearly amended during debate to give Congress the power to remedy specific abuses. Congress does not have the power to substantively change law, the Court ruled; therefore, it cannot apply the RFRA to the states.

The voting rights cases of the 19th century supported the Court's conclusions. In the Voting Rights Act, Congress adopted a law to correct the abuses of a citizen's right to vote. The Court explained that in the earlier cases, Congress had the right to enact strong "remedial and preventive measures" to correct the wrongs emerging from a history of racial discrimination in the United States. The Court reasoned that if Congress were to have the right to change the meaning of the Fourteenth Amendment, it would, in effect, have the power to rewrite the Constitution.

Turning again to the situation in *Flores,* the Court asked whether the RFRA met the constitutional requirements for enforcing the Fourteenth Amendment: Any remedial measures must be tailored to address the wrongs that exist. The Court found that the RFRA sweeps too broadly and would lead to intrusion at every level of government. The Court wondered how it would determine whether governmental action substantially burdened a person's religious freedom. Laws of general applicability, the Court maintained, do not unduly burden the religious freedom of the members of the Native American Church. The Court concluded that RFRA actually violates the principles that are needed to assure that the powers of the branches of the federal government are separated.

Justice Sandra Day O'Connor wrote a spirited dissenting opinion. She argued that the Court needed to reconsider its opinion in *Smith.* Her lengthy review of the history of the religion clauses of the First

Amendment led her to conclude the First Amendment guarantees citizens the right not to have their religious practices burdened by the government.

After *Smith,* the Court decided *Gonzales v. Centro Espirita Beneficiente Unaio do Vegetal,* a case involving the American branch of a Brazilian spiritist sect. The members of the sect imported into the United States and used *hoasca,* a tea that contained a controlled substance in violation of the Controlled Substances Act. The church sought relief under RFRA. Justice Roberts delivered the opinion of the Court in an 8-to-0 decision in which Justice Scalia did not participate. The Court upheld the right of the church members not to have undue burdens placed on the free exercise of their religion under RFRA. In a footnote, the Court made it clear that *Flores* meant that the RFRA did not apply to the states. It only applies to actions by the federal government.

While persons cannot use the RFRA to insulate religious practices from the authority of the states, the legislation does apply to actions by the federal government. Thus, *Gonzales* should alert educators in school systems that are supported by federal funds to the fact that the Court will look seriously at policies and procedures that unduly burden the free exercise of religion.

J. Patrick Mahon

See also Prayer in Public Schools; Religious Activities in Public Schools

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Civil Law

In the U.S. legal system, civil law is the branch of law concerning disputes between individuals and/or organizations, where a judgment can be the requirement of action, the cessation of action, and/or monetary payments from one party to another. In general, civil law is all law that is not criminal law, which concerns the state charging someone with having committed a crime. Civil law can involve matters of torts, such as accidents and negligence; disputes regarding contracts, property, wills and trusts, marriages, and family issues; and adherence to administrative regulations, commercial laws, civil rights law, and constitutional law. This entry provides an overview of civil law with examples from education.

Some Basics

Civil laws derive from four main sources: (1) statutes written by a legislature, either a state legislature or the U.S. Congress; (2) regulations created by local, state, and federal agencies, such as the state department of education; (3) common law based on court interpretations of specific cases; and (4) state and the U.S. constitutions. All state laws and regulations are subordinate to their state's constitutions, and no law or regulation may contradict the U.S. Constitution. Every state constitution contains an education provision, while the U.S. Constitution does not.

The vast majority of litigation in education law comes from civil law. State laws mandating school attendance, general curriculum content, and disciplinary practices as well as similar district regulations are examples of civil law. State laws outlawing bilingual education are another example of civil law. Federal legislation, such as the No Child Left Behind Act and the Individuals with Disabilities Education Act, are examples of civil law at the national level. Court cases, such as *Brown v. Board of Education of Topeka* (1954) and *Lau v. Nichols* (1954), are civil law actions.

Civil rights lawsuits, for example, have been an essential tool used by minority students to require that states provide them with educational opportunities equal to those provided to the majority White students in regular education. Minority groups, by themselves, do not have the votes necessary to pass legislation that will ensure that minority students receive quality schooling, if those laws are resisted by the majority White population. Nor are they able to stop discriminatory practices, if those practices are supported by

the majority White population. Relying on the U.S. Constitution and the Civil Rights Act, civil rights lawsuits have helped these minority students improve their educational opportunities where legislative success would be unlikely or impossible.

Nevertheless, civil rights lawsuits, while necessary, have not been sufficient to effect substantive, lasting change by themselves. To improve the political, social, and structural aspects of schooling for minority students, protests and public education campaigns, as well as legislation, when possible, have been needed in addition to the legal victories.

Civil Lawsuits

In pursuing a civil lawsuit, plaintiffs have the burden of proving their cases against defendants. Plaintiffs will prevail if they can prove their cases by a preponderance of all of the evidence presented at trial. In numerical terms, plaintiffs win if there is more than a 50% probability that their claims are true. If not, the defendants win. This is a much lower burden of proof than in a criminal trial, where claims must be true beyond a reasonable doubt. In numerical terms, *beyond a reasonable doubt* is generally estimated to mean that there is at least a 95% likelihood that the prosecution's claims are correct. In a few tort claims, such as fraud, plaintiffs must prove their case with *clear and convincing evidence,* a standard between *preponderance* and *beyond a reasonable doubt.*

There are times when the burden of proof can shift from plaintiffs to defendants in civil suits. In these situations, the plaintiffs first present a preponderance of evidence that some aspect of their case is true; this creates a presumption that the defendants have committed wrong actions. To win, defendants must refute the presumption by a preponderance of the evidence. For example, in civil actions by parents to desegregate a school system, the parents can first demonstrate that a school board intentionally segregated at least one part of the system. Once the parents have made this demonstration with a preponderance of the evidence, there is a presumption that the entire school district is intentionally segregated. Once the judge determines that this has occurred, the defendant school board must prove with a preponderance of the evidence that the entire school district has not been intentionally segregated. Otherwise, the board will be subject to a judicial desegregation order.

In gathering evidence for a civil trial, considerable cooperation is required between plaintiffs and defendants. The attorney for any party may demand nonprivileged information from the other parties about any matter that is relevant to the case. This can include requests for documents, visits to property, deposition interviews with parties and their proposed witnesses, and a list from the other parties of any other persons who might have relevant information. Further, in a civil lawsuit, the defendants and the plaintiffs themselves must be available for deposition interviews and to testify as witnesses. If, at trial, a party refuses to testify, the judge can instruct the jury that they may make a negative inference against that party in their deliberations.

Possible Outcomes

Generally, in civil cases, losing defendants are required to compensate the plaintiffs for losses caused by their actions. In a contract case, that would be the amount that the plaintiff lost as a result of the defendant's violation of the terms of the contract. In a tort case, that would be the amount of money necessary to put the plaintiffs back in the position they would have been in if the tort had not taken place. In cases where negligence has led to personal injuries, it can be very difficult to determine the amount of money that would compensate a plaintiff for the loss of a limb or the pain and suffering experienced during recovery. At times, juries have awarded hundreds of millions of dollars in these cases.

In certain civil cases, such as actions for negligence and civil rights violations, the plaintiff may demonstrate that the defendant's behavior was willful or especially egregious and may be awarded punitive damages in addition to compensatory damages for the harm caused to the plaintiff. Punitive damages are awarded to make a public example of the defendant and to deter the defendant and similar individuals or organizations, like a large corporation, from engaging in this type of behavior in the future. Punitive damages are often awarded in torts where the defendant is

a wealthy corporation or the actual injury is small and there is a low compensatory award, such as that provided for harm to personal dignity (like invasion of privacy) or for the violation of a civil right (like racial harassment).

The result of a civil lawsuit can also be the requirement that defendants cease from engaging in a behavior or that they perform court-mandated actions. In education, for example, some state legislatures have outlawed bilingual education as a method for teaching English language learners, and courts have mandated busing and other race-based assignments to end school segregation. Unlike defendants in criminal lawsuits, defendants in civil suits may not be incarcerated as the direct result of losing a civil trial. However, a civil defendant may be incarcerated for violating a court order to act or desist in acting, under a contempt of court citation.

An action under civil law does not preclude an action under criminal law, or vice versa. By way of illustration, in some states, if a student were to hurt a teacher while at school, it is possible for the teacher to sue the parents of the student for money damages under civil law and for the state to also charge the student with the crime of assault. The civil lawsuit would be filed by the teacher (the plaintiff) and would seek some judgment, most likely an amount of money, against the parents of the student (the defendants). The criminal case would be filed by the government (the prosecution) against the student (the defendant). Each case would occur separately.

In civil law, there can be only one trial regarding claims arising from a single transaction or occurrence. The losing party, whether it is the plaintiff or defendant, may appeal the decision to a higher court for review, but a new trial may not be initiated on the same issue by the same plaintiff against the same defendant. This is referred to as *res judicata.* It corresponds to the prohibition against double jeopardy in criminal law.

Eric M. Haas

See also Bill of Rights; *Brown v. Board of Education of Topeka;* Civil Rights Act of 1964; Common Law; Contracts; *Lau v. Nichols;* No Child Left Behind Act; Regulation; Remedies, Equitable Versus Legal

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Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).
No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

Civil Rights Act of 1871 (Section 1983)

The Civil Rights Act of 1871 (Section 1983) was intended to provide a remedy in federal courts for former slaves whose rights were violated by the Ku Klux Klan (KKK) or by state officials during the Reconstruction period in American history. After 1871, literally hundreds of Klansmen and public officials were sued successfully for violating the Fourteenth Amendment rights of Blacks. Klan membership and activity declined commensurately. Although Section 1983 was rarely cited as the basis for federal litigation for almost a century after that, it has been the source of much civil rights litigation in the federal courts over the last half century. Elected public officials and educational leaders at all levels are frequent targets of those actions. Section 1983 is now viewed as bane by many public officials who fear and dislike its provision that permits personal payment of damages for violation of someone's constitutional rights.

The Law and Its Context

Pursuant to the Union victory in the Civil War, the Thirteenth Amendment (1865) freed the slaves, the Fourteenth Amendment (1868) made them citizens with the rights to due process and equal protection under the law, and the Fifteenth Amendment (1870) guaranteed Black males the right to vote. In response to

these constitutional amendments guaranteeing citizenship and related rights to former slaves, the KKK began a reign of terror against Black citizens that included threats, public whippings, arson, and lynchings. The intent, of course, was to frighten and intimidate Black citizens and keep them socially and economically subservient to Whites. Klansmen referred to their illegal and brutal tactics as "keeping Blacks in their place."

To exacerbate the situation, many politicians in the postwar South were Klan supporters who were unwilling or unable to enforce the law and protect the safety and legal rights of Blacks. Further, some officials deliberately used the authority of their offices to help the KKK harass Black citizens. It was clear that quick and decisive action was necessary to protect the newly acquired constitutional rights of Blacks.

The Civil Rights Act of 1871 was passed by the 41st U.S. Congress to prevent public officials and the KKK in the South from violating the constitutional rights of former slaves. Also known as an act to enforce the provisions of the Fourteenth Amendment to the Constitution of the United States, and for other purposes, the 1871 act was authored by former Union general Benjamin Butler, Congressman from Massachusetts, who was universally hated by Southern Whites. Presently codified and known as 42 U.S.C. § 1983, the original Civil Rights Act of 1871 included the 1870 Force Act and the 1871 Ku Klux Klan Act and was intended to provide a civil remedy for Black citizens who were being abused by the KKK and sympathetic public officials.

The following statutory language warns public officials of the consequences of denying constitutional rights to others:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, 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, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Civil Rights Act of 1871 did not create any new civil rights, but it did provide a civil remedy for abuses then being committed by the KKK and some public officials in the South. The act allowed individual citizens to sue state officials in federal courts for civil rights violations. In order to gain access to federal courts, plaintiffs had to demonstrate that state officials allegedly violated civil rights guaranteed in the Constitution or federal statutes.

Impact and Evolution

Under provisions in the Civil Rights Act of 1871, federal troops, rather than state militias, were used to enforce the law in the South. In addition, Klansmen were prosecuted in federal courts, where juries often included Black citizens, rather than in state courts where juries were invariably all White and not likely to indict, much less convict, a Klansman. Hundreds of violent Klansmen were fined or imprisoned under the 1871 act, and KKK violence decreased significantly in the South. Although the KKK was successful in delaying the extension of voting rights to former slaves under the Fifteenth Amendment, Klan membership and activity declined sharply after 1871, and the KKK did not resurface in force until 1915.

For most of its 135-year history, the Civil Rights Act of 1871 (Section 1983) prompted relatively few lawsuits, because attorneys did not view the statute as a reliable check on the behavior of public officials. However, perceptions in the legal profession changed after the U.S. Supreme Court's ruling in *Monroe v. Pape* (1961). In *Monroe,* the Court listed three purposes of the Civil Rights Act of 1871:

1. to override certain kinds of state laws,
2. to provide plaintiffs with a federal remedy when state law was inadequate, and
3. to provide a federal remedy where the state remedy, although adequate in theory, was not adequate in practice.

Monroe prompted renewed interest in the Civil Rights Act of 1871 (Section 1983) as the basis for civil rights legislation. For example, the act was invoked in subsequent civil rights actions including the 1964 murders of James Chaney, Andrew Goodman, and Michael Schwerner and the 1965 murder of Viola Luizzo. Klan members were allegedly involved in the murders of all four civil rights activists.

Today, the Civil Rights Act of 1871 is often invoked whenever a state official allegedly violates a constitutional right. It is now perhaps the most powerful legal precedent used by federal courts to protect constitutional rights. Seldom cited as a basis for litigation until the mid-1960s, the act then became an effective weapon against state officials for every conceivable cause. Coverage under the Civil Rights Act of 1871 (Section 1983) is limited in two ways. First, it imposes liability on public officials only for actions carried out "under color of [law], custom, or usage." Second, it imposes liability only on the defendant official rather than the state, and monetary damages may be levied directly against the defendant, who is sued in his or her person for violating the constitutional rights of another individual.

Section 1983 is often cited as the basis for federal suits against law enforcement officers and public officials who are charged with enforcing and administering the law as part of their assigned duties. Because all public officials, including school superintendents and college presidents, act under color of the law, custom, or usage, all are potential defendants in Section 1983 actions. Furthermore, they must be sued in their individual capacities in accordance with Section 1983 provisions—a chilling prospect for professionals dependent on their careers and salaries for economic security.

Robert C. Cloud

See also Civil Rights Movement; Fourteenth Amendment

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Civil Rights Act of 1964

The Civil Rights Act of 1964, passed after decades of legal and grassroots advocacy, is viewed as a landmark in the struggle for civil rights in the United States. The intent of the Civil Rights Act of 1964 was to enforce the Equal Protection Clause of the U.S. Constitution, to ensure the constitutional right to vote, and to prohibit racial segregation in public accommodations and educational institutions. In addition to prohibitions against discrimination on the basis of race, the act also makes it illegal to segregate on the basis of color, religion, and national origin. Further, the law makes it illegal for private employers to discriminate on the basis of race, color, religion, national origin, and sex. According to most commentators, the prohibition against sex discrimination was added to the bill at the last moment as a ploy by some lawmakers to ensure that the bill would not pass Congress. The strategy backfired, and sex discrimination was included, albeit with very little legislative history explaining the intent of Congress. This entry looks at the historical background of civil rights, the contents of the act, and its enforcement.

Historical Background

The civil rights movement advocated an end to the "separate but equal" doctrine enunciated in *Plessy v. Ferguson* (1896), a dogma that legally upheld racial segregation in schools, public accommodations, and even cemeteries. The movement also fought for an end to literacy tests, examinations given at voting booths

that were designed to keep African Americans and others from exercising their constitutional right to vote. Literacy tests went well beyond proving that voters could read or write. The tests asked increasingly difficult and arcane questions about the voting process, such as what time of day is a senator sworn into office; these challenges were designed to ensure that Blacks in the South and Hispanics in the Southwest would not be able to vote.

The civil rights movement utilized the legal system in an attempt to end segregation, most notably in *Brown v. Board of Education of Topeka* (1954), the U.S. Supreme Court case that repudiated *Plessy*'s notion of "separate but equal" as it applied to public education in ruling that educational facilities must not be segregated by race. Yet, 10 years after *Brown,* only 1% of students in the South attended integrated schools. Thus, the movement also engaged in grassroots organizing and civil disobedience to gain national attention.

Civil rights are legal claims for protection that individuals are entitled to make on the government. Civil rights include those rights that emanate from the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

What the Law Says

The Civil Rights Act of 1964 is the most comprehensive civil rights statute in the United States. The act is composed of 11 separate titles. In the education context, the four most important titles cover voting rights (Title I), desegregation in public schools (Title IV), nondiscrimination in federally assisted programs (Title VI), and equal employment opportunity (Title VII).

The Fifteenth Amendment to the Constitution, ratified in 1870 after the Civil War, prohibits denial of the right to vote on account of race. Yet, by 1880, the voting rights of African Americans, Asian Americans, and Hispanics had been rescinded by so-called Jim Crow laws. Poll taxes and literacy tests kept poor Whites and Blacks, Asians, and Hispanics from voting in the United States. In 1962, the Twenty-Fourth Amendment was ratified, outlawing poll taxes. In 1964, Congress enacted the Civil Rights Act, in which Title I provided for federal enforcement of the right to vote. In 1965, Congress passed the Voting Rights Act, making it illegal to intimidate voters and providing for the federal government to register voters in the southern states. Title I and the Voting Rights Act apply to state and county school board elections and ensure the right to vote regardless of race, color, or national origin.

Title IV of the Civil Rights Act requires public schools to desegregate and not take into account a student's race, color, religion, or national origin in making school assignments. Public schools that fall under the purview of the act include elementary and secondary schools as well as public colleges and institutions of higher education. Title IV is an example of Congress passing a law that in many ways enforces a Supreme Court opinion, in this instance, *Brown.* Although *Brown* required public schools to desegregate, the Civil Rights Act of 1964 and the regulations that implement Title IV provide an enforcement mechanism for the Department of Education to use to investigate schools and postsecondary institutions to determine if they are integrated.

Title VI covers all programs, including schools and colleges, that receive federal funds from the U.S. Department of Education. Title VI prohibits the exclusion of any participant on the basis of his or her race, color, or national origin. The Office for Civil Rights (OCR) in the Department of Education is responsible for enforcing nondiscrimination in federally assisted programs.

Title VII of the Civil Rights Act provides equal employment opportunity. The law prohibits discrimination in hiring, firing, referral, and promotion on the basis of the worker's race, color, religion, sex, or national origin. The Equal Employment Opportunity Commission (EEOC) is responsible for investigating complaints of employment discrimination and enforcing the law. In addition to the federal prohibitions against employment discrimination, states have antidiscrimination laws. The EEOC and state agencies have time limits for filing a charge and in some cases will work together to investigate cases.

Enforcement Issues

The Civil Rights Act established a number of federal agencies to enforce the antidiscrimination laws,

including the OCR and the EEOC. If individuals believe that they have been discriminated against in employment, there is a process to file discrimination charges with the EEOC. Often, EEOC officials contact employers, conduct investigations, and, in many instances, settle disputes. OCR employs a similar process. That is, individuals who believe that educational institutions have discriminated against them on the basis of race or sex, for example, can write letters to the OCR. OCR officials generally contact institutions and in, some cases, conduct investigations.

Most discrimination cases, whether in employment or education, settle prior to going to court. If cases do not settle, officials at the appropriate agencies decide whether to file suit. If agency officials decline to file judicial complaints, they may provide the individuals with right-to-sue letters that grant them limited periods of time during which to file complaints in court.

Over the years, courts have interpreted sections of the Civil Rights Act as providing private rights of action to remedy discrimination. Private rights of action allow persons who have been harmed by discriminatory practices to file suits, even if the appropriate federal agencies decline to do so. Often referred to as a private attorney general, the right of individuals to file suits recognizes that government agencies may lack the resources to initiate litigation for each and every valid claim of discrimination. In such cases, individuals may act like private attorneys general by filing their own suits.

In the employment context, individuals have private rights of action. In other words, if the EEOC decides not to file a case against an employer under Title VII, the worker is provided with a right-to-sue letter allowing a private suit against the employer. The courts have recognized a private right of action under Title VII to file cases of intentional discrimination (if, for example, the purpose of a hiring policy is discriminatory) and disparate impact discrimination complaints (if a policy is neutral but has the effect of harming a racial group) in court. Put another way, if the EEOC does not file a case, the individual has a right to go to court.

The rules for cases under Title VI of the Civil Rights Act are different from those filed under Title VII or by the EEOC. If the OCR does not file a case, individuals may file intentional discrimination claims in court against federally funded programs. However, individuals may not file Title VI disparate impact cases in court. This distinction arose due to a 2001 U.S. Supreme Court case, *Alexander v. Sandoval* (2001), in which the justices determined that there is no private right of action to file a disparate impact claim pursuant to Title VI. Accordingly, only officials of the OCR may file disparate impact charges under the agency's regulations.

Karen Miksch

See also Civil Rights Movement; Disparate Impact; Equal Employment Opportunity Commission; Title VII

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Plessy v. Ferguson, 163 U.S. 537 (1896).

Civil Rights Movement

The civil rights movement, a decades-long effort to win equitable treatment for African Americans and other groups underrepresented in American society, is described chronologically in this entry. Two themes are evident. First, federal protection of civil rights has a paradoxical relationship with states' rights. All civil rights legislation has been opposed or limited in response to the argument that pursuant to the Tenth Amendment, the federal government should not involve itself in areas of state responsibility. The Supreme Court repeatedly voiced this concern and, in

the past, invalidated civil rights legislation partly on this ground.

Deference to state law enforcement prerogatives always has been a centerpiece of Justice Department civil rights enforcement policy. For decades, Congress repeatedly rebuffed so basic a measure as antilynching legislation in the name of states' rights. Yet, the original federal civil rights statutes, and their underlying constitutional amendments, were responses to outrages by states or to private outrages that states failed to ameliorate. Given the origins of the need for federal protection of civil rights, states' interests often received undue weight in shaping federal civil rights policy.

Second, for many years, the federal government was more involved in denying the rights of Blacks and other minorities than in protecting their interests. The quest for equal education emerged as early as 1787 in an unsuccessful petition by Reverend Prince Hall and Black citizens to the Massachusetts state legislature for equal educational facilities. Well into the 20th century, federal employment policy included racial segregation and exclusion. De jure segregation in politics, the armed forces, public housing services, and, of course, education demonstrate the depth of federal involvement in discrimination.

Early Federal Efforts

The Bureau of Refugees, Freedmen, and Abandoned Lands (Freedmen's Bureau), created near the end of the Civil War, is viewed as the federal government's initial civil rights enforcement effort. The bureau established or supervised many kinds of schools: day, night, Sunday, industrial, and higher education. In fact, many of the nation's Black colleges, including Howard University, Hampton Institute, and Fisk University, were founded with the bureau's aid. Even so, the initial effort to assist Blacks was tainted by, among other factors, the bureau's role in establishing the oppressive system of southern labor contracts. With few exceptions, federal protection of Blacks via the Freedmen's Bureau ended in 1868.

Other congressional Reconstruction legislation employed a variety of techniques to protect civil rights. The Civil Rights Act of 1866 and the Force Act of 1870 imposed penalties on those who enforced discriminatory features of the southern Black Codes. In addition, the 1870 law not only made it a crime to conspire to hinder a citizen's exercise of federal rights but also provided special protection for Black voters. The Civil Rights Act of 1871 authorized civil actions and criminal penalties against those who violated the constitutional rights of Blacks, authorizing the president to use federal forces to suppress insurrections or conspiracies to deprive people of their federal rights. The Civil Rights Act of 1875, the culmination of the Reconstruction period civil rights program, imposed civil and criminal sanctions for discrimination in public accommodations, conveyances, and places of amusement. Armed with the criminal provisions, federal prosecutors brought thousands of cases in southern federal courts as the primary vehicle through which the government protected civil rights.

This burst of protective activity, along with the rest of the Reconstruction, disintegrated with Rutherford B. Hayes's compromise of 1877 and the withdrawal of federal troops from the South. In 1878, federal authorities prosecuted only 25 federal criminal civil rights violations. There are many reasons why federal criminal prosecutions were and are ineffective to protect civil rights. First, shortly after enactment of the post–Civil War antidiscrimination legislation, the Supreme Court limited Congress's power to protect civil rights when, in *United States v. Reese* (1876) and *James v. Bowman* (1903), it invalidated portions of the 1870 act. Further, in *United States v. Harris* (1883) and *Baldwin v. Franks* (1887), the Court struck down the criminal conspiracy section of the 1871 act and the *Civil Rights Cases* (1883), finding that the 1875 act was unconstitutional. These cases included the *Slaughterhouse Cases* (1873) and *United States v. Cruikshank* (1876), decisions that narrowly construed constitutional and statutory protections.

The Era of "Separate but Equal"

At the start of the 20th century, the Civil Rights Repeal Act of 1894 and reorganization of federal law in 1909 further weakened federal law. Similar judicial difficulties characterized federal civil remedies to protect civil rights. For example, in *Plessy v. Ferguson*

(1896), the Supreme Court declared "separate but equal" the law of the land, providing legal justification for six decades of Jim Crow segregation. Then, the Court upheld separation of the races in *Berea College v. Commonwealth of Kentucky* (1908). The Court explicitly extended separate but equal to K–12 education in *Gong Lum v. Rice* (1927).

From the Compromise of 1877 until the 1940s, references to federal "protection" of civil rights were a misnomer at best. The end of World War II renewed violence against Blacks. President Harry S Truman, in Executive Order 9008, created a presidential civil rights committee to conduct inquiries and to recommend civil rights programs. Truman, like other presidents, promoted civil rights most effectively in areas not requiring legislative action.

Southern political power in Congress precluded significant civil rights legislation. In 1947, Truman authorized the Justice Department to submit an amicus curiae brief opposing judicial enforcement of racially restrictive covenants. This brief was influential in the Supreme Court's decision in *Shelly v. Kramer* (1948), which rendered racially restrictive housing covenants judicially unenforceable. From 1948 through 1951, Truman issued an array of executive orders prohibiting discrimination in federal activities, culminating in his desegregating the military. Civil rights enforcement received little attention early in the administration of Dwight D. Eisenhower, but there were important exceptions to this pattern. Executive Order 10479 (1953) extended the antidiscrimination provisions previously required in defense contracts to all government procurement contracts.

The *Brown* Breakthrough

Change was on the horizon in education in the wake of *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Regents for Higher Education* (1950), wherein the Supreme Court invalidated segregation in higher education. Of course, the Supreme Court's unanimous decision in *Brown v. Board of Education of Topeka* (1954) was a milestone. Following *Brown,* President Eisenhower could not avoid civil rights issues, exemplified in the controversy surrounding the desegregation of schools in Little Rock, Arkansas (*Cooper v. Aaron,* 1958). Little Rock was not a turning point in the administration's enforcement efforts. Even when armed with increased authority to investigate denials of voting rights by the Civil Rights Act of 1957, the Justice Department brought few cases.

President John F. Kennedy's administration began with little impetus toward substantial civil rights achievement. However, the rising tide of civil rights activity, increased public awareness, and continued southern resistance to desegregation made new federal and state confrontations inevitable. In May 1961, federal marshals protected freedom riders. In September 1962, in connection with efforts to integrate the University of Mississippi, heavily outnumbered federal marshals and federalized National Guard troops withstood an assault by segregationists. Only the arrival of thousands of federal troops restored order. In the Birmingham crisis of 1963, which gained notoriety for the brutal treatment of demonstrators by state and local law enforcement officers, the federal government tried to act as a mediator.

The Kennedy administration's inability to deal forcefully with situations such as that in Birmingham led the president to propose further federal civil rights legislation. At the executive branch's request, the Interstate Commerce Commission promulgated stringent rules against discrimination in transportation terminals. In November 1962, President Kennedy issued an executive order prohibiting discrimination in public housing projects and in projects covered by direct, guaranteed federal loans. Further, in executive orders in 1961 and 1963, Kennedy both required affirmative action by government contractors and extended the executive branch's antidiscrimination program in federal procurement contracts to all federally assisted construction projects.

Soon after Lyndon B. Johnson succeeded to the presidency, he endorsed Kennedy's civil rights legislation. Due in part to his direct support, Congress enacted the Civil Rights Act of 1964, the most comprehensive civil rights measure in American history. The act outlaws discrimination in public accommodations, in federally assisted programs, and by large private employers, extending federal power to deal with

voting discrimination. Title VII of the act created a substantial new federal bureaucracy to enforce antidiscrimination provisions in employment. The 1964 act also marked the first time that the Senate voted cloture against an anti–civil rights filibuster.

Unlike the Reconstruction civil rights program, Congress's 1960s civil rights legislation survived judicial scrutiny. In a series of cases from 1964 to 1976, the Supreme Court both sustained the new civil rights program and revived the Reconstruction-era laws. For example, in *Katzenbach v. McClung* (1964) and *Heart of Atlanta Motel v. United States* (1964), the Court rejected attacks on the act's public accommodations provisions. Consequently, it appeared that, at least formally, the legal battle against racial discrimination was won. The federal civil rights program encompassed nearly all public and private purposeful racial discrimination in public accommodations, housing, employment, education, and voting. Future civil rights progress would have to come through vigorous enforcement, through programs aimed at relieving poverty, through affirmative action, and through laws benefiting groups other than Blacks.

Retrenchment

Within six months of President Nixon's inauguration, for the first time, the Justice Department opposed the NAACP Legal Defense and Education Fund in a desegregation case. Yet, under the pressure of Supreme Court decisions and the momentum of the civil rights efforts under President Johnson, the Nixon administration did help promote new levels of southern integration as his 1968 "southern strategy" included campaigning against busing. However, the administration continued to lash out at "forced busing."

An era of ambivalence and uncertainty directed civil rights enforcement from 1970 through 1986. Civil rights enforcement became engulfed in the constitutionality of desegregation remedies, for example, whether to bus schoolchildren for purposes of desegregation. The Supreme Court addressed state-mandated school segregation in numerous post-*Brown* cases such as *Swann v. Charlotte-Mecklenburg board of Education* (1971); *Keyes v. School District No. 1, Denver, Colorado* (1973); and *Milliken v. Bradley* (1974).

The comprehensive coverage of federal civil rights law did not eliminate the inferior status of Blacks in American society. Pressure mounted for assistance in the form of affirmative action or preferential hiring and admissions in higher education. These programs, most notably reflected by *Regents of the University of California v. Bakke* (1978), divided even the liberal community traditionally supportive of civil rights enforcement.

The period since 1986 reflects an era of retrenchment and unpredictability with a weakened policy direction for civil rights law and legislation. During this period, the Supreme Court narrowly interpreted constitutional provisions and federal statutes that provided protections for the civil rights of various minorities. In particular, minorities experienced setbacks in desegregation (*Missouri v. Jenkins,* 1990; *Board of Education of Oklahoma City Public Schools v. Dowell,* 1991; *Freeman v. Pitts,* 1992) and race-conscious admissions plans in K–12 schools (*Parents Involved in Community Schools v. Seattle School District No. 1,* 2007). Thus, the struggle for civil rights continues.

Paul Green

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *Dowell v. Board of Education of Oklahoma City Public Schools;* Federalism and the Tenth Amendment; *Freeman v. Pitts; Keyes v. School District No. 1, Denver, Colorado; Milliken v. Bradley; Missouri v. Jenkins; Parents Involved in Community Schools v. Seattle School District No. 1; Plessy v. Ferguson; Swann v. Charlotte-Mecklenburg Board of Education;* Title VII

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Cleveland Board of Education v. Loudermill

In *Cleveland Board of Education v. Loudermill* (1985), the Supreme Court specified the right of educational employees to some kind of pretermination notice as part of due process that must be given as part of educational performance assessment. In addition to notice of the intended action and the rationale for that action, board officials must also afford school employees a chance to present their side of the issue. This entry discusses *Loudermill,* the Court's opinion, and its impact.

Facts of the Case

Loudermill involves a security guard named James Loudermill, who was hired by the Cleveland Board of Education in 1979 after completing an application form on which he indicated that he had never been convicted of a felony. When board officials learned that Loudermill had, in fact, been convicted of grand larceny in 1968, he was dismissed in November of 1980 for not being honest on his application. Prior to *Loudermill,* many administrators would have considered this a clear case in which the board should have been able to dismiss the employee without the trouble of a hearing or the need to allow the employee the right to present his or her side of the issue. The problem, however, arises not in whether the substance of a board's action to terminate an employee's job was correct, but whether the process by which it was completed was proper.

Loudermill initially appealed his dismissal to the Civil Service Commission (CSC), because, as a "classified civil servant," Ohio law entitled him to an administrative review of his dismissal for cause. A referee appointed by the CSC recommended reinstatement on the basis of Loudermill's argument that he should have been given the opportunity to explain that he was not dishonest, insofar as he thought that the conviction was only a misdemeanor and not a felony. However, the full commission overturned the referee's action and upheld the dismissal. It took nine months for this to happen, which Loudermill claimed was too long.

Even so, a federal trial court held that due to a heavy docket, the delay was acceptable. The Sixth Circuit found that the board of education did not provide procedural due process in "that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing" (p. 4). On further review, the Supreme Court affirmed this finding.

The Court's Ruling

In *Loudermill,* Justice White, delivering the opinion of the Court, clearly stated that rights to life, liberty, and property cannot be compromised without

"constitutionally adequate" procedures. That Loudermill had a property interest seems not to be disputed, but the argument was over the procedures that would be required to impinge on that interest. The Court noted that federal law mandates some minimal requirements, regardless of what state law may say. The Court said: "We have described 'the root requirement' of the Due Process Clause as being 'that an individual be given the opportunity for a hearing before he is deprived of any significant property interest'" (*Boddie v. Connecticut,* cited in *Loudermill,* p. 5).

The Court balanced Loudermill's property interest in his job against "the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination" (p. 6). Given the facts of case, the Court would not rule on whether the substance of the decision was correct; however, the decision said that Loudermill was entitled to due process, even if he would be dismissed anyway. The "public employee is entitled to oral or written notice of the charges against him, and explanation of the employer's evidence, and an opportunity to present his side of the story" (p. 7), the Court said.

What *Loudermill* means to educators, especially school administrators, is that no matter what the facts are, employees who are being dismissed have a right to be heard. Therefore, even if an employee's actions are so unprofessional or offensive that officials are certain that they will lead to dismissal, they must still afford individuals due process. Put another way, officials can dismiss employees for cause but must first afford them the opportunity to be heard.

A. William Place

See also Due Process Rights: Teacher Dismissal

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Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Cleveland Board of Education v. Loudermill (Excerpts)

In Cleveland Board of Education v. Loudermill *and its companion case,* Parma Board of Education v. Donnelly, *the Supreme Court ruled that under the Fourteenth Amendment, school boards must provide employees who have property interests in their jobs, whether through tenure or unexpired contracts, to procedural due process before dismissal*

Supreme Court of the United States

CLEVELAND BOARD OF EDUCATION,
Petitioner,

v.

LOUDERMILL

PARMA BOARD OF EDUCATION

v.

DONNELLY

470 U.S. 532

Argued Dec. 3, 1984.

Decided March 19, 1985.

Justice WHITE delivered the opinion of the Court.

In these cases we consider what pretermination process must be accorded a public employee who can be discharged only for cause.

I

In 1979 the Cleveland Board of Education . . . hired . . . James Loudermill as a security guard. On his job application, Loudermill stated that he had never been

convicted of a felony. Eleven months later, as part of a routine examination of his employment records, the Board discovered that in fact Loudermill had been convicted of grand larceny in 1968. By letter dated November 3, 1980, the Board's Business Manager informed Loudermill that he had been dismissed because of his dishonesty in filling out the employment application. Loudermill was not afforded an opportunity to respond to the charge of dishonesty or to challenge his dismissal. On November 13, the Board adopted a resolution officially approving the discharge.

Under Ohio law, Loudermill was a "classified civil servant." Such employees can be terminated only for cause, and may obtain administrative review if discharged. Pursuant to this provision, Loudermill filed an appeal with the Cleveland Civil Service Commission on November 12. The Commission appointed a referee, who held a hearing on January 29, 1981. Loudermill argued that he had thought that his 1968 larceny conviction was for a misdemeanor rather than a felony. The referee recommended reinstatement. On July 20, 1981, the full Commission heard argument and orally announced that it would uphold the dismissal. Proposed findings of fact and conclusions of law followed on August 10, and Loudermill's attorneys were advised of the result by mail on August 21.

Although the Commission's decision was subject to judicial review in the state courts, Loudermill instead brought the present suit in the Federal District Court for the Northern District of Ohio. The complaint alleged that § 124.34 was unconstitutional on its face because it did not provide the employee an opportunity to respond to the charges against him prior to removal. As a result, discharged employees were deprived of liberty and property without due process. The complaint also alleged that the provision was unconstitutional as applied because discharged employees were not given sufficiently prompt postremoval hearings.

Before a responsive pleading was filed, the District Court dismissed for failure to state a claim on which relief could be granted. It held that because the very statute that created the property right in continued employment also specified the procedures for discharge, and because those procedures were followed, Loudermill was, by definition, afforded all the process due. The postermination hearing also adequately protected Loudermill's liberty interests. Finally, the District Court concluded that, in light of the Commission's crowded docket, the delay in processing Loudermill's administrative appeal was constitutionally acceptable.

The other case before us arises on similar facts and followed a similar course. Respondent Richard Donnelly was a bus mechanic for the Parma Board of Education. In August 1977, Donnelly was fired because he had failed an eye examination. He was offered a chance to retake the examination but did not do so. Like Loudermill, Donnelly appealed to the Civil Service Commission. After a year of wrangling about the timeliness of his appeal, the Commission heard the case. It ordered Donnelly reinstated, though without backpay. In a complaint essentially identical to Loudermill's, Donnelly challenged the constitutionality of the dismissal procedures. The District Court dismissed for failure to state a claim, relying on its opinion in *Loudermill.*

The District Court denied a joint motion to alter or amend its judgment, and the cases were consolidated for appeal. A divided panel of the Court of Appeals for the Sixth Circuit reversed in part and remanded. . . . it concluded that the compelling private interest in retaining employment, combined with the value of presenting evidence prior to dismissal, outweighed the added administrative burden of a pretermination hearing. With regard to the alleged deprivation of liberty, and Loudermill's 9-month wait for an administrative decision, the court affirmed the District Court, finding no constitutional violation.

. . . .

Both employers petitioned for certiorari. In a cross-petition, Loudermill sought review of the rulings adverse to him. We granted all three petitions and now affirm in all respects.

II

Respondents' federal constitutional claim depends on their having had a property right in continued employment. If they did, the State could not deprive them of this property without due process.

Property interests are not created by the Constitution, "they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." The Ohio statute plainly creates such an interest. Respondents were "classified civil service employees" entitled to retain their positions "during good behavior and efficient service," who could not be dismissed "except . . . for . . . misfeasance, malfeasance, or nonfeasance in office." The statute plainly supports the conclusion, reached by both lower courts, that respondents possessed property rights in continued employment. Indeed, this question does not seem to have been disputed below.

The Parma Board argues, however, that the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation. The Board stresses that in addition to specifying the grounds for termination, the statute sets out procedures by which termination may take place. The procedures were adhered to in these cases. According to petitioner, "[t]o require additional procedures would in effect expand the scope of the property interest itself."

. . . .

. . . it is settled that the "bitter with the sweet" approach misconceives the constitutional guarantee. If a clearer holding is needed, we provide it today. The point is straightforward: the Due Process Clause provides that certain substantive rights—life, liberty, and property—cannot be deprived except pursuant to constitutionally adequate procedures. The categories of substance and procedure are distinct. Were the rule otherwise, the Clause would be reduced to a mere tautology. "Property" cannot be defined by the procedures provided for its deprivation any more than can life or liberty. The right to due process "is conferred, not by legislative grace, but by constitutional guarantee. While the legislature may elect not to confer a property interest in [public] employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards."

In short, once it is determined that the Due Process Clause applies, "the question remains what process is due." The answer to that question is not to be found in the Ohio statute.

III

An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." We have described "the root requirement" of the Due Process Clause as being "that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest." This principle requires "some kind of a hearing" prior to the discharge of an employee who has a constitutionally protected property interest in his employment. As we pointed out last Term, this rule has been settled for some time now. Even decisions finding no constitutional violation in termination procedures have relied on the existence of some pretermination opportunity to respond. For example, in *Arnett* six Justices found constitutional minima satisfied where the employee had access to the material upon which the charge was based and could respond orally and in writing and present rebuttal affidavits.

The need for some form of pretermination hearing, recognized in these cases, is evident from a balancing of the competing interests at stake. These are the private interests in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.

First, the significance of the private interest in retaining employment cannot be gainsaid. We have frequently recognized the severity of depriving a person of the means of livelihood. While a fired worker may find employment elsewhere, doing so will take some time and is likely to be burdened by the questionable circumstances under which he left his previous job.

Second, some opportunity for the employee to present his side of the case is recurringly of obvious value in reaching an accurate decision. Dismissals for cause will often involve factual disputes. Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect.

The cases before us illustrate these considerations. Both respondents had plausible arguments to make that might have prevented their discharge. The fact that the Commission saw fit to reinstate Donnelly suggests that an error might have been avoided had he been provided an opportunity to make his case to the Board. As for Loudermill, given the Commission's ruling we cannot say that the discharge was mistaken. Nonetheless, in light of the referee's recommendation, neither can we say that a fully informed decision maker might not have exercised its discretion and decided not to dismiss him, notwithstanding its authority to do so. In any event, the termination involved arguable issues, and the right to a hearing does not depend on a demonstration of certain success.

The governmental interest in immediate termination does not outweigh these interests. As we shall explain, affording the employee an opportunity to respond prior to termination would impose neither a significant administrative burden nor intolerable delays. Furthermore, the employer shares the employee's interest in avoiding disruption and erroneous decisions; and until the matter is settled, the employer would continue to receive the benefit of the employee's labors. It is preferable to keep a qualified employee on than to train a new one. A governmental employer also has an interest in keeping

citizens usefully employed rather than taking the possibly erroneous and counterproductive step of forcing its employees onto the welfare rolls. Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

IV

The foregoing considerations indicate that the pretermination "hearing," though necessary, need not be elaborate. We have pointed out that "[t]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings." In general, "something less" than a full evidentiary hearing is sufficient prior to adverse administrative action. Under state law, respondents were later entitled to a full administrative hearing and judicial review. The only question is what steps were required before the termination took effect.

In only one case, *Goldberg v. Kelly,* has the Court required a full adversarial evidentiary hearing prior to adverse governmental action. However, as the *Goldberg* Court itself pointed out that case presented significantly different considerations than are present in the context of public employment. Here, the pretermination hearing need not definitively resolve the propriety of the discharge. It should be an initial check against mistaken decisions—essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action.

The essential requirements of due process, and all that respondents seek or the Court of Appeals required, are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

V

Our holding rests in part on the provisions in Ohio law for a full post-termination hearing. In his cross-petition Loudermill asserts, as a separate constitutional violation, that his administrative proceedings took too long. The Court of Appeals held otherwise, and we agree. The Due Process Clause requires provision of a hearing "at a meaningful time." At some point, a delay in the post-termination hearing would become a constitutional violation. In the present case, however, the complaint merely recites the course of proceedings and concludes that the denial of a "speedy resolution" violated due process. This reveals nothing about the delay except that it stemmed in part from the thoroughness of the procedures. A 9-month adjudication is not, of course, unconstitutionally lengthy *per se.* Yet Loudermill offers no indication that his wait was unreasonably prolonged other than the fact that it took nine months. The chronology of the proceedings set out in the complaint, coupled with the assertion that nine months is too long to wait, does not state a claim of a constitutional deprivation.

VI

We conclude that all the process that is due is provided by a pretermination opportunity to respond, coupled with post-termination administrative procedures as provided by the Ohio statute. Because respondents allege in their complaints that they had no chance to respond, the District Court erred in dismissing for failure to state a claim. The judgment of the Court of Appeals is affirmed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Citation: *Cleveland Board of Education v. Loudermill,* 470 U. S. 532 (1985).

Closed Shop

A *closed shop* refers to a business or organization in which all employees are required to become union members as a precondition of employment. A related term, a *union shop,* refers to businesses or organizations in which employees are not required to be union members when they are initially hired but must become union members shortly after being hired in order to maintain their jobs. In contrast to a closed shop, an *open shop* is a business or organization that does not

provide any preferential treatment to union members in the hiring process. This entry looks at the history of closed shops, which have been illegal for several decades, and current union-related hiring practices.

Historical Background

In the late 19th and early 20th century, closed shops were popular in the United States, particularly among construction craft unions and other unions representing employees largely hired on a temporary basis, as a means to protect union standards and reserve job opportunities for specific union members. For example, because there was often high employee turnover in the construction industry, union control would have been minimized if employers could replace their unionized workforce with nonunion employees. In fact, some unions insisted on closed shops as a way to gain more control over the labor market as well as secure job opportunities for their members.

In 1935, Congress passed the Wagner Act, a federal law protecting the legal rights of workers to organize labor unions, to take part in collective bargaining, and to strike in support of employee workplace issues and concerns. Additionally, the passage of the Wagner Act created the National Labor Relations Board (NLRB), an independent government agency responsible for conducting and monitoring labor union elections as well as investigating unfair labor practices. Shortly after the passage of the Wagner Act, the majority of federal courts briefly upheld the legality of closed shops. However, by the early 1940s, many states, either by legislation or court decision, banned the use of closed shops across the country.

In 1947, the passage of the Taft-Hartley Labor Act officially declared closed shops illegal throughout the country. More specifically, the act gave states the legal authority to create "right-to-work" laws and allowed the federal courts jurisdiction over the enforcement of collective bargaining agreements between employers and employees. It was not until 1959 that Wisconsin became the first state to pass legislation legalizing collective bargaining for public sector employees, including public school teachers. While closed shop practices did not impact schools directly, the rise of legalized collective bargaining in their aftermath were significant in the ultimate ability of teachers to unionize or collectively negotiate with their school boards in the majority of states.

Today's Practice

While closed shops were officially declared illegal under the Taft-Hartley Labor Act in 1947, the hiring practices associated with closed shops still operate unofficially in certain industries in the United States. While no requirement to hire union workers is explicitly written into contracts, some employers in select industries, including construction and others that are characterized by temporary employment, still rely disproportionately on union members when hiring employees. For instance, some employers actively recruit employees from labor union halls, but it is entirely legally allowable for them to recruit these employees at other locations.

Moreover, there are many modern variations of union arrangements in the United States. By way of illustration, in *agency shops,* employees pay union membership dues or fees but are not required to join unions. In the years since the enactment of the Taft-Hartley Labor Act, unions across the country have repeatedly attempted to repeal this act and eliminate laws restricting union control over the hiring process, such as state right-to-work provisions. Yet, to date, none of the legal efforts to overturn the act have been successful.

Kevin P. Brady

See also Agency Shop; Collective Bargaining; Contracts; Open Shop; Unions

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Cochran v. Louisiana State Board of Education

Cochran v. Louisiana State Board of Education (1930) is one of two early cases wherein the Supreme Court of the United States dealt with the rights of students in religiously affiliated nonpublic schools. The other case was *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925). However, in neither dispute did the Court rely on the Establishment Clause in the First Amendment to the U.S. Constitution.

The controversy in *Cochran* arose when taxpayers challenged a law that taxed citizens for the purpose of furnishing school books to children, arguing that it violated not only their rights under the Due Process Clause of the Fourteenth Amendment but also their property rights. The Supreme Court dismissed the due process claim and addressed only the taxpayers' property contention, determining that the state was providing a public benefit and therefore the taxation was not an unconstitutional taking.

Facts of the Case

In 1928, the state of Louisiana passed Acts No. 100 and 143. Act No. 100 required the state to furnish schoolchildren with school books free of charge. Act No. 143 provided that the state's severance tax fund would provide for the costs created by Act No. 100. According to the statutes, all children in the state, regardless of whether they attended public or nonpublic schools that were religiously affiliated or nonsectarian, would receive school books at no cost, and it directed the state board of education to implement this policy.

The litigation began when taxpayers unsuccessfully sought an injunction to prevent the state board of education and other officials from implementing the laws. The taxpayers argued that the state laws violated both their rights to due process and property. A state trial court and the Supreme Court of Louisiana rejected the taxpayers' claims and refused to grant the injunction.

The Court's Ruling

On further review, the Supreme Court affirmed in favor of the state. At the outset of analysis, the Court pointed out that no question existed under the Due Process Clause of the U.S. Constitution. To this end, the only issue that the Court found necessary to address was whether taxation for the purpose of purchasing and providing school books that benefited children at nonpublic schools, whether religious or nonsectarian, amounted to an unconstitutional taking of private property for private purpose.

The Supreme Court explained that an unconstitutional taking occurs when the state takes a citizen's private property and, instead of using it to further a public purpose, uses the property for the benefit of another private entity. The taxpayers argued that the two Louisiana acts were an unconstitutional taking of their private property, because the acts allowed the state to tax citizens, thereby taking their private property, for the purpose of providing school books to nonpublic schools, which were not otherwise a part of the public school system. The taxpayers described the state's purpose narrowly and argued that the state's purpose was to benefit private, religious, sectarian schools.

The Court rejected the taxpayers' contention, because the text of the statute made no mention of schools, private or public. The Court relied on the literal meaning of the text of the statute, which directed the state school board to furnish school books free of charge to all students in the state regardless of what school they attended. The Court acknowledged that the statutes at issue did not permit or require the purchase of religious books from state funds. Even so, the Court failed to address that religiously affiliated nonpublic schools, in particular, were spared the expense of purchasing school books for their students and that the schools, not the students, retained possession of the books.

Cochran is significant because the Court rejected the taxpayers' argument that the schools were the ultimate beneficiaries of the school books. In *Cochran,* the Court adopted the position that the children and the state were the ultimate beneficiaries, essentially laying the groundwork for what has become known as the child benefit test that emerged more fully in *Everson v. Board of Education of Ewing Township* (1947), wherein the Court upheld a statute from New Jersey that permitted parents to be reimbursed for the cost of transporting their children to religiously affiliated nonpublic schools.

Cochran remains an important case in education law insofar as it established the general principle that laws intended to benefit children, rather than their schools, are constitutional under Establishment Clause analysis. Pursuant to the child benefit test, states have permitted a wide array of benefits to religiously affiliated nonpublic schools and their students, such as transportation, textbooks, and vouchers.

Kathryn Ahlgren

See also Child Benefit Test; *Everson v. Board of Education of Ewing Township;* Nonpublic Schools; State Aid and the Establishment Clause

Legal Citations

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Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

Collective Bargaining

The term *collective bargaining* refers to contractual negotiations between employers and groups of employees to determine specific conditions of employment. The results of these negotiations are referred to as *collective bargaining agreements.* In most instances, school employees are legally represented in the bargaining process by unions or some other labor organizations. Collective bargaining is governed by a variety of different laws, including administrative agency regulations, federal and state statutory laws, and judicial decisions. Even though collective bargaining laws vary considerably from state to state, the majority of these statutes include the following minimum provisions: a duty to negotiate in good faith, formal appeals procedures, and contractual provisions discussing the ability of teachers to strike.

The National Labor Relations Act, a comprehensive federal statute, covers bargaining practices in the private sector. On the other hand, the rules regulating collective bargaining for public employees, including teachers, vary widely from state to state. Since 1959, when Wisconsin became the first state to allow collective bargaining by its public sector employees, the vast majority of states have permitted public school teachers to bargain collectively. Only the states of North Carolina, Texas, Utah, and Virginia expressly prohibit collective bargaining with school district authorities.

Collective bargaining law for public schools is very jurisdiction specific and varies considerably by state. The passage of the No Child Left Behind Act in 2002, which requires states to collect and distribute information pertaining to student achievement, has helped bring more attention to the legal issues associated with collective bargaining practices in schools. This entry describes the fundamentals of these practices.

Bargaining Units

In public education, employee unions must establish officially recognized bargaining units in order to engage in contractual negotiations with their school boards. Bargaining units are officially certified as the exclusive bargaining representatives for specific sets of employees such as teachers. In most instances, certification to become a bargaining unit occurs through state public employment relations boards or labor relations boards. In the majority of states, elections must take place before the organizations selected by the majority of the employees can be certified, or approved, to serve as their exclusive representatives in collective bargaining negotiations. School boards are not allowed to interfere with either the creation or certification of bargaining units.

Under the majority of state collective bargaining statutes, units include employees who share a community of interests in the terms and conditions of employment that most effectively represent their interests. *Community of interests* means that the employees represented, usually teachers, have substantial mutual interests and that the union represents their concerns. *Professionals,* distinguishing typically between teachers and administrators, and *nonprofessional* school employees, such as secretarial or maintenance staff, must usually form separate bargaining

units, with teachers in one unit and other, nonprofessional staff typically, but not always, in another. In some circumstances, professional staff may have more than one unit. Once members formally elect their exclusive bargaining representatives, or unions, school boards are legally bound to deal exclusively with those organizations; the failure of school boards to meet with exclusive bargaining representatives can constitute unfair labor practices.

Legal Duty to Bargain in Good Faith

One of the most important legal obligations between public school employees and their boards in the collective bargaining process is the requirement to bargain in good faith, which means that the parties involved in negotiation must make a genuine effort to resolve their contractual differences. Courts have continually ruled that bargaining in good faith includes the willingness to meet at mutually reasonable times as well as a sincere desire to reach agreement through the bargaining process. Additionally, the legal obligation to bargain in good faith requires school boards not to penalize, discriminate, or intimidate employees based on their union membership.

The majority of states that recognize the right of public school teachers to collectively bargain divide the subjects of bargaining into three distinct categories: mandatory, permissive, and prohibited subjects. Teachers and their school board may bargain over contractual provisions, a sampling of which includes academic freedom, curriculum, wages, salaries, retirement benefits, workload, tenure, promotion, reclassification, evaluation procedures, grievance procedures, student discipline, sick leave, and sabbaticals. Overall, legal determinations of whether collective bargaining subjects are mandatory, prohibited, or permissive differ considerably by state. In numerous instances, state collective bargaining laws are not clear as to whether specific bargaining subjects are mandatory, prohibited, or permissive. Consequently, state courts need to rule on a variety of collective bargaining subjects across numerous legal jurisdictions.

Subjects of Collective Bargaining

Mandatory Subjects

Mandatory subjects of collective bargaining in public schools refer to those issues about which boards must bargain with their employees. In most instances, mandatory subjects of collective bargaining refer to issues associated with wages, work hours, and work conditions. The failure of school boards to negotiate a mandatory subject of bargaining violates their duty to bargain in good faith and constitutes an unfair labor practice. Unfair labor practices refer to board interference with teachers in the exercise of their legal labor rights. Generally, work related issues in public schools include benefits, salaries, work load, employee hours, and grievance procedures; these are legally considered mandatory subjects of collective bargaining. Additionally, courts have recently included antinepotism rules as mandatory subjects of collective bargaining.

State courts have adopted two major approaches to evaluating whether bargaining subjects are mandatory: the step approach and the step-plus balancing approach. The *step approach* requires courts to use a two- or three-part legal test to consider whether issues are mandatory subjects of collective bargaining. In the *step-plus balancing approach,* courts apply a more rigorous rules analysis with a legal balancing test. Insofar as collective bargaining law varies from state to state, and courts review a myriad of different factual situations, it is difficult to make a definitive categorization of what is a mandatory subject of collective bargaining. Most of the legal disputes that public school employees bring over mandatory bargaining protection involve salaries, retirement, and pension issues.

Permissive Subjects

Permissive subjects of collective bargaining in public schools refer to those topics of bargaining that may be included if both parties agree in the negotiation process. Often, permissive subjects of collective bargaining refer to management decisions that only remotely impact school personnel matters. Unlike mandatory subjects, boards have no legal duty to bargain over permissive subjects. When considering whether topics are permissive subjects of collective

bargaining, it is imperative for the courts to review statutory and common law, because mandatory or prohibited bargaining subjects in one state may be allowed in others.

Prohibited Subjects

Prohibited or illegal subjects of collective bargaining in public schools are those subjects over which school boards or school unions may not negotiate, because such agreements would contravene state statutes or court decisions. Examples of prohibited subjects of collective bargaining in public schools include issues relating to staffing, transfer and assignment, curricula, and the length of the school year. For example, the ability of public school boards to hire and terminate their employees is a prohibited subject of bargaining. Another prohibited subject of collective bargaining in public schools involves financial contributions from boards to school unions, such as a board's funding of members' attendance at union-related functions without union reimbursements. States differ on whether some subjects of bargaining are prohibited. State courts vary, for instance, on the issue of whether residency requirements should be a condition of employment and a permissive or prohibited subject of collective bargaining.

Resolution of Disputes

The majority of collective bargaining disputes involve the interpretation of issues found in collective bargaining agreements. When unions and school boards are unable to reach agreements in collective bargaining contracts, it is said that they have reached an impasse. An *impasse* in the collective bargaining process occurs when the parties have reached their final positions but disagree over one or more subjects of a contract. When bargaining agreements reach an impasse, most states mandate several mechanisms for facilitating the resolution of parties' disagreements. These methods include mediation, fact-finding, and arbitration.

In mediation, a third party mediator is selected by a state labor relations board or through the mutual agreement of the school board and bargaining unit. Mediation is often a precursor to fact-finding or arbitration.

Fact-finding is also referred to as *advisory arbitration.* A neutral third party intermediary is selected by a state labor relations board or through mutual agreement of the school board or bargaining unit. A fact finder has the power to conduct hearings and can collect evidence from the parties and any additional outside sources.

The use of arbitration to settle labor disputes is strongly advocated by public policy in the United States. Historically, the legal policy favoring arbitration has been advanced in a famous collection of three Supreme Court labor cases called the steelworkers' trilogy. These three cases are *United Steelworkers of America v. American Manufacturing Company* (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Company* (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corporation* (1960). Unlike mediation and fact-finding methods of dispute resolution, an arbitrator's decision is legally binding on the parties involved. Subjects of bargaining that are not subject to arbitration include issues of managerial discretion, including issues such as teacher assignments, teacher workforce size, and the nonrenewal of nontenured teachers' contracts.

Kevin P. Brady

See also Arbitration; Contracts; Impasse in Bargaining; Mediation; Unions

Further Readings

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Columbus Board of Education v. Penick

During the 1970s, officials in several boards of education in Ohio responded to allegations that they consciously engaged in racial discrimination by creating and perpetuating dual school systems. The resulting litigation placed Ohio in the judicial forefront of Northern school desegregation cases, wherein school boards sought to limit the circumstances under which federal courts could mandate districtwide school desegregation remedies.

Columbus Board of Education v. Penick (1979) was one of those landmark cases that made its way to the U.S. Supreme Court. As evidence of the ongoing desegregation litigation in Ohio, *Columbus* was handed down on the same day as *Dayton Board of Education v. Brinkman II* (1979), owing to the similarity of facts and legal questions that the two cases generated.

Facts of the Case

The dispute in *Columbus* arose when 14 minority students filed a class action suit against their school board alleging that its segregative policies and procedures had both the purpose and effect of creating and perpetuating racial segregation throughout the district. The students claimed that the actions of their local board, combined with those of a variety of state officials and agencies, violated their rights to Equal Protection under the Fourteenth Amendment and pursuant to the Supreme Court's ruling in *Brown Board of Education v. Board of Education of Topeka I* (1954), which struck down racial segregation in public schools.

After a federal trial court and the Sixth Circuit's agreement that the defendants violated the students' rights, the school board developed a school desegregation plan that it intended to implement during the 1978–1979 academic year. However, as school board officials prepared to implement the plan, they recognized the financial burdens that doing so would have imposed on the system; they sought and were granted a stay. In the meantime, the board also sought further review from the Supreme Court, which agreed to hear an appeal.

At issue at the Supreme Court was whether the school board's actions in *Columbus,* in creating discriminatory attendance zones, discriminatory administrator and teacher assignment policies, and discriminatory policies as to school site selections constituted sufficient evidence of discriminatory purpose and impact to establish an equal protection violation and the need for imposing a districtwide remedial order.

The Court's Ruling

Affirming in favor of the plaintiffs in a 7-to-2 judgment, Justice White delivered the opinion of the Court. In declaring that there was no reason to disturb the Sixth Circuit's opinion, White referred to the findings and conclusions of the trial court. To this end, White acknowledged that the trial court had decided that the board's conduct, before and at the time of the initial trial, was not only motivated by an unconstitutional and segregative intent but also had contemporary racial impact that was sufficiently wide to justify a remedial plan for the entire system.

Relying on a variety of the Supreme Court's precedent-setting cases, most notably *Brown v. Board of Education of Topeka II* (1955), White pointed out that the board had a continuous constitutional obligation to dismantle all components of its dual school system but failed to meet the appropriate standard of duty. As such, the majority of the Court concluded that a districtwide remedy was warranted insofar as the board's actions had the foreseeable and anticipated effect of preserving racial segregation in schools throughout the entire system.

Columbus makes an important contribution to case law on school desegregation to the extent that it informs policies and practices of both educational and legal professionals. Insofar as the Supreme Court found that the board in *Columbus* engaged in a variety of discriminatory practices, its analysis stands for the proposition that as long as there is sufficient prima facie evidence of purposeful discrimination in violation of the Fourteenth Amendment, a trial court can call for districtwide corrective remedies to eliminate racial segregation in public schools.

John F. Heflin

See also *Brown v. Board of Education of Topeka; Dayton Board of Education v. Brinkman, I and II;* Equal Protection Analysis; Fourteenth Amendment; Segregation, De Facto; Segregation, De Jure

Further Readings

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Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Columbus Board of Education v. Penick, 443 U.S. 449 (1978).
Dayton Board of Education v. Brinkman I, 443 U.S. 406 (1977).
Dayton Board of Education v. Brinkman II, 43 U.S. 526 (1979).

Committee for Public Education and Religious Liberty v. Levitt

Committee for Public Education and Religious Liberty v. Levitt (1973, 1977, 1980) is a dispute that made its way to the U.S. Supreme Court on three separate occasions during a seven-year period. At issue in *Levitt* was the constitutionality of a New York statute that allowed nonpublic schools to be reimbursed for expenses that they incurred in complying with requirements for the administration and reporting of test results along with other student records.

In the initial round of litigation, a federal trial court in New York issued a permanent injunction against the enforcement of a state statute that provided monies directly to nonpublic schools as reimbursement for the provision of required services such as state mandated student testing and record keeping. The court maintained that the law violated the First Amendment's Establishment Clause, because it was a form of impermissible aid to religiously affiliated nonpublic schools.

On further review in *Levitt* (1973), the Supreme Court affirmed that the statute was unconstitutional, because it was unclear whether teacher-prepared tests fell within its scope, and it was also unclear how a single per-pupil state allotment, designed to cover the costs of an array of services, could have been monitored to assure that public monies were not used for sectarian purposes. Insofar as there were no restrictions on the use of the funds, such that teacher-prepared tests on religious subject matter were seemingly reimbursable, the Court was of the opinion that the aid had the primary effect of advancing religious education, because there were insufficient safeguards in place to regulate how the monies were spent.

Subsequently, the New York state legislature revised the statute that the Supreme Court struck down in *Levitt,* clarifying that nonpublic schools would no longer receive per-pupil allotments. Rather, the new law mandated that nonpublic schools were to be reimbursed for actual, incurred costs that were subject to financial audit. Yet, a month after the revised statute was signed into law, numerous organizations took action to have it again declared unconstitutional under the Establishment Clause.

In the second round of litigation, a federal trial court turned to *Lemon v. Kurtzman* (1971) and *Meek v. Pittenger* (1975) for guidance, concluding that while the statute's intent was secular, the revised version still violated the Establishment Clause to the extent that the state monies that went to religiously affiliated nonpublic schools could have been used to free up money for their religious missions. After the trial court struck the statute down as unconstitutional, the Supreme Court summarily reversed and remanded in light of its recent decision in *Wolman v. Walter* (1977), wherein it noted that the state has a substantial interest in ensuring that educational standards are met, and the provision of state funding for nonpublic school programs such as state-required testing and test scoring does not provide direct aid to a religious organization.

On being returned to the trial court, the statute was upheld as constitutional. Even so, opponents again appealed to the Supreme Court. On further review, this time the Court was satisfied that the statute passed constitutional muster. In its analysis, the Court recognized that the differences between the two versions of the statute were permissible, because scoring of essentially objective tests, and recording their results along with attendance data, offered no significant opportunity for religious indoctrination while serving

secular state educational purposes. The Court added that the new provisions in the law were acceptable, because the accounting methods that it called for did not create excessive entanglement insofar as the reimbursements were equal to the actual costs that the schools incurred.

Brenda R. Kallio

See also *Lemon v. Kurtzman; Meek v. Pittenger;* Nonpublic Schools; State Aid and the Establishment Clause; *Wolman v. Walter*

Legal Citations

Committee for Public Education and Religious Liberty v. Levitt, 413 U.S. 472 (1973), 444 U.S. 646 (1980).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Meek v. Pittenger, 421 U.S. 349 (1975).
Wolman v. Walter, 433 U.S. 220 (1977).

Committee for Public Education and Religious Liberty v. Nyquist

In *Committee for Public Education and Religious Liberty v. Nyquist* (1973), the U.S. Supreme Court ruled that state legislation that provided monies for the maintenance and repair of religious facilities as well as for tuition reimbursements and income tax benefits to parents of children who attended religiously affiliated nonpublic schools advanced religion in violation of the Establishment Clause of the First Amendment.

Facts of the Case

New York state legislators believed the nonpublic schools had fallen into fiscal crisis, which had caused them to reduce maintenance and repair programs. The legislators, determining that they had a responsibility to institute laws designed to ensure students' health, welfare, and safety and believing that maintaining the health, welfare, and safety of nonpublic schoolchildren in low-income urban areas would add to the stability of urban neighborhoods, passed legislation designed to address these issues.

The legislation contained three provisions. The first provided money directly to qualifying nonpublic schools for the maintenance and repair of facilities and equipment. Under this provision, each qualifying school would receive $30 per pupil. However, if the qualifying school's building was more than 25 years old, the school would receive $40 per pupil, but in no case would the amount received by any qualifying school exceed 50% of the average per-pupil cost for the equivalent service in the public schools.

The additional two provisions of the statute, tuition reimbursement and income tax relief, were bundled together and titled the Elementary and Secondary Education Opportunity Program. The tuition reimbursement section recognized that students from low-income families have a reduced opportunity to attend private school. Therefore, in order to maintain an education system befitting a pluralistic society, the legislators believed accommodations needed to be made that would allow children of low-income families to attend private school. This section of the statute also addressed the legislative fear that because many public schools were at full capacities, any major shift in attendance between the private and public schools could seriously jeopardize the quality of the children's education in the public schools.

In the tuition reimbursement section of the statute, parents with annual income of less than $5,000 were entitled to reimbursement in the amount of $50 per elementary child and $100 per high school child. The amount reimbursed was not to exceed 50% of tuition paid. The tax relief portion of the statute was available for parents whose income was greater than $5,000. The amount of the tax relief was not dependent on the amount of tuition paid to the qualifying school.

A federal trial court in New York held that the grants for maintenance and repair and for tuition reimbursement were invalid but that the tax relief provisions did not violate the Establishment Clause.

The Court's Ruling

On further review, the Supreme Court affirmed that the maintenance and repair portion of the statute violated the Establishment Clause, because it subsidized and advanced the religious mission of sectarian

schools. The Court, recognizing that each of the three propositions contained elements of legitimate secular concern, struck the law down on the basis that a statute can be interpreted as establishing a religion even if it is not designed to promote an official state religion. As such, the Court concluded that the first section of the legislation did not contain adequate restrictions to assure that the maintenance and repair monies would be used for purely secular purposes, a violation of the first prong of its tripartite *Lemon v. Kurtzman* (*Lemon*, 1971) test, the standard that it applied in disputes involving the Establishment Clause.

As for the tuition reimbursement and the tax relief portions of the statute, the Supreme Court ruled that both sections violated the Establishment Clause, because they ran afoul of the second part of the *Lemon* test by having the effect of providing financial support for religiously affiliated nonpublic institutions. The Court noted that even though the monies in *Nyquist* were given to the parents in the form of reimbursements or tax deductions, the funds still served as an incentive for them to send their children to qualifying religiously affiliated nonpublic schools. In its summary, the Court pointed out that allowing legislation of this nature to stand would have led to massive, direct subsidization of religious elementary and secondary schools and that parents who choose religious education for their children were not entitled to erode the limitations of the Establishment Clause.

Brenda R. Kallio

See also *Lemon v. Kurtzman;* State Aid and the Establishment Clause

Legal Citations

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
Lemon v. Kurtzman, 403 U.S. 602 (1971).

Committee for Public Education and Religious Liberty v. Regan

At issue in *Committee for Public Education and Religious Liberty (PEARL) v. Regan* (1980) was the constitutionality of a statute from New York that authorized the use of public funds to reimburse church-related and secular nonpublic schools for performing various state-mandated testing and reporting services. The Supreme Court held that the 1974 New York law was constitutional, because it had a secular purpose, its primary effect did not advance religion, and it did not entangle the state with organized religion. While not recommending the case as "a litmus-paper test to distinguish permissible from impermissible aid to religiously oriented schools" (p. 662), the Court described its judgment as consistent with its historical effort to balance the constitutional mandate to separate church and state with the states' obligations to educate all youth properly.

Facts of the Case

All nonpublic schools in New York state were reimbursed for their direct costs in administering, grading, and reporting the results of tests, whether the tests were prepared by the state, by individual teachers, or by the nonpublic school. In addition, school officials were required to furnish the state with information on their student bodies, faculties and staffs, physical facilities, curricula, and student attendance.

PEARL filed suit, claiming that the law violated the First and Fourteenth Amendments. Insofar as there were no restrictions on the use of the public funds, which may have covered teacher-prepared religious examinations, the U.S Supreme Court struck the statute down as unconstitutional in *Levitt v. Committee for Public Education* (1973). However, when the plaintiffs challenged a 1974 revision of the statute in *Regan,* the Court held that it was acceptable, because the nonpublic schools developed safeguards against teacher-made and religious tests, rendering the reimbursements constitutional.

The Court's Ruling

In its analysis, the Supreme Court cited the statute in noting that the law's purpose was to provide "educational opportunity of a quality that would prepare [all] New York citizens for the challenges of American life" (p. 650). In order to accomplish this purpose, the

Court recognized that the law required all school officials, public and nonpublic, to participate in a uniform state system of testing and evaluating student performance while also reporting descriptive data about their schools to the state. Further, the Court asserted that the law permitted the state to reimburse nonpublic schools for costs incurred in carrying out the legislative mandate. On further review of an order from a federal trial court upholding the revised statute's constitutionality, the Supreme Court affirmed.

At the outset of its rationale in *Regan,* the Supreme Court reflected on several of its decisions in previous church-state cases, primarily *Lemon v. Kurtzman* (1971). In *Lemon,* the Court developed its three-pronged *Lemon* test for use in adjudicating disputes involving the First Amendment. Under the *Lemon* test, a law or policy must have a secular purpose, must have a primary effect that neither advances nor inhibits religion (in other words, it must be neutral), and must not foster excessive government entanglement with religion.

Turning to the first prong of *Lemon,* the Supreme Court found that the statute's intent was to improve educational opportunity for all citizens, a decidedly secular purpose, because it called for standardized state tests to be administered and graded on campus by personnel from nonpublic schools who had no control over the test contents. The Court explained that there were three types of state-prepared tests: student evaluation program tests, comprehensive achievement tests, and Regents Scholarship and College Qualifications Tests. Each of the tests addressed secular academic subjects such as English, mathematics, biology, or social studies. Insofar as none of the tests dealt with religious subject matter, the Court reasoned that there was no substantial risk that the examinations could have been used for religious instruction. The Court was clearly satisfied that the law had a secular purpose and a secular effect, helping it to pass the first prong of the *Lemon* test.

As to the second prong of *Lemon,* the Court ruled that the test management and reporting functions were not part of the teaching-learning process and could not be used to advance any religious ideologies. The Court maintained that personnel in the nonpublic schools simply graded the tests and reported the results to the state officials, with the state reimbursing the schools for their services. To the Supreme Court, nonpublic schools were actually "being relieved of the costs of grading [and reporting on] state-required, state-furnished examinations" (p. 658). The Court saw no constitutional conflict with New York's paying nonpublic schools to perform the grading function rather than paying state employees or independent contractors to perform the task. Further, the Court did not accept the appellants' argument that all government aid to religious institutions was forbidden, because aid to one aspect of a school frees officials to spend their other resources on religious purposes. Citing one of its earlier judgments, the Court observed,

> The Court [is] not blind to the fact that in aiding a religious institution to perform a secular task, the State frees the institution's resources to be put to sectarian ends. If this were impermissible, however, a church could not be protected by the police and fire departments. . . . The Court never has held that religious activities must be discriminated against in this way. (p. 659)

The Court was of the view that because the law did not advance the cause of religion, its primary effect was secular.

Finally, the Court was of the opinion that the testing and reporting services for which schools were reimbursed were discrete and clearly identifiable insofar as the reimbursement process was simple, straightforward, and routine. The Court thus concluded that the statutory plan did not portend excessive entanglement between government and religion. Moreover, the Supreme Court was not persuaded that the law would have led to political alliances along religious lines, because it reimbursed private schools for "actual costs" only. The Court added that the statute was unlikely to provoke religious competition over future legislative appropriations, thereby impermissibly entangling government with religion in violation of prong three of the *Lemon* test.

Robert C. Cloud

See also *Lemon v. Kurtzman; Meek v. Pittenger;* Nonpublic Schools; School Board Policy; School Boards; State Aid and the Establishment Clause; *Wolman v. Walter*

Legal Citations

Lemon v. Kurtzman, 403 U.S. 602 (1971).
Levitt v. Committee for Public Education, 413 U.S. 472 (1973).
Meek v. Pittenger, 421 U.S. 349 (1975).
Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).
Roemer v. Maryland Public Works Board, 426 U.S. 736 (1976).
Sloan v. Lemon, 413 U.S. 825 (1973).
Wolman v. Walter, 433 U.S. 229 (1977).

Common Law

The evolution of the common law began when Henry II established a system of English royal courts in 1166. These courts employed juries and were presided over by circuit-riding judges. These common law courts were not the only court system in medieval England. Ecclesiastical courts enforced church law and claimed jurisdiction over any crime involving a member of the clergy. Common law courts also stood in contrast to the chancery courts, or courts of equity. The highly complex and formalized system of writs and remedies developed by the law courts sometimes denied a plaintiff fair and equitable compensation for his injury. In such cases, the aggrieved party had the right to petition the chancery courts for redress.

These courts remained distinct in England until the judicature act of 1875. The decisions of English equity courts are included in common law as adopted in the United States. There is a general trend in both the U.S. and England of merging the two branches of jurisprudence. Under the Federal Rules of Civil Procedure, which came into effect in 1938, plaintiffs in federal courts may bring all claims, whether under law or equity, in the same action.

English common law also developed in contrast to civil law, or the code-based law of continental Europe. Civil courts viewed the Roman law code of Justinian and subsequent statutes as the exclusive primary sources of law, whereas English courts held that, in the absence of a statute on the subject, courts could create a rule of law through analogy with previous cases. Prior court decisions, if not overruled, then became binding on future courts as primary and definitive statements of the law. This doctrine, known as *stare decisis,* appeared as early as the 13th century, when judges began citing previous decisions in their verdicts. Civil law and common law remain distinct in spite of the increasing codification of law in both the United States and the United Kingdom.

U.S. Practice

The English common law was adopted by all 13 original colonies either by statute or as part of their constitutions. Almost every subsequent state has likewise adopted the common law, except for the former French colony of Louisiana, which uses continental-style civil law for civil cases. State statutes adopting the common law generally specify that the state adopts the common law as it existed at a particular time, such as the time of the American Revolution, or of the arrival of English settlers in America. English statutes and court decisions made prior to that time are considered part of the common law of the adopting state unless they are inapplicable to the United States. Any developments in English common law subsequent to that time are not considered to be part of the law of the state.

The common law is not fossilized as it was received from England, however. Because constitutional provisions, statutes, and court decisions may abrogate or change the common law in America, common law in the United States is not necessarily the same as English common law. Courts in the United States have a continuing duty to change the common law if it becomes obsolete. On the other hand, courts often decide that important changes in the common law are better left to the legislature. Both Congress and the state legislatures may alter or abolish the remedies or rights provided by the common law except where doing so would be unconstitutional. Statutes, if constitutional, will control over common law if there is no way to interpret the two consistently. Yet, without a comprehensive system of legislation clearly intended to replace the common law or a clear statement of legislative intent to abrogate the common law, courts will generally find a construction of a statute that is consistent with the common law.

Under *Erie Railroad Co. v. Thompkins* (1938), there is no general federal common law at odds with

state law. Rather, the federal courts must apply the constitution, federal statutes or regulations, or the laws of the states. Insofar as all of these sources of law may incorporate or refer to the common law, however, common law issues remain important in federal jurisprudence. For example, if Congress or a state legislature uses a legal term in a statute without defining it, courts will apply the common law definition of the term when interpreting the law. American constitutions, whether state or federal, are strongly influenced by the common law as it existed at the time of the Revolution. The Second Amendment right to keep and bear arms derives from and expands upon a provision of the English Bill of Rights of 1689, which allowed only Protestants to carry weapons.

Education Law

Students, teachers, and parents may all have common law claims, remedies, or duties, unless state statutory schemes in education either explicitly overrule previously existing common law or regulate an area of education so comprehensively as to demonstrate the clear intent of the legislature to entirely abrogate the common law in that area. In addition to liability under state or federal statute, school boards and their employees may have liability under a theory of common law negligence, provided that state law does not bar civil suits against school districts as state entities. Such liability would depend on a plaintiff's being able to prove the elements of common law negligence, including that the negligent actions of a board or its employees were the proximate cause of the injury.

James Mawdsley

See also Bill of Rights; Civil Law; Negligence; Precedent; Stare Decisis; Statute

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Compensatory Services

Compensatory services are educational services that are awarded to students with disabilities to make up for services that they lost because of a school board's failure to provide an appropriate educational placement under the Individuals with Disabilities Education Act (IDEA). Courts may grant compensatory educational service awards to students with disabilities in situations where school officials failed to provide a free appropriate public education (FAPE). Commonly, compensatory service are offered during time periods when students would otherwise be ineligible for services. This entry summarizes court rulings in this area.

Court Awards

It is well settled that courts have the authority to award compensatory services; Congress empowered them to fashion appropriate remedies to cure a deprivation of rights protected by the IDEA. Hearing officers also have the power to grant awards of compensatory educational services. As with the ability to grant tuition reimbursement, courts have recognized that hearing officers may devise appropriate relief, which often requires an award of compensatory services, as, for example, in *Big Beaver Falls Area School District v. Jackson* (1993) and *Cocores v. Portsmouth, NH School District* (1991).

Compensatory services usually are provided for a time period equal to the time that students were denied services (*Big Beaver Falls Area School District v. Jackson,* 1993; *Manchester School District v. Christopher B.,* 1992; *Valerie J. v. Derry Cooperative School District,* 1991). Compensatory awards may even be granted after students have passed the ceiling age for eligibility under the IDEA or have graduated (*Pihl v. Massachusetts Department of Education,* 1993; *Puffer v. Raynolds,* 1988; *State of West Virginia ex rel. Justice v. Board of Education of the County of Monongalia,* 2000; *Straube v. Florida Union Free*

School District, 1991, 1992; *Valerie J. v. Derry Cooperative School District,* 1991).

Awards of compensatory educational services are similar to those for tuition reimbursement in that they may be necessary to preserve the rights of students to a free appropriate public education. The Eleventh Circuit, in *Jefferson County Board of Education v. Breen* (1988), concluded that without compensatory services awards, a student's rights under the IDEA might depend on the parents' ability to privately obtain services during due process hearings. An award for compensatory services accumulates from the point that school board officials knew, or should have known, that a student's Individualized Education Program (IEP) was inadequate (*Ridgewood Board of Education v. N.E.,* 1999; *M.C. ex rel. J.C. v. Central Regional School District,* 1996).

Grounds for Rejection

As is the case with tuition reimbursement, compensatory services may be awarded only when parents can demonstrate that their children were denied the free appropriate public education mandated by the IDEA (*Garro v. State of Connecticut,* 1994; *Martin v. School Board of Prince George County,* 1986*; Timms v. Metropolitan School District,* 1982, 1983). Even so, the Third Circuit asserted that compensatory services are warranted only when parents can demonstrate that their child underwent a prolonged or gross deprivation of the right to a free appropriate public education (*Carlisle Area School District v. Scott P.,* 1995).

Similarly, the Eighth Circuit affirmed that a student was not entitled to compensatory services without a showing of egregious circumstances or culpable conduct on the part of school board officials (*Yankton School District v. Schramm,* 1995, 1996). The fact that a student had not regressed as a result of the school board's failure to provide an appropriate program in a timely fashion caused a trial court in New York to deny compensatory services (*Wenger v. Canastota Central School District,* 1997, 1998). For similar reasons, a school board's timely action to correct deficiencies in a student's IEP caused the federal trial court in New Jersey to deny an award of compensatory services (*D.B. v. Ocean Township Board of Education,* 1997).

Parental failure to take advantage of offered services can cause courts to deny awards of compensatory services. For example, the Ninth Circuit found evidence that school officials offered parents extra tutoring and summer school for their child, but the parents rejected the proposal (*Parents of Student W. v. Puyallup School District No. 3,* 1994). Thus, the court denied the parents' request for compensatory services. For similar reasons, the federal trial court in Minnesota denied compensatory speech therapy services, because the parents withdrew their son from his educational program and rejected the services that school board officials offered (*Moubry v. Independent School District No. 696,* 1996).

Allan G. Osborne, Jr.

See also Disabled Persons, Rights of; Hearing Officers; Related Services

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Big Beaver Falls Area School District v. Jackson, 624 A.2d 806 (Pa. Commw. Ct. 1993).
Carlisle Area School District v. Scott P., 62 F.3d 520 (3d Cir. 1995).
Cocores v. Portsmouth, NH School District, 779 F. Supp. 203 (D.N.H. 1991).
D.B. v. Ocean Township Board of Education, 985 F. Supp. 457 (D.N.J. 1997).
Garro v. State of Connecticut, 23 F.3d 734 (2d Cir. 1994).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Jefferson County Board of Education v. Breen, 853 F.2d 853 (11th Cir. 1988).
Manchester School District v. Christopher B., 807 F. Supp. 860 (D.N.H. 1992).
Martin v. School Board of Prince George County, 348 S.E.2d 857 (Va. Ct. App. 1986).
M.C. ex rel. J.C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996).
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Pihl v. Massachusetts Department of Education, 9 F.3d 184 (1st Cir. 1993).
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Straube v. Florida Union Free School District, 778 F. Supp. 774 (S.D.N.Y. 1991), 801 F. Supp. 1164 (S.D.N.Y. 1992).
Timms v. Metropolitan School District, EHLR 554:361 (S.D. Ind. 1982), *aff'd*, 718 F.2d 212 (7th Cir. 1983); *amended*, 722 F.2d 1310 (7th Cir. 1983).
Valerie J. v. Derry Cooperative School District, 771 F. Supp. 483 (D.N.H. 1991).
Wenger v. Canastota Central School District, 979 F. Supp. 147 (N.D.N.Y. 1997), *aff'd*, 146 F.3d 123 (2d Cir. 1998).
Yankton School District v. Schramm, 900 F. Supp. 1182 (D.S.D. 1995), *aff'd*, 93 F.3d 1369 (8th Cir. 1996).

Compulsory Attendance

Compulsory attendance laws refer to legislative mandates that school-aged children attend public, nonpublic, or homeschools until reaching specified ages. The primary components of compulsory attendance laws include school admission and exit ages, length of school years, student enrollment procedures and requirements, and enforcement of student truancy provisions. Local school attendance officers and/or juvenile domestic relations courts generally enforce compulsory attendance laws. Additionally, all jurisdictions hold parents or legal guardians legally responsible for the school attendance of their children.

Consequences for students who violate compulsory attendance laws typically include removal from regular classrooms and placement in alternative school settings. In some instances, students who violate compulsory attendance laws have had their driving privileges revoked. More recently, local school officials have been able to resort to their states' child abuse and neglect statutes as a means of prosecuting parents or legal guardians whose children do not comply with their states' compulsory attendance laws. In these instances, the parents are prosecuted as guilty of educational neglect rather than child abuse. This entry looks at the historical background of such statutes and related case law.

Historical Background

In 1852, Massachusetts became the first jurisdiction in the United States to adopt a compulsory attendance law. The Massachusetts School Attendance Act of 1852 specified that children between the ages of 8 and 14 were required to attend school for a minimum of 12 weeks per year; 6 weeks of a student's attendance was required to be consecutive if the school was open for that period of time. By 1918, all states had formally adopted compulsory attendance laws requiring school-aged children to attend school. While all jurisdictions currently require children to attend school, the mechanisms for their doing so vary.

A 2000 study by the Education Commission of the States indicated that the youngest age for compulsory attendance in the United States is 5, and the upper age limit ranges from 16 to 18. The legal authority for compulsory attendance laws in the United States is firmly rooted in the courts as a valid use of state power under the U.S. Constitution. In *Meyer v. Nebraska* (1923), for example, the Supreme Court ruled "that the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally, and morally. . . ." (p. 627).

Court Support

The bulk of legal arguments relating to compulsory attendance laws involve issues surrounding the balancing of the state's interest in ensuring that students receive an appropriate education against the right of parents to decide when and where their children attend school. The U.S. Supreme Court specifically addressed whether compulsory education laws could be satisfied by sending children to nonpublic, including private or religiously affiliated schools, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925).

In *Pierce,* the Court struck down Oregon's Compulsory Education Act, a law that required students between the ages of 8 and 16 to attend public schools. In finding that parents could satisfy the compulsory attendance law by sending their school-aged children to nonpublic schools, the Court formally recognized the rights of parents to direct the upbringing of their children, namely the freedom of choice to decide whether to send their child to a public school or a private school or to homeschool the child. At the same time, in *Pierce,* the Court

acknowledged the importance of the states' need to ensure that students receive an appropriate education. To this end, the Court noted that states can "reasonably regulate" all schools, including private schools, in areas such as accreditation, curriculum approval, health, and safety.

Two years after *Pierce,* in *Farrington v. Tokushige* (1927), the Supreme Court affirmed the legal doctrine that parents may send their children to nonpublic schools as an effective means of satisfying compulsory attendance laws. In *Farrington,* Hawaii attempted to impose strict regulations on all predominately Japanese foreign language schools, arguing that the teachers who worked in those schools had to have demonstrated knowledge in American history and fluency in English. The Court indicated that because attempts to regulate the Japanese foreign language school did not serve a public interest, they infringed on the rights of both parents and the owners of the schools.

Exceptions to the Law

In light of the precedent established in *Pierce,* state compulsory education laws have generally withstood constitutional challenges. However, when an Amish group contested the state of Wisconsin's compulsory education law that required school-aged children to attend school until age 16, the Supreme Court ruled in their favor. *Wisconsin v. Yoder* (1972) thus represents the Court's most significant departure from judicial support for compulsory attendance laws. The Amish maintained that they did not want their children attending either public or nonpublic schools after the eighth grade, because the children would by then have received all of the education and preparation for life that they would need in the Amish communities.

Relying on the First Amendment's Free Exercise Clause, the Court reasoned that both the Amish community's religious way of life and its unique societal values would have been severely endangered by complying with the compulsory attendance laws. The Court concluded that because the Amish way of life and religion were inseparable, the state's compulsory attendance laws would have significantly jeopardized the free exercise of Amish religious beliefs. Even so, since *Yoder,* courts have consistently denied religious-based exceptions, typically to parents who wish to homeschool their children, from compulsory attendance laws.

Recently, compulsory attendance statutes in some states have been amended to address alternative education and to include a limited number of exceptions. One of the most common exceptions, or conditions to compulsory education statutes in most states, is the requirement that students be properly immunized or vaccinated prior to enrolling in schools. The vaccination requirement is predicated on the state's police powers of looking after the health and welfare of its citizens.

In limited instances, an exception to a state's compulsory education law could occur if students become mentally or physically impaired. This exception is rarely used, because federal law requires local school boards to provide special education related services for students with disabilities. Overall, insofar as the authority of states to mandate specific compulsory attendance laws is largely within their legal boundaries, courts generally do not interfere with prescribed compulsory attendance legislative mandates.

Kevin P. Brady

See also Homeschooling; *Meyer v. Nebraska; Pierce v. Society of Sisters of the Holy Names of Jesus and Mary; Wisconsin v. Yoder*

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Wisconsin v. Yoder, 406 U.S. 205 (1972).

Connick v. Myers

At issue in *Connick v. Myers* (1983) was whether a former assistant district attorney (ADA) who was dismissed for conducting a survey about morale in the district attorney's office was speaking as a private citizen on a matter of public concern. The Supreme Court found that the survey's content did not involve matters of public concern but rather employee grievances potentially disruptive to the district attorney's office and thus was not protected under the First Amendment.

In light of *Connick* and related cases, it may be more difficult for public employees such as teachers to prove that they are speaking as private citizens on matters of public concern when they voice complaints about internal school operations. Among the questions that need to be resolved are where courts will draw the line between matters of public and private concern as well as whether an employee's discussing a report with the media is a matter of private or public concern.

Facts of the Case

After the district attorney transferred the ADA, against her will, to another division in the office, she distributed the morale survey. As a result, the district attorney terminated the ADA's employment for refusing to accept the new assignment. The district attorney also informed the ADA that distributing the survey was an act of insubordination. The ADA then filed suit in a federal trial court in Louisiana, claiming that the district attorney infringed on her free speech rights under the First Amendment. The trial court and the Fifth Circuit entered judgments on behalf of the former ADA, but the Supreme Court reversed in favor of the district attorney.

The Court's Ruling

In its analysis, the Supreme Court observed that *Pickering v. Board of Education of Township School District 205, Will County,* (1968) clearly established that public employees may speak as private citizens on matters of public concern. In *Pickering,* a teacher successfully challenged his dismissal for writing a letter to a local newspaper in which he voiced concerns over school policies. Even though the report contained some inaccuracies, the Court held that the teacher was speaking as a citizen on matters of public concern.

To this end, the Court acknowledged that the judiciary must balance the rights of public employees to speak on matters of public concern with the interests of public employers in maintaining the efficiency of service. In other words, the Court decided that employees may speak, provided their speech is on a matter of public concern and does not disrupt close working relationships.

As part of its rationale in the *Connick* case, the Supreme Court explained that judges must evaluate whether speech addresses a matter of public concern by looking at its content, form, and context. The Court noted that the issues in the questionnaire were, with one exception, not matters of public concern. As such, the Court found that when an employee's speech does not relate to matters of political, social, or other public concerns, the judiciary must afford public officials wide latitude in managing their offices. The Court noted that because the questionnaire was designed to give the disgruntled employee ammunition to further challenge her supervisors, it was not a matter of public concern. Rather, the Court viewed the questionnaire as simply an extension of the former ADA's grievance about her transfer.

The Supreme Court also indicated that time, place, and manner of distribution are also important. The Court was of the opinion that while the former ADA's having prepared and distributed the questionnaire at the office was not a clear violation of any policies or procedures, it did provide her supervisor with reason to believe that her doing so was disrupting the office.

In its analysis, the Supreme Court conceded that one item in the ADA's questionnaire dealt with a matter of public concern. This question asked whether other employees felt pressured to work for candidates not of their choosing in political campaigns. When the Court balanced the interests of the former ADA and her employer, it thought that although her distributing the questionnaire did not interfere with her ability to perform her duties, it did disrupt close working relationships. The Court thus ruled that the district attorney did not have to tolerate speech that had the

potential to disrupt his office. The Court concluded that employee grievances on matters that are not of public concern are not entitled to protection under the First Amendment.

The Supreme Court recently applied *Connick* in *Garcetti v. Ceballos* (2006). In *Garcetti,* the Court held that a deputy district attorney's complaints about supervisors, in a dispute over a memorandum he wrote claiming that a police officer lied in his affidavit to secure a warrant, were not on matters of public concern in a disagreement. The Court was of the opinion that when public employees such as deputy district attorneys make statements pursuant to their official duties, they are not speaking as citizens for First Amendment purposes. The Court rejected the argument that the outcome would deter whistleblowers from reporting misconduct, because they are protected by powerful state statutes.

J. Patrick Mahon

See also First Amendment; *Givhan v. Western Line Consolidated School District; Mt. Healthy City Board of Education v. Doyle; Pickering v. Board of Education of Township School District 205, Will County;* Teacher Rights

Legal Citations

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Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).
Pickering v. Board of Education of Township School District 205, Will County, 391 U.S. 563 (1968).

Consent Decree

Consent decrees in educational disputes are negotiated equitable agreements between plaintiffs and defendants in elementary and secondary school settings and in higher education. They involve a wide array of issues, such as desegregation and special education, wherein courts accept the agreed-on settlements. In consent decrees in education, defendants, usually school boards or other educational entities, agree to discontinue specified illegal activities such as segregation based on race, disability, or gender. In fact, consent decrees are not so much judicial orders but rather more properly judicially approved agreements between the parties that are binding only on the parties to the agreement.

Following *Brown v. Board of Education of Topeka* (1954), wherein the Supreme Court struck down segregation in public schools based on race as violating the Equal Protection Clause of the Fourteenth Amendment, many school systems entered into judicially supervised consent decrees. These consent decrees sough to compel school boards and their officials to desegregate their districts as federal trial courts retained jurisdiction over the disputes until they fully complied with the terms of their agreements. Moreover, these decrees remained viable despite massive resistance, especially in the South. To this end, major Supreme Court cases on school desegregation, such as *Swann v. Charlotte-Mecklenburg Board of Education* (1971), *Keyes v. School District No. 1, Denver, Colorado* (1973); *Board of Education of Oklahoma City Public Schools v. Dowell* (1991), and *Freeman v. Pitts* (1992), all involved consent decrees, some of which were subject to judicial oversight for more than two decades. Hundreds of desegregation cases remain under the control of federal trial courts.

Consent decrees have also played a major role in the development of special education. In perhaps the most notable early dispute, *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (1971), parents challenged segregated programs, practices, and policies that deprived their children of equal educational opportunities under the Fourteenth Amendment's Due Process and Equal Protection clauses. When officials representing the commonwealth agreed to abide by the terms proposed by the plaintiffs, the court's granting its imprimatur to the agreement that the parties reached helped to pave the way for equitable treatment of children (and adults) with disabilities in education as well as in wider society.

Disputes in higher education have also involved consent decrees, even if courts have not always accepted their content. For example, in *Adams v.*

Califano (1977), the federal trial court in Washington, D.C., rejected a proposed plan involving six states. The court refused to accept the plan, not only because it failed to comply with desegregation plans for Black schools in the states' systems of higher education as mandated by the Department of Health, Education, and Welfare but also because it did not adequately increase Black enrollment at public White institutions of higher education. Further, although the Ninth Circuit rejected a consent decree that was designed to provide gender equity in interscholastic sports pursuant to Title IX in California's state university system (*Neal v. Board of Trustees of California State Universities,* 1999), the outcome reveals that such agreements are often at the heart of attempts to reach decisions via alternative dispute resolution.

In sum, consent decrees can be viewed as worthwhile alternative tools in helping to avoid costly, often protracted, litigation. Moreover, even though adequate judicial monitoring to implement consent decrees can be costly, they can be a useful strategy to help resolve contentious disagreements in a manner that is still less costly and typically less confrontational, resulting in benefits for both plaintiffs and defendants.

Paul Green

See also *Brown v. Board of Education of Topeka; Dowell v. Board of Education of Oklahoma City Public Schools; Freeman v. Pitts; Keyes v. School District No. 1, Denver, Colorado; Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania; Swann v. Charlotte-Mecklenburg Board of Education*

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Contracts

Contracts are legally enforceable agreements between two or more parties to perform obligations resulting from bargained-for exchanges. In most contexts, state laws govern contracts, with each state having jurisdiction-specific rules regarding contract formation and interpretation that have been established by statute and/or judicially created common law decisions. This entry looks at the law regarding contracts and their application in the school setting.

Basic Requirements

In order for contracts to be valid and enforceable, agreements must generally represent a meeting of the minds and intent to be bound objectively manifested by parties with capacity to contract; be supported by valid consideration from each party to be bound; include essential terms that are sufficiently specific

and definite to be enforced; be of sufficient form, such as in writing; and have lawful subject matter.

There must be at least two parties to contracts. Parties to contracts must have the capacity to form those agreements. Minors and incapacitated persons, such as those who are incapable of handling their affairs due to mental disorders, generally lack the capacity to enter into contracts. In the education context, the capacity of parties to enter into contracts might be most relevant with respect to agreements between an educational institution and a minor student.

For example, educators in some schools, as motivating tools or behavior management strategies, engage in the practice of asking students to sign contracts specifying the school's expectations for their behavior. While such strategies might have pedagogical underpinnings, such as teaching students about taking responsibility for their actions, setting clear guidelines and expectations, and others, such "contracts" are, in most instances, unenforceable as legal agreements. These "contracts" are unenforceable because, among other reasons, student parties are minors who are incapable of binding themselves by contracts under law. For this reason, school officials seeking to enter into agreements with students, such as when school boards and their employees seek to be released from liability relating to students' participation in sports or other extracurricular activities, should ensure that they receive such consent in writing from the students' parents as well as the students.

Parties with capacity to enter into agreements have done so only when each has given objective manifestations of their intent to do so. Objective manifestations of intent might be signatures on written agreements, handshakes, oral commitments to be bound, or even, under some circumstances, performance of obligations of agreements.

Essential to the formation of contracts is the existence of valid consideration offered by each party. Consideration is something, such as funds, forbearances, performances, or return promises, that each party offers in exchange for the other party's (or parties') consideration. Absent consideration, a promise that would otherwise constitute a contract is a mere gift unenforceable under law. Accordingly, with relatively few exceptions, a promise unsupported by valid consideration cannot be a contract.

Valid contracts must include all essential terms and must be sufficiently specific. The omission of essential terms from agreements renders them unenforceable and therefore invalid. Valid contracts must also sufficiently describe their essential terms. Terms are described as sufficiently specific where the adequacy of a party's performance can be understood when considered in light of such terms. Insofar as contracts with terms that are insufficiently defined cannot be enforced, they cannot be valid.

A common misconception regarding contracts is that to be enforceable they must be in writing. Generally, this is not the case. However, a preference for written agreements has arisen out of the obvious benefit of having such agreements for the benefit of proving the terms of agreements should such proof be necessary at a later date. Many jurisdictions require by statute that agreements for certain kinds of performance, such as for the sale of goods valued over a certain amount, for interests in land, for sureties, and for performance that cannot be completed in a year's time, be in writing to be enforceable. The last example, contracts that cannot be performed within a year, is of particular importance to school employees, who typically sign contracts several months before the start of academic years.

Valid contracts must also concern legal subject matter. Public policy in favor of the freedom to contract is a respected aspect of American legal thought. This preference for freedom of contract is generally limited only by the boundaries of statutory law, public policy, or common law (judicially decided law). If contracts conflict with statutes, such as by requiring performance that would amount to a criminal act, the agreement lacks legal subject matter and is void as a matter of law even if the parties are unaware of its illegality.

Contracts are commonly referred to as unilateral or bilateral in nature. Bilateral contracts are formed when parties offer their consideration in return for a promise or set of promises. Conversely, unilateral contracts are formed when one party extends an offer to the other that may be accepted by performance rather than by return promises.

School-Related Contracts

Contracts arise in a myriad of ways in the educational context. Perhaps most common are employment contracts between school boards and their employees. Such contracts are often collective bargaining agreements reached following negotiations between boards and the labor unions representing teachers or other staff members. Collective bargaining agreements, otherwise termed labor or collective-labor agreements, often address various aspects of employment including wages, benefits, other employment conditions, employee and employer rights, discipline, and a grievance process.

In the public school context, contracts of employment have been found to confer on the party contracting with the state a property right protected by the Due Process Clause of the Fifth and Fourteenth amendments to the U.S. Constitution. For example, in *Cleveland Board of Education v. Loudermill* (1985), the U.S. Supreme Court observed that where a public school employee had a contract that created a reasonable expectation of continued employment, the contract amounted to a property interest that the school board could not deprive the employee of without due process of law. Accordingly, the Court explained, a board cannot constitutionally discharge such employees without first affording the employee the basic requirements of due process: notice and the opportunity to respond to the charges before the deprivation of the property interest.

Contracts also arise in the school context in much the same way that they arise in other contexts. Schools enter into contractual agreements relating to a wide variety of pursuits, including construction and building maintenance, the provision of special education services, the purchase of products such as textbooks, and other goods and services.

Alli Fetter-Harrott

See also *Cleveland Board of Education v. Loudermill;* Collective Bargaining; *Board of Regents v. Roth; Perry v. Sindermann*

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Cooper v. Aaron

In *Cooper v. Aaron* (1958), the U.S. Supreme Court responded to an early skirmish in the battle over school segregation, in which nine students who desegregated Central High School in Little Rock, Arkansas, during the 1957–1958 school year had to confront the fierce resistance of Governor Faubus and the state legislature. The Court ruled that the school's desegregation plan should go forward despite the conflict and that the governor and legislators were acting unconstitutionally to prevent the African American youngsters from getting an equal education.

Facts of the Case

Throughout the month of September 1957, starting with the first day African American students attended the school, Faubus created a great deal of resistance, including taking steps to bar those students from entering school on that first day of class and subsequently by using the National Guard troops to impede their entry. Faubus was not acting at the direct request of school officials, who were implementing a judicially approved desegregation plan.

As bitter criticism of the school board's plan and of the educational officials themselves grew, the board asked the African American students to discontinue their attendance until the legal situation was resolved. The board then petitioned the federal trial court to postpone the plan until the controversy was resolved. Meanwhile, Governor Faubus continued his offensive of blatant resistance with the National Guard at his disposal for three weeks.

A federal trial court in Arkansas granted a delay in the implementation of a previously judicially

approved desegregation plan, but the Eighth Circuit reversed that order, and Faubus was forced to discontinue obstructing or interfering with the orders of the court in connection with the plan. A unanimous Supreme Court affirmed the order of the Eighth Circuit, finding that the actions of the governor and legislature unconstitutionally deprived the African American students of their right to equal educational opportunities under the Fourteenth Amendment.

The Court's Ruling

At the outset of its opinion, the Supreme Court noted that *Cooper* raised important questions regarding the maintenance of the federal system of government. The Court explained that this acknowledgment essentially grew out of the claims of the governor and state legislature that they had no duty to obey federal court orders that were based on the Supreme Court's considered interpretation of the federal Constitution. Specifically, the governor and legislature of Arkansas argued that they were not bound by the Court's holding in *Brown v. Board of Education of Topeka* (1954).

According to the Supreme Court, at issue in *Cooper,* in the context of the Fourteenth Amendment, was whether the good faith efforts of members of the school board and district superintendent, in light of strong actions of resistance of other state officials (mainly the governor and legislators), constituted a constitutionally acceptable legal excuse for delay in implementing the desegregation plan for the public schools. The board members also claimed that the actions of the governor and legislators were responsible for conditions that allegedly made prompt implementation of the desegregation plan impossible. The board's reason for postponement in this proceeding stated that

> the effect of that action [of the Governor] was to harden the core of opposition to the Plan and cause many persons who theretofore had reluctantly accepted the Plan to believe there was some power in the State of Arkansas which, when exerted, could nullify the Federal law and permit disobedience of the decree of this [District] Court. (p. 10)

The Supreme Court held that the Fourteenth Amendment forbids states from using their governmental powers to bar children on racial grounds from attending schools where there is state participation through any arrangement, management, funds, or property. At the same time, the Court reasoned that the governor and state legislature were bound by the Court's prior decision in *Brown* that called for an end to state-enforced racial segregation in public schools. The Court ruled that the failure to follow *Brown* amounted to an unconstitutional denial of equal protection of laws.

The Supreme Court refused to uphold the suspension of Little Rock's plan to eradicate segregated public schools until such time as state laws and efforts to nullify its judgment in *Brown* had been subject to further judicial challenges and tests. The Court concluded that from the perspective of the Fourteenth Amendment, because members of the school board and the district superintendent stood as agents of the state, their good faith did not constitute a legal excuse for delay in implementing a desegregation plan for schools insofar as other state officials, in the form of the governor and various legislators, were making it difficult or impossible for them to do so.

Mark A. Gooden

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment

Legal Citations

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Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
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Copyright

Copyrights are intangible rights granted by the federal Copyright Act to authors or creators of original artistic or literary works that can be fixed in a tangible

means of expression such as hard copies, electronic files, videos, or audio recordings. The Copyright Act protects literary, musical, dramatic, choreographic, pictorial, sculptural, and architectural works as well as motion pictures and sound recordings. Each copyrightable work has several "copyrights"—the rights to make copies of the work, distribute the work, prepare "derivative works," and perform or display the work publicly. Each author or creator may transfer one or more of these copyrights to others. For example, book authors who wish their books to be used in schools sell the copying and distribution rights to publishers in return for royalties gained from book sales. This entry looks at copyright law as it applies to education.

Fair Use Exception

Copyright law protects against unauthorized copying, performance, or distribution of copyrighted works, and the unauthorized creation of derivative works. The Copyright Act imposes several limits on these exclusive rights. Three of theses rights are applicable to educational settings. First, according to Section 107 of the Copyright Act, fair use of a copyrighted work, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Fair use balances the rights of the owners and creators of copyrighted works with the needs of those who use such works. If a use is a fair use, then users need not obtain consent of owners. In infringement cases, the defendants generally bear the burden of proof to show that their use was fair. Evaluating whether a use is fair requires the application of four factors, articulated explicitly in the act:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work

The fair use doctrine is often applied successfully in schools, because most educational uses are not commercial. However, some guidelines are necessary. According to a report of the Ad Hoc Committee of Educational Institutions and Organizations on the Copyright Law Revision of 1976, teachers may make single copies of the following items for use in teaching or preparation to teach a class: a chapter from a book; an article from a newspaper or periodical; a short story, essay, or poem; and a chart, diagram, graph, or picture from a book, periodical, or newspaper.

Other Accepted Uses

Second, under Section 108, it is not an infringement of copyright for a library to reproduce one copy or audiorecording of a work, or to distribute the copy or audiorecording, if these activities are done without intentional commercial advantage, if the library is open to the public, and if the reproduction includes a notice of copyright. This provision allows libraries and archives to replace lost, stolen, damaged, or deteriorating works and to preserve unpublished works. Libraries in K–12 educational settings are very rarely open to the public. Therefore, in education, this exception will likely apply only in colleges and universities.

Third, Section 110(1) permits teachers and students in nonprofit educational institutions to perform or display a copyrighted work "in the course of face-to-face teaching activities." Section 110(2), which codifies the Technology, Education, and Copyright Harmonization Act of 2002, permits essentially these same activities in distance education or online environments, but with several additional requirements. First, the performance or display must be at the direction of or under the supervision of an instructor. Second, it must be an integral part of a class session offered as part of the "systematic mediated instructional activities" of the educational institution. Third, the performance or display must be directly related and of material assistance to the teaching content of the transmission. Fourth, the transmission must be available only to those students enrolled in the course and those employed to teach or assist in teaching it. Fifth, the school must implement policies and practices that educate teachers and students about

copyright law, and they must apply technological measures that prevent the retention and accessibility of the copyrighted work for longer than the class session. The use granted by Section 110(2) does not apply to copyrighted works produced or marketed primarily for distance education (e.g., distance education courses for sale).

Ownership Issues

Initially, ownership in a work's copyright is vested in the authors or creators of the work. Educational institutions, however, may deal with "works for hire," which are works created by employees within the scope of employment. In such cases, the employer becomes the copyright holder. There is a solid legal argument for a "teacher exception" to the work-for-hire doctrine, however (Daniel & Pauken, 1999).

Copyrightable works created on or after January 1, 1978 (the effective date of the Copyright Act of 1976), are protected from the time the work is fixed in a tangible medium of expression until 70 years after the death of the author/creator. If the work has corporate authorship, copyrights last 95 years from publication or 120 years from creation, whichever is shorter. The duration of copyright for works created before 1978 is dependent on several factors. For a chart spelling out the application of these factors, see Gasaway, *When U.S. Works Pass Into the Public Domain.* Once a copyright term expires, the work goes into the public domain and advance permission to use the work is no longer necessary.

Remedies available to successful copyright infringement claims include injunctive relief, impoundment or disposal of infringing works, monetary damages (e.g., actual damages and lost profits), statutory damages (provided by the Copyright Act and decided by the courts), and attorneys' fees.

Patrick D. Pauken

See also Digital Millennium Copyright Act; Fair Use; Intellectual Property

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Copyright Act, 17 U.S.C. §§ 101 *et seq.*

Corporal Punishment

In the mid-1970s, the U.S. Supreme Court upheld the right of educators to use corporal punishment to foster discipline in the public schools. In doing so, the Court observed that the use of the hickory stick was a venerable tradition. Yet, 30 years later, there has been a dramatic shift in state policies and local practices governing corporal punishment. This entry briefly traces the origins of corporal punishment in American education, litigation that has challenged the practice, often unsuccessfully, and recent state policy initiatives restricting its use.

An American Tradition

Corporal punishment is a practice deeply ingrained in American education. Its roots reach into the pre-Revolutionary colonial era. Consistent with the then-pervasive view of schooling as a means of passing on pious values, and of discipline as the means of driving sin from children, parents and teachers alike believed their responsibility to correct children, including the use of the rod, was commanded by God.

The adoption and ratification of the Constitution, and the writings of some of its framers and their contemporaries in the late 1700s, served to recast the mission of education in the young republic. Even though the schools' religious underpinnings faded and a new, enlightened view of civic responsibility emerged, the harsh disciplinary regime that had characterized the schools prior to the Revolution persisted well into the 1800s. Nor did the growing influence of the Common School Movement in the mid-1800s, with its emphasis on moral suasion and a more nurturing view of child development, radically alter the use of physical punishment in many schools. Throughout even the latter half of the 19th century, state court challenges to corporal punishment in the public schools were of limited success, with teachers most often accorded appreciable, if not necessarily the same, discretion as parents in the use of physical punishment. Illustrative of these were cases decided in North Carolina and Vermont respectively, *State v. Pendergrass* (1837) and *Lander v. Seaver* (1859).

During the first quarter of the 20th century, many states moved to enact school codes as a means of bringing greater uniformity to their educational policies and practices. Many codified the common law right of teachers to use corporal punishment and established standards for its usage. Most authorized corporal punishment when "reasonable" or "necessary" and provided that teachers could be held liable only for punishment that was "excessive" or, in some jurisdictions, "grossly excessive" or "malicious."

Litigation

As critics of various school policies turned to the federal courts with some success beginning around the midpoint of the last century, a new wave of litigation focusing on corporal punishment emerged. Federal courts, however, proved largely unreceptive to constitutional challenges that sought to restrict the discretion of teachers and school administrators to use physical punishment as a means of maintaining discipline.

In 1975, the Supreme Court summarily affirmed a lower federal court's order upholding the authority of school officials to use corporal punishment, even over prior express parental objection to its use with respect to their child. The Court's affirmation in *Baker v. Owens* (1975) suggests that minor or moderate physical punishment does not unduly infringe on the liberty interest of parents to guide the upbringing of their children, at least where it is rationally related to a legitimate purpose such as the maintenance of order in the schools.

Two years later, in *Ingraham v. Wright* (1977), the Supreme Court rejected arguments that corporal punishment violated the Eighth Amendment's prohibition on cruel and unusual punishment. The Court found the Eighth Amendment inapplicable to schools, because the framers of the Constitution intended it to protect only those incarcerated for the conviction of crimes. The Court in *Ingraham* also held that the administration of corporal punishment by school officials does not violate the procedural due process provisions of the Fourteenth Amendment, at least where the practice of corporal punishment is authorized and limited by common law. In arriving at this conclusion, the Supreme Court noted that the use of corporal punishment as a means of school discipline dates back to the colonial period, and that in spite of the fact that public and professional opinion on the issue has been sharply divided for more than a century, "We discern no trend toward its elimination" (pp. 650–651).

The Court in *Ingraham,* however, expressly declined to review whether the infliction of severe corporal punishment on a student may, under certain circumstances, constitute arbitrary and capricious action in violation of the substantive due process protections of the Fourteenth Amendment (p. 659 note 12). Since 1977, then, the majority of the federal court challenges to school-administered corporal punishment have been brought on substantive due process grounds. Only with respect to such substantive due process claims have students, with any regularity, won acknowledgment of

constitutionally guaranteed rights, and then only where the practice of corporal punishment has been found to be so severe as to" shock the conscience of the community" or reflect "maliciousness" on the part of school officials. Illustrative of these federal appellate cases is the Fourth Circuit's ruling in *Hall v. Tawney* (1980), which has been followed in most but not all other circuits.

State Legislation

Even as the Supreme Court turned a largely deaf ear to the children and their advocates challenging corporal punishment in the 1970s, state legislatures and administrative agencies were becoming more receptive to their concerns. At the time of *Ingraham,* only New Jersey and Massachusetts prohibited corporal punishment of schoolchildren as a matter of state policy. Only Maine had added a prohibition on corporal punishment by the end of the decade. The magnitude and pace of state policy review and revision, however, increased substantially beginning in the 1980s. Fourteen states adopted legislation or administrative rules prohibiting the use of corporal punishment before the end of the decade, most coming in a flurry of policymaking during the latter half of the decade.

This state policy activity, fueled by growing social science evidence calling into question the effects of corporal punishment, persisted into the 1990s. By the opening of the 1994–1995 school year, eight additional states had enacted legislation or administrative regulations banning corporal punishment from their schools. By 2005, a total of at least 28 states had adopted prohibitions on the use of corporal punishment by public school officials. Several additional states adopted legislation either permitting parents to exempt their children from such punishment by notifying school officials of their objection or prohibiting its usage unless local boards of education affirmatively elected to continue its usage after a study of available disciplinary alternatives.

While the trend over the last three decades has clearly been toward the elimination of the use of corporal punishment, more than 20 states continue to authorize its use, either as a matter of common law or by virtue of express statutory authority. The preponderance of these states are in the southeast and southcentral region of the country. Yet according to data from the U.S. Department of Education, Office for Civil Rights (2004), legislative enactments in other regions, as well as lessening usage by districts in the South, have contributed to the decline in the number of students who experience corporal punishment annually, from a high of 1.5 million in 1976 to less than 300,000 in 2004.

Charles B. Vergon

See also Due Process; Eighth Amendment; *Ingraham v. Wright*

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Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos

In *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos* (1987), former employees of unincorporated divisions of the Church of the Latter-Day Saints (LDS) who refused or were ineligible to become members of the church challenged their being dismissed from their jobs. The employees who lost their jobs filed suit alleging that

the LDS church committed religious discrimination under Title VII of the Civil Rights Act. In a decision that can be of great significance for religious schools and their employees, the Supreme Court found that religious employers do not run afoul of the Establishment Clause if they place religious requirements on their employees pursuant to Title VII.

Facts of the Case

According to Section 702 of Title VII of the Civil Rights Act of 1964, "The subchapter. . . shall not apply . . . to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

The former employees claimed that insofar as their duties were not religious in nature—for example, they served as truck drivers and as a seamstress—the LDS church did not qualify for exemption under Section 702. The LDS church responded that while the duties of these individuals did not directly involve proselytizing or the conversion of others to their faith, it was imperative that those working for LDS divisions support the church's values. The employees answered that allowing religious employers to be exempt from liability under Section 702 for nonreligious jobs would, in actuality, have promoted religion in violation of the Establishment Clause.

Initially, the federal trial court in Utah granted the employees' motion for summary judgment, but it vacated its order so that the United States could intervene. On reconsideration, the trial court reached the same outcome as in its first hearing. In attempting to resolve the issue, the trial court relied on the tripartite *Lemon v. Kurtzman* (1971) test, considering whether there was a tie between the religious organization and the activity such as finances, day-to-day management, and supervision; whether there was a relationship between the activity and the religious tenets or beliefs of the organization; and what the relationship was between the job that the employees performed and the religious tenets of the organization. Based on these criteria, the trial court decided that because their work had nothing to do with promoting or teaching religion, the LDS church had violated its employees' Title VII rights with the dismissal.

The Court's Ruling

On further review, the Supreme Court reversed in favor of the LDS church. The Court held that Title VII's prohibition against religious discrimination in employment as related to secular nonprofit activities of religious organizations did not violate the Establishment Clause.

The Supreme Court also applied the *Lemon* test but reached a different result. In its review of *Lemon*'s first prong, or "secular legislative purpose" test, the Court noted that the intent was not that an issue needed to be unrelated to religion, but rather that the government was prevented from promoting a particular point of view in religious matters. As for the second prong, "a principal or primary effect . . . that neither advances nor inhibits religion," the Court pointed out that it is not unconstitutional for religious organizations to advance their beliefs. Rather, the Court explained, it is only forbidden for the government to advance religion through its influence and activities. Moreover, as applied in the case at bar, the Court observed that it was the LDS church, not the government, which fired its employees. When considering the third prong, the Court held that there was no impermissible entanglement between church and state. In its application of all three prongs of the test, the Court was of the view that because it was the LDS church, not the government, that dismissed the employees, their rights were not violated.

In sum, the Supreme Court noted that Section 702 of Title VII limits government interference with nonprofit activities of religious employers carrying out their religious missions.

Brenda R. Kallio

See also *Lemon v. Kurtzman;* Teacher Rights; Title VII

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Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
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Crawford v. Board of Education of the City of Los Angeles

Crawford v. Board of Education of the City of Los Angeles (1982) involved two decades of legal wrangling over the desegregation of Los Angeles schools, including several rounds through California's state courts and a trip to the U.S. Supreme Court. The case began in August 1963, when the American Civil Liberties Union (ACLU), representing a group of minority students, brought a class action suit against the Los Angeles City Board of Education seeking to desegregate two high schools, one predominantly African American and the other mostly White. The dispute was later expanded to include the entire district.

An Extended Conflict

After initially filing suit in 1963, the plaintiffs spent nearly five years trying to persuade the board to desegregate its schools. In 1968, litigation replaced negotiations. A trial court found that the board substantially engaged in de jure segregation in violation of the state and federal Constitutions, and in 1970, the court ordered the board to prepare a desegregation plan for immediate use. The board sought further review, which did not come until 1975.

While awaiting the appeal, the Supreme Court made it clear that for the purpose of the federal Constitution, courts could order remedies only in de jure segregation effected by state action. When the appeal finally came through, the court reversed in favor of the board. However, a year later, the Supreme Court of California, in turn, reversed in favor of the plaintiffs, affirming the order calling on the board to desegregate its schools (*Crawford v. Board of Education of the City of Los Angeles,* 1976).

At the next stage in the controversy, the school board submitted a mostly voluntary plan for desegregating the schools that a trial court declared ineffective in July 1977. The court ordered the board to submit a new plan within 90 days. The new plan called for mandatory student reassignment and busing to be implemented in the fall of 1978. Yet, before the plan could be implemented, a group called Bustop, composed of White parents, challenged the mandatory busing part of the plan. Ultimately, the Supreme Court denied the group's request for a stay (*Bustop, Inc. v. Board of Education of the City of Los Angeles,* 1978). In denying the stay, the Court discussed the difference between the California and federal constitutions, noting that when state courts interpret their own constitutions, they may impose more rigorous restrictions on local school boards than would be permitted under the federal counterpart.

On remand, the opponents of mandatory busing relied on the distinction in the Supreme Court's opinion. To this end, the state legislature placed a constitutional amendment, Proposition 1, on the November 1979 ballot that declared school boards had no obligation or responsibility to exceed the guarantees of the Equal Protection Clause of the Fourteenth Amendment with regard to student school assignment or pupil transportation. Once the amendment passed, the school board immediately invoked Proposition 1, seeking a judicial order to end all mandatory student reassignment and busing.

A Final Challenge

In July 1980, a state trial court rejected the board's request, calling for a new mandatory busing plan in relying on the de jure segregation finding 10 years earlier. An intermediate appellate court decided that the trial court, not the school board, had the responsibility for overseeing the desegregation plan. After the Supreme Court of California refused to review the case, the school board submitted a completely voluntary plan for desegregating the schools that led the trial court, in late 1981, to end its jurisdiction over *Crawford.* Even so, the dispute did not end there, because the viability of the state constitutional amendment had yet to be resolved.

The question that came before the Supreme Court in *Crawford* was whether Proposition 1 violated the Equal Protection Clause of the Fourteenth Amendment. The Court upheld the constitutionality of the amendment based on four main points. First, the Court ruled that because the proposition did not involve a racial classification, it was constitutional. Second, the Court pointed out that an attempt to

repeal or modify desegregation or antidiscrimination laws as in *Crawford* did not involve a presumptively invalid classification based on race. Third, the justices agreed that the state courts correctly decided that the amendment was not based on a discriminatory purpose. Fourth, the Court concluded that the Fourteenth Amendment does not prohibit states from backing away from its dictates once they have completed actions that exceeded its dictates.

Darlene Y. Bruner

See also Equal Protection Analysis; Fourteenth Amendment; Segregation, De Jure

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Creationism, Evolution, and Intelligent Design, Teaching of

Four distinct movements in American educational history have approached the interpretation of what may be taught to children regarding the origins of life. The first movement focused on the teaching of the theory of evolution in the public schools. The second movement dealt with the teaching of creationism *only* in the public schools. The third movement sought to provide equal time to both the theories of evolution and creationism. Most recently, these two have been joined by a fourth movement that seeks to introduce creationism into public school science curricula through either the mandatory teaching of intelligent design or divine design, or mandatory disclaimers as to the factual nature of the theory of evolution.

The second, third, and fourth movements have in common the belief that all living species in their present form can be attributed to a creator or designer that is supernatural or not knowable by scientific means. These perspectives also share the goal of challenging the scientific explanation of life, or the theory of evolution, that all living species are the result of physical changes over time through natural processes that can be explained by scientific means.

Opposing Sides

Darwin's theory of evolution, published in his seminal work, *On the Origin of Species by Means of Natural Selection* (1859), is the foundation of the first movement, the theory of evolution. Even so, prior to Darwin's theory of evolution, there were escalated controversies between scientists and religious fundamentalists. In fact, two centuries before Darwin's theory of evolution, the religious and scientific communities struggled with their respective explanations of life. The most famous early controversy was the trial of Galileo in 1633 for publishing *Dialogue,* a book that supported the Copernican theory that the earth revolved around the sun, not the other way, as the Bible suggests.

The second movement involving the teaching of creationism sought to forbid the teaching of evolution and mandate the teaching of creationism. The theory of evolution, which was being taught in public school classrooms, came under challenge and became visible in the Scopes "Monkey Trial" (*Scopes v. State,* 1927). According to a state law from Tennessee, the teaching of evolution in public schools was a criminal offense. The American Civil Liberties Union (ACLU) assisted in the defense of John Scopes, a public schoolteacher charged under the statute. Mr. Scopes was prohibited from teaching evolution and convicted of the criminal offense. Decades after this trial, the Tennessee state legislature continues to attempt to challenge the teaching of evolution as battles are waged in school board rooms throughout the state.

Court Intervention

This challenge remained unresolved until, in 1968, the U.S. Supreme Court entered the fray in *Epperson v. State of Arkansas,* which declared an Arkansas law that prohibited the teaching of evolution unconstitutional under the Establishment Clause of the First

Amendment of the U.S. Constitution, because its purpose was the advancement of a religious belief in creationism. The Court found implicit state support of the Christian doctrine of creationism.

Epperson emphasized that the Establishment Clause protects against advocacy by government for religion. To this end, the Court ruled that the government must remain neutral in the area of religion. The Court suggested that teaching religion in public schools as part of history was acceptable, but teaching it for the purposes of furthering a religious doctrine was constitutionally forbidden.

The third movement attempted to avoid violating the Establishing Clause by mandating the teaching of creation science (creationism) as an alternative theory to evolution and to balance the teaching of evolution and creationism. Creationists sought to avoid being classified as promoting religion by providing scientific explanations of divine creation and avoiding any reference to the literal interpretation of the book of Genesis in the Bible (*Edwards v. Aguillard,* 1987). In 1985, lower federal courts, affirmed by the Supreme Court, agreed that a Louisiana creationism statute was unconstitutional, because it removed the state from a position of neutrality toward advancing a particular belief. Of particular significance was the Court's statement in *Edwards* that the Establishment Clause bars any theory based on supernatural or divine creation, because these theories are inherently and inescapably religious, regardless of whether they are presented as a philosophy or a science.

In 1999, the Kansas Board of Education voted to remove evolution from the list of subjects tested on state standardized tests. In 2000, Kansas voters responded by eliminating the antievolution board and restored the old science standards. However, by 2004, a new board majority proposed that intelligent design be discussed in science classes.

The Current Debate

The fourth movement advocates for equal time for the teaching of intelligent design alongside the other theories. Parents represented by the ACLU successfully challenged a policy from the Dover, Pennsylvania, school district that required high school science teachers to read a statement questioning the theory of evolution and presenting intelligent design as an alternative (*Kitzmiller v. Dover Area School District,* 2005). Proponents of intelligent design do not mention the nature of the intelligent designer and the Bible. The plaintiffs successfully argued that intelligent design is a form of creationism, and that the school board policy violated the Establishment Clause. In reaching its judgment, the court maintained that the religious nature of intelligent design would be readily apparent to an objective observer, adult or child. The other issue that the court specifically addressed was the question of whether intelligent design was religion or science. The court specifically concluded that intelligent design is not a science and cannot be separated from its religious purposes.

Conflicts between science and religion, and their respective roles in American classrooms, will not end any time soon. In the future, legal conflicts between science and religion can be expected to continue.

Deborah E. Stine

See also Darrow, Clarence S.; *Edwards v. Aguillard; Epperson v. State of Arkansas;* First Amendment; Prayer in Public Schools; Scopes Monkey Trial; State Aid and the Establishment Clause

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Critical Theory

Critical theory views the law as a tool of social, political, and economic reform oriented toward addressing social injustices. In attending to the social context of the law, critical legal theory draws on social theory, political philosophy, economics, and literary theory. One of the main tenets of critical theory is the elimination of unjust hierarchies of privilege that are created and perpetuated through educational practices, pedagogy, admissions, grading, job placement, awarding of research grants, conferences, publishing, and faculty or teacher recruitment, as well as interpretations of free speech principles. This position is outlined in one of the most influential critical legal theory texts, *Legal Education and the Reproduction of Hierarchy* (1983), by Duncan Kennedy.

All of these educational practices rest on a false ideology of rationalism, consisting of objectivity, impartiality, impersonality, neutrality, universalism, and fairness. The critical legal theory critique of the politics of reason regards rationality as inherently incoherent, authoritarian, and politically biased. It is accompanied by a critique of capitalism as reflected in such notions as corporate identity, property laws, fair value, due process, title, and contract applied to the social construction of the law, its enforcement through administrative policy, electoral politics, and political discourse. This approach is important in questioning technocracy and a marketplace model of education. The background of this theory and its application to education are discussed in this entry.

Theoretical Background

The term *critical theory* is derived from the Greek *kritikos* (decide) and *theoria* (behold). Critical theory as applied to the law is most closely associated with Franz Neumann (1900–1954) and Otto Kirchheimer (1905–1965) of the Frankfurt School and Jürgen Habermas (1929–), as well as Max Weber's (1864–1920) social theory as valuationally oriented, Antonio Gramsci's (1891–1937) concept of hegemony, Michel Foucault's (1926–1984) historicism, and Jacques Derrida's (1930–2004) deconstructionism. All of these are legal theories that challenge accepted norms and standards believed to perpetuate hierarchical structures of domination in modern society.

Critical theory has been influential in legal theory on both sides of the Atlantic. In Germany, Neumann and Kirchheimer advanced a critical history of legal transformation supporting the welfare state, liberalism, and democratic institutions, particularly a "social rule of law" associated with the Weimar constitution, arguing that its failure was due to the entrenchment of capitalist ideology. Kirchheimer proposed a parliamentary approach to articulating the interests of diverse social groups and developed a postwar legal analysis of the depoliticization of the public sphere as it was increasingly replaced by consumerism. Neumann presented a social democratic interpretation of Max Weber's (1864–1920) theory of modern law, a critique of liberalism, and the limits of legalistic thinking under certain political and economic conditions.

More recently, Habermas argued for a theory of rights, rooted in a Kantian approach to natural law that attempts to ground rights on moral principle in contrast to the dominant Anglo-Saxon tradition of legal positivism, realism, and pragmatism that rests upon the legitimacy of political authority. Drawing on Kantian constructivism and an interpretive social-scientific research approach that introduces a provisional character to normative principles, Habermas promotes a democratic communicative process in deriving a system of rights aimed at emancipation, what he calls "the logical genesis of rights," which requires people to see one another as political equals, as "free and equal consociates under law."

From this granting of mutual autonomy and from equal freedom under the law expressed through public discourse, legal legitimacy is achieved through an ongoing democratic process resulting in an assent by all citizens to legislation. In this manner, Habermas establishes a set of legal guarantees, or rights, that govern the process of constructing laws. In other words, it is a set of formal rather than substantive normative principles that are intended to ground and ensure the provisions for communicative action.

United States Application

In the United States, critical legal theory grew out of the social activism of the 1960s and was first spoken of in 1977 at a conference at the University of Wisconsin–Madison. It has differentiated into a number of applications, including feminist legal theory, critical race theory, postmodern legal theory, moral legal theory, and a critical political economy strand. One important area of critique is that of the theory of rights characteristic of mainstream American legal theory, although it is not shared by all feminist and critical race theorists.

There are five main criticisms of the rights approach in pursuing social reform. First, it is less useful in attaining progressive social change than assumed. Second, legal rights are indeterminate and incoherent. Third, the rights discourse inhibits imagination and mystifies people about how the law works. Fourth, it reflects and produces isolated individualism that undermines social solidarity. Fifth, rights discussion can impede progressive democratic and justice movements. A second major feature of critical theory is its critique of the rule of law viewed as a neutral set of rules, when it in fact operates as a tool of oppression.

Derived from traditional class critique, critical theory examines discrimination through educational practices based on other types of difference, such as race, ethnicity, language, gender, and sexual orientation. This examination has been conducted on a broader, more pluralistic scale than studies have been of any one socially identifiable marginalized or oppressed group. Of all forms of American critical legal theory, critical race theory has received the most attention in education, bringing into question the seeming race-neutral and color-blind character of law and policy, including those means used to produce racial inequality such as immigration, desegregation, affirmative action, curriculum selection, instruction, and educational administration and leadership. For adherents of legal critical theory, education is often the engine that drives legal reform, such as the civil rights legislation that emerged in response to desegregation in the landmark *Brown v. Board of Education of Topeka* (1954). This approach has also been applied to curriculum design, assessment practices, and educational funding disparities.

Drucilla Cornell draws on critical theory, primarily Habermas's *The Structural Transformation of the Public Sphere* (1962), in examining the disappearance of the public sphere in modern society. The major implication for school law is the transformation of education from a public sphere locus into a technically rationally regulated sphere; in critical theory terms, this is a colonization of lifeworld by system. This compromises the right to privacy in dealing with personal experience, inhibiting communicative action by removing the conditions under which it takes place, thereby greatly reducing the possibilities for civil society and the community-based activity typical of lifeworld that is necessary for educational reform. In addition, critical legal theory has implications for research practices, favoring qualitative and interpretive methods that include subjectivity and social and cultural embeddedness. One major research innovation is the expansion of sources considered appropriate for narrative analysis, including parables, chronicles, stories, literature, and film that represent and express the more ambiguous and subtle aspects of lifeworld experience. In fact, it is the broad range of experiential, that is, historical and biographical, as well as aesthetic, sources that carry their own legitimacy that conventional positivistic data cannot. For these reasons, scholarship that is informed by existentialism, phenomenology, and hermeneutics, in addition to other empirical research practices, produces a more authentic expression of marginalized groups. Along with the traditional conventions of critical theory, poststructural and deconstructionist analyses that uncover underlying contradictions have been included in critical legal theory research methods.

Eugenie Angele Samier

See also *Brown v. Board of Education of Topeka*

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Cumming v. Board of Education of Richmond County

At issue in *Cumming v. Board of Education of Richmond County* (1899) was whether denying a high school education to African American students was a "clear and unmistakable disregard of rights" (p. 545) in violation of their constitutional protections under the Equal Protection Clause of the Fourteenth Amendment. The board of education had decided to discontinue high school services for 60 African American students in order to provide education for 300 African American students who attended elementary schools, and the Supreme Court upheld its action.

Cumming and the accompanying judicial analyses reflect the difficult struggle that African American students experienced as they sought to obtain the constitutionally protected rights to equal protection in education. Fifty-five more years would pass before *Brown v. Board of Education of Topeka* (1954) began to rectify this situation by opening an era of equal educational opportunities.

Facts of the Case

In 1880, the board of education in Richmond County, Georgia, established Ware High School for African American students and charged tuition of $10. In 1897, a special committee recommended that for economic reasons the high school be closed and converted into four elementary schools. The board made this recommendation based on its assertion that the students could have obtained a public education at the Haines Industrial Institute, the Walker Baptist Institute, or the Payne Institute for a fee no greater than that charged by Ware High School.

When African American parents objected to the board's closing the high school, a trial court refused to grant an injunction against the tax collector. While the court did issue an order restraining the board of education from expending any of the tax funds, it suspended its directive until the Supreme Court of Georgia could render a decision on the issues. The high court then dissolved the injunction, reversed in favor of the board, and dismissed the parents' petition.

The court explained that the parents had not pointed out specifically what parts of the Fourteenth Amendment the school board violated. If anything, the court was convinced that the board had not violated the Fourteenth Amendment at all. Although the board did devote some of the school taxes that it collected to support a high school for White girls and a denominational high school for boys, the court was of the opinion that insofar as it had not established a high school for White boys, it did not violate the Fourteenth Amendment.

The Court's Ruling

On further review, a unanimous U.S. Supreme Court affirmed in favor of the school board. The Court began by analyzing Article 8, Section 1 of the Constitution of the State of Georgia, which required local boards to provide a thorough system of elementary schools for English education. The provision added that these schools had to be supported by tax funds. In light of this language, the Court believed that the board made a nondiscriminatory decision to provide education for 300 elementary students in lieu

of offering a secondary education for 60 high school students. The Court quickly pointed out that the affected secondary school students could still have received an education in private schools for tuition that was no greater than they already were paying at Ware High School.

The Court concluded its analysis by deferring to the power of the states to determine who should be educated in the schools provided that the benefits of taxation are shared by all without any discrimination. Absent a clear violation of rights, the Court did not think that federal authorities had the authority to interfere in the operation of the schools.

Not surprisingly, *Cumming* was resolved after *Plessy v. Fergus*on (1896), which introduced the notion of "separate but equal" into the national legal lexicon by upholding the requirement of such facilities for Whites and African Americans in public railway accommodations. Insofar as Georgia's constitution only provided for a system of elementary schools, and the board charged tuition at Ware High School, Tubman High School, and Richmond Academy, the Supreme Court agreed with the board's action in closing the school as a temporary measure based on economic necessity.

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Equal Protection Analysis; Fourteenth Amendment; *Plessy v. Ferguson*

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Plessy v. Ferguson, 163 U.S. 537 (1896).

Cyberbullying

Cyberbullying generally encompasses any kind of harassing or bullying conduct that occurs through electronic communication channels or devices, including e-mail, Web pages, blogs, online video sharing sites, social networking services, cell phones, and camcorders. Cyberbullying is a fairly recent educational and legal concern and is fueled by the ever-increasing affordability and ease-of-use of digital technologies. This entry describes the behavior and some policy guidelines.

Challenges

Cyberbullying can take many forms. For example, a harassing message can be transmitted as a blog post, cell phone text message, or Web page comment. Similarly, bullying behavior can occur as mocking videos, pictures with denigrating captions, hurtful user-created cartoons or animations, and so on. The very tools that empower numerous legitimate uses also enable harassing behaviors.

One of the biggest challenges facing educators who are trying to address cyberbullying issues is the difficulty of monitoring all of the various communication methods that are available to students and employees. Shutting down a Web page or blog is not a viable solution when individuals can easily repost offending material on an infinite variety of free Web site or blog hosts. Tracking down an anonymous e-mail could require a court order and still might result in failure. Even finding harassing or bullying content within the vast ocean of online material can be quite difficult; educators typically learn about hurtful messages from victims or other students and employees.

The ability of individuals to anonymously send or post material online is another challenge for educators. For example, if a student receives a harassing text message on her cell phone from an anonymous antagonist, it can be nearly impossible to track down the offender. Similarly, Internet service providers and online companies often provide individuals with the ability to either keep their identities secret or to create alternative, false identities. Cracking the veil of anonymity poses significant difficulties for educators attempting to address cyberbullying issues.

Policy Guidelines

Educators who are working to reduce cyberbullying incidents must remember several key principles. The first is that school organizations have an affirmative obligation to protect students and staff from harassing or bullying conduct. Employees and students have the legally enforceable right to be free from hostile working and learning environments. Second, school officials must remember that the default rule is that student speech is protected, at least in public schools. In *Tinker v. Des Moines Independent Community School District,* the Supreme Court first noted that students do not give up their constitutional rights simply because they attend school. Teachers and administrators should never operate from the initial assumption that student speech is unprotected. One notable exception to this rule is that true threats are never protected.

Any type of electronic communication that threatens, or reasonably appears to threaten, to cause severe harm should fall under this exception and can be easily regulated by schools. Educators should be careful, however, to distinguish between true threats and insincere statements that pose little to no risk of actual harm. Other exceptions to the general rule include student speech that materially and substantially disrupts the school environment, is vulgar, or advocates illegal drug use.

Third, cyberbullying that occurs using school-owned equipment or technology systems is usually easy to regulate. Courts have upheld the right of public schools to regulate speech because of legitimate pedagogical concerns about school endorsement or sponsorship. Courts also have upheld the right of schools to search their own property, whether it be an e-mail system or a student locker. School organizations should have strong acceptable use policies (AUPs) for both students and employees that outlines the rights and responsibilities associated with using district technological equipment. Consequences for violating the AUP also should be spelled out fairly explicitly. Legal enforcement of an AUP can be strengthened by having students and staff affirmatively sign each year that they have read and understood the document.

Fourth, educators must realize that cyberbullying that occurs off-campus using hardware or software that is not owned by the school organization may be quite difficult to regulate. In these instances, public school educators should tread carefully before attempting to discipline students for cyberspeech that occurs off school grounds. Only a few judicial opinions have dealt with school discipline for public school students' harassing, bullying, or insulting off-campus cyberspeech, and the vast majority have ruled against the schools. In these cases, courts have vigorously tended to protect students' First Amendment rights to express themselves absent a material and substantial disruption to the school learning environment. Insults, negative commentary, hurtful statements, degrading pictures, and contrarian viewpoints all have been found to fall within the protections of the First Amendment. Unless they can show a very significant impact on the school environment, school officials would be better served to substitute education, counseling, and informing victims of their private legal rights for school disciplinary procedures.

Finally, officials in public schools always have greater leeway to regulate employees' off-campus cyberspeech, because staff members are "agents" of their boards. Cyberspeech that is protected for students may not be protected for employees. Past court cases have ruled that employee speech is protected only if it is on a matter of legitimate public concern and is not outweighed by the school organization's responsibility to manage its internal affairs and to provide effective and efficient service to the public.

Cyberbullying issues still are relatively new, and future court cases will further delineate educators' ability to regulate bullying or harassing cyberspeech. Insofar as so much legal uncertainty still exists on this topic, school systems must ensure that ongoing training of administrators and teachers is an important component of their professional development efforts.

Scott McLeod

See also Antiharassment Policies; Bullying; First Amendment; Free Speech and Expression Rights of

Students; Sexual Harassment; Teacher Rights; Technology and the Law; Web Sites, Student

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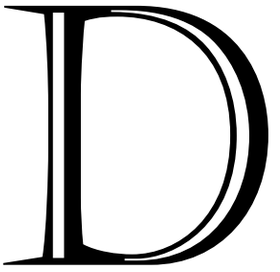
Cyberschools

See Virtual Schools



Darrow, Clarence S. (1857–1938)

Clarence S. Darrow rode to fame in education law with his unusual defense of high school teacher John T. Scopes in the infamous "Monkey Trial" in Dayton, Tennessee, in 1925. His innovative strategy of putting the prosecution's attorney, William Jennings Bryan, on the witness stand for the defense to illustrate the flaws in Christian fundamentalist assaults on Darwin's theory of evolution was later embedded in the Broadway play and the film, *Inherit the Wind.* But this foray was not Darrow's only work in education. The Chicago attorney also donated his time to assist Catherine Goggin and Margaret Haley, leaders of the Chicago Teachers Federation, in their pursuit of having corporations pay their fair share of property taxes for public education in Chicago. This entry summarizes his life and legal career.

Early Years

Darrow was born in Kinsman, Ohio, the fifth child of Amirus and Emily Eddy Darrow. While Darrow's father had studied theology, he never became a preacher. Darrow came to understand that most of the townsfolk regarded his father as an iconoclast on most matters. Darrow soon followed in his father's footsteps.

Darrow did not find formal education much to his liking, believing that it produced narrow minds and rigid responses to life's circumstances. He was particularly critical of the morality tales embedded in the school books of his times. As a young person growing up, he came also to deeply resent his mandatory attendance at Sunday school. His resistance later became the source of a career-long skepticism for most forms of organized religion.

For a brief time, Darrow attended Allegheny College, but he did not graduate. He became a school teacher in a nearby town. As a teacher, Darrow abolished corporal punishment in the school and expanded time for lunch. He also took time to study law. Later he attended the University of Michigan's law school but once again did not graduate. Darrow apprenticed to an attorney and passed the Ohio bar at age 21. A short time later, he began the practice of law, first in Andover and later in Ashtabula.

Darrow soon discovered that he could not be a dispassionate legal counselor. He had to believe in his client and in the cause. He moved to Chicago in 1887. Almost immediately, Darrow became involved with John P. Altgeld, considered a Democratic radical. Altgeld later became governor of Illinois.

Legal Career

From his Chicago law office, Clarence Darrow was at the heart of many celebrated cases in the political spasms of the early 19th century. He became the attorney for the United Mine Workers. In 1906, Darrow went to Idaho to defend Big Bill Haywood, secretary-treasurer of the Western Federation of Miners, who was accused of murdering ex-Governor Frank Steunenberg.

In that trial, Darrow gave a long and impassioned plea to the jury. Bill Haywood was acquitted.

Darrow went to Los Angeles where he defended three union men who were accused of being involved in the bombing of *The Los Angeles Times,* a tragedy that resulted in the deaths of 21 people. When one of the men arrested with the bombers turned state's evidence and confessed to the plot, it became clear to Darrow that his clients were actually guilty. Under these circumstances, Darrow determined that a trial would not be in their best interests, and he did not want certain documents made public that implicated the union in the bomb scheme.

He tried for a negotiated sentence with the bombers shifting their pleas to guilty. This maneuver ended Darrow's work with labor unions. A short while later, he had to defend himself against charges that he had attempted to bribe prospective jurors. While Darrow pled innocence and spent eight months defending himself, a careful review of his case by Geoffrey Cowan, a public affairs lawyer and a faculty member at UCLA, concluded that he indeed had tried to bribe two jurors. However, after a long and emotional plea by Darrow at his own trial, it ended with a "not guilty" verdict.

The result was that Darrow restarted his legal career with a public pledge to continue to help the disadvantaged in all walks of life. This commitment earned him the moniker of "attorney for the damned."

Clarence Darrow was not the totally selfless hero as he has come to be portrayed in some books or films, nor was he the ideal trial lawyer. He was sometimes not well prepared and left the burdensome task of writing legal briefs to associates who sometimes grumbled at their lack of recognition. Even so, many of Darrow's oral summaries at his most celebrated trials have come to be seen as exemplars of social justice and compassion. As a lifelong opponent of the death penalty, Darrow lost only one case and client to capital punishment. In another legal epoch, he defended Loeb and Leopold, who tried to commit the perfect murder, a case that became the plot of the novel and film *Compulsion.* Darrow was one of the first big-time attorneys to fully grasp the fact that some celebrated cases and trials are first won or lost in the public mind before the legal system has had time to render an official verdict, and that one is sometimes connected to the other.

Fenwick W. English

See also *Epperson v. State of Arkansas;* Prayer in Public Schools; Religious Activities in Public Schools; Religious Freedom Restoration Act; Scopes Monkey Trial

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Davenport v. Washington Education Association

In a unanimous 9-to-0 decision, the U.S. Supreme Court, in *Davenport v. Washington Education Association* (2007), ruled that states do not violate the First Amendment in requiring public sector labor unions to obtain the formal permission of nonunion member employees before spending their fair-share or agency shop fees on politically related expenses, including campaigns and elections. Fair-share or agency shop fees refer to the mandatory collection of union dues or fees for employees who are not union members.

Facts of the Case

Davenport upheld a 1992 legislative provision, referred to as Section 760, from the state of Washington's Fair Campaign Practices Act. Section 760 states the following:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

In 1992, a majority of Washington voters passed Section 760 and its mandated restrictions against public sector unions from spending the agency shop fees of its nonunion members on politically related activities unless the unions receive "affirmative authorization" from their nonunion members to do so. The primary legislative intent of Section 760 is to protect the overall integrity of political campaigns by closely monitoring electoral contributions and spending levels.

The primary legal issue in *Davenport* was whether the use of nonunion employee wages by public sector unions for funding partisan political campaigns without obtaining nonunion employees' consent was a violation of the First Amendment. The Washington Education Association (WEA), the state's leading teacher union, argued that the state of Washington's restrictions involving the union's use of nonunion member employee union dues for political purposes was an excessive intrusion on its First Amendment freedom of political speech. David Davenport and more than 4,000 public school teachers in the state of Washington unsuccessfully filed suit against the WEA, claiming that the union failed to obtain the "affirmative authorization" required in Section 760 of the state's Fair Campaign Practices Act.

The Court's Ruling

Writing for the Court's 9–0 unanimous decision, Justice Antonin Scalia held that the Supreme Court of Washington erred in finding that Section 760's Fair Campaign Practices Act was unconstitutional because it was an undue burden on the First Amendment rights of public sector unions. Scalia reasoned that the previous decision in *Davenport* was based on a misinterpretation of the Supreme Court rulings in two previous agency shop fee cases, *Abood v. Detroit Board of Education* (1977) and *Chicago Teachers Union, Local No. 1 v. Hudson* (1986). Insofar as the Court had not previously addressed whether a First Amendment issue arises when a governmental entity, such as the state, limits a union's entitlement to agency shop fees beyond the legal scope of either *Abood* or *Hudson,* all nine Court justices agreed that the First Amendment was not applicable in *Davenport.*

The Supreme Court's unanimous decision in *Davenport* reinforced the legal precedent that states do have the authority to prevent public sector unions, including teacher unions, from using the compulsory union dues of their nonunion members for politically related endeavors. Even so, *Davenport*'s impact on other states is limited, because 28 states currently allow unions to collect mandatory agency shop fees from their public sector employees, while the remaining 22 states, commonly referred to as "right-to-work" states, disallow this practice.

Moreover, *Davenport* applies only to public sector unions and does not include employees working in the private sector. Rather than completely banning the use of agency shop fees for political purposes unless a particular public employee consents to the use of such fees, *Davenport* allows individual states to set their own provisions. While *Davenport* can undoubtedly be viewed as a legal victory for nonunion workers against public sector unions, it falls short of remedying the full spectrum of potential abuses often associated with compulsory union dues as a condition of employment.

Kevin P. Brady

See also *Abood v. Detroit Board of Education;* Agency Shop; Closed Shop; Open Shop; Teacher Rights

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Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).

Davenport v. Washington Education Association (Excerpts)

Davenport v. Washington Education Association *is the Supreme Court's most recent opinion on the status of agency-shop fees that nonmembers must pay to unions that represent them in the process of collective bargaining.*

Supreme Court of the United States

DAVENPORT

v.

WASHINGTON EDUCATION ASSOCIATION,

127 S. Ct. 2372

Argued Jan. 10, 2007.

Decided June 14, 2007.

Justice SCALIA delivered the opinion of the Court.

The State of Washington prohibits labor unions from using the agency-shop fees of a nonmember for election-related purposes unless the nonmember affirmatively consents. We decide whether this restriction, as applied to public-sector labor unions, violates the First Amendment.

I

The National Labor Relations Act leaves States free to regulate their labor relationships with their public employees. The labor laws of many States authorize a union and a government employer to enter into what is commonly known as an agency-shop agreement. This arrangement entitles the union to levy a fee on employees who are not union members but who are nevertheless represented by the union in collective bargaining. The primary purpose of such arrangements is to prevent nonmembers from free-riding on the union's efforts, sharing the employment benefits obtained by the union's collective bargaining without sharing the costs incurred. However, agency-shop arrangements in the public sector raise First Amendment concerns because they force individuals to contribute money to unions as a condition of government employment. Thus, in *Abood v. Detroit Bd. of Ed.*, we held that public-sector unions are constitutionally prohibited from using the fees of objecting nonmembers for ideological purposes that are not germane to the union's collective-bargaining duties. And in *Teachers v. Hudson,* we set forth various procedural requirements that public-sector unions collecting agency fees must observe in order to ensure that an objecting nonmember can prevent the use of his fees for impermissible purposes. Neither *Hudson* nor any of our other cases, however, has held that the First Amendment mandates that a public-sector union obtain affirmative consent before spending a nonmember's agency fees for purposes not chargeable under *Abood*.

The State of Washington has authorized public-sector unions to negotiate agency-shop agreements. Where such agreements are in effect, Washington law allows the union to charge nonmembers an agency fee equivalent to the full membership dues of the union and to have this fee collected by the employer through payroll deductions. However, § 42.17.760 (hereinafter § 760), which is a provision of the Fair Campaign Practices Act (a state initiative approved by the voters of Washington in 1992), restricts the union's ability to spend the agency fees that it collects. Section 760, as it stood when the decision under review was rendered, provided:

> A labor organization may not use agency shop fees paid by an individual who is not a member of the organization to make contributions or expenditures to influence an election or to operate a political committee, unless affirmatively authorized by the individual.

Respondent, the exclusive bargaining agent for approximately 70,000 public educational employees, collected agency fees from nonmembers that it represented in collective bargaining. Consistent with its responsibilities under *Abood* and *Hudson* (or so we assume for purposes of these cases), respondent sent a "*Hudson* packet" to all nonmembers twice a year, notifying them of their right to object to paying fees for nonchargeable expenditures, and giving them three options: (1) pay full agency fees by not objecting within 30 days; (2) object to paying for nonchargeable expenses and receive a rebate as calculated by respondent; or (3) object to paying for nonchargeable expenses and receive a rebate as determined by an arbitrator. Respondent held in escrow any agency fees that were reasonably in dispute until the *Hudson* process was complete.

In 2001, respondent found itself in Washington state courts defending, in two separate lawsuits, its expenditures of nonmembers' agency fees. The first lawsuit was brought by the State of Washington, petitioner in No. 05–1657, and the second was brought as a putative class action by several nonmembers of the union, petitioners in No. 05–1589. Both suits claimed that respondent's use of agency fees was in violation of § 760. Petitioners alleged that respondent had failed to obtain affirmative

authorization from nonmembers before using their agency fees for the election-related purposes specified in § 760. In No. 05–1657, after a trial on the merits, the trial court found that respondent had violated § 760 and awarded the State both monetary and injunctive relief. In No. 05–1589, a different trial judge held that § 760 provided a private right of action, certified the class, and stayed further proceedings pending interlocutory appeal.

After intermediate appellate court proceedings, a divided Supreme Court of Washington held that, although a nonmember's failure to object after receiving respondent's "*Hudson* packet" did not satisfy § 760's affirmative-authorization requirement as a matter of state law, the statute's imposition of such a requirement violated the First Amendment of the Federal Constitution. . . . The court also held that § 760 interfered with respondent's expressive associational rights under *Boy Scouts of America v. Dale.* We granted certiorari.

II

The public-sector agency-shop arrangement authorizes a union to levy fees on government employees who do not wish to join the union. Regardless of one's views as to the desirability of agency-shop agreements, it is undeniably unusual for a government agency to give a private entity the power, in essence, to tax government employees. As applied to agency-shop agreements with public-sector unions like respondent, § 760 is simply a condition on the union's exercise of this extraordinary power, prohibiting expenditure of a nonmember's agency fees for election-related purposes unless the nonmember affirmatively consents. The notion that this modest limitation upon an extraordinary benefit violates the First Amendment is, to say the least, counterintuitive. Respondent concedes that Washington could have gone much further, restricting public-sector agency fees to the portion of union dues devoted to collective bargaining. Indeed, it is uncontested that it would be constitutional for Washington to eliminate agency fees entirely. For the reasons that follow, we conclude that the far less restrictive limitation the voters of Washington placed on respondent's authorization to exact money from government employees is of no greater constitutional concern.

A

The principal reason the Supreme Court of Washington concluded that § 760 was unconstitutional was that it believed that our agency-fee cases, having balanced the constitutional rights of unions and of nonmembers, dictated that a nonmember must shoulder the burden of objecting before a union can be barred from spending his fees for purposes impermissible under *Abood*. The court reached this conclusion primarily because our cases have repeatedly invoked the following proposition: "'[D]issent is not to be presumed—it must affirmatively be made known to the union by the dissenting employee.'" The court concluded that § 760 triggered heightened First Amendment scrutiny because it deviated from this perceived constitutional balance by requiring unions to obtain affirmative consent.

This interpretation of our agency-fee cases extends them well beyond their proper ambit. Those cases were not balancing constitutional rights in the manner respondent suggests, for the simple reason that unions have no constitutional entitlement to the fees of nonmember-employees. We have never suggested that the First Amendment is implicated whenever governments place limitations on a union's entitlement to agency fees above and beyond what *Abood* and *Hudson* require. To the contrary, we have described *Hudson* as "outlin[ing] a *minimum* set of procedures by which a [public-sector] union in an agency-shop relationship could meet its requirement under *Abood*." The mere fact that Washington required more than the *Hudson* minimum does not trigger First Amendment scrutiny. The constitutional floor for unions' collection and spending of agency fees is not also a constitutional ceiling for state-imposed restrictions.

The Supreme Court of Washington read far too much into our admonition that "dissent is not to be presumed." We meant only that it would be improper for a court to enjoin the expenditure of the agency fees of all employees, including those who had not objected, when the statutory or constitutional limitations established in those cases could be satisfied by a narrower remedy. But, as the dissenting justices below correctly recognized, our repeated affirmation that *courts* have an obligation to interfere with a union's statutory entitlement no more than is necessary to vindicate the rights of nonmembers does not imply that legislatures (or voters) themselves cannot limit the scope of that entitlement.

B

Respondent defends the judgment below on a ground quite different from the mistaken rationale adopted by

the Supreme Court of Washington. Its argument begins with the premise that § 760 is a limitation on how the union may spend "its" money, citing for that proposition the Washington Supreme Court's description of § 760 as encumbering funds that are lawfully within a union's possession. Relying on that premise, respondent invokes First Nat. Bank of Boston v. Bellotti, Austin v. Michigan Chamber of Commerce, and related campaign-finance cases. It argues that, under the rigorous First Amendment scrutiny required by those cases, § 760 is unconstitutional because it applies to ballot propositions and because it does not limit equivalent election-related expenditures by corporations.

The Supreme Court of Washington's description of § 760 notwithstanding, our campaign-finance cases are not on point. For purposes of the First Amendment, it is entirely immaterial that § 760 restricts a union's use of funds only after those funds are already within the union's lawful possession under Washington law. What matters is that public-sector agency fees are in the union's possession only because Washington and its union-contracting government agencies have compelled their employees to pay those fees. The cases upon which respondent relies deal with governmental restrictions on how a regulated entity may spend money that has come into its possession without the assistance of governmental coercion of its employees. As applied to public-sector unions, § 760 is not fairly described as a restriction on how the union can spend "its" money; it is a condition placed upon the union's extraordinary state entitlement to acquire and spend other people's money.

The question that must be asked, therefore, is whether § 760 is a constitutional condition on the authorization that public-sector unions enjoy to charge government employees agency fees. Respondent essentially answers that the statute unconstitutionally draws distinctions based on the content of the union's speech, requiring affirmative consent only for election-related expenditures while permitting expenditures for the rest of the purposes not chargeable under *Abood* unless the nonmember objects. The contention that this amounts to unconstitutional content-based discrimination is off the mark.

It is true enough that content-based regulations of speech are presumptively invalid. We have recognized, however, that "[t]he rationale of the general prohibition . . . is that content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" And we have identified numerous situations in which that risk is inconsequential, so that strict scrutiny is unwarranted. For example, speech that is obscene or defamatory can be constitutionally proscribed because the social interest in order and morality outweighs the negligible contribution of those categories of speech to the marketplace of ideas. Similarly, content discrimination among various instances of a class of proscribable speech does not pose a threat to the marketplace of ideas when the selected subclass is chosen for the very reason that the entire class can be proscribed. Of particular relevance here, our cases recognize that the risk that content-based distinctions will impermissibly interfere with the marketplace of ideas is sometimes attenuated when the government is acting in a capacity other than as regulator. Accordingly, it is well established that the government can make content-based distinctions when it subsidizes speech. And it is also black-letter law that, when the government permits speech on government property that is a nonpublic forum, it can exclude speakers on the basis of their subject matter, so long as the distinctions drawn are viewpoint neutral and reasonable in light of the purpose served by the forum. . . .

The principle underlying our treatment of those situations is equally applicable to the narrow circumstances of these cases. We do not believe that the voters of Washington impermissibly distorted the marketplace of ideas when they placed a reasonable, viewpoint-neutral limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees. As the Supreme Court of Washington recognized, the voters of Washington sought to protect the integrity of the election process which the voters evidently thought was being impaired by the infusion of money extracted from nonmembers of unions without their consent. The restriction on the state-bestowed entitlement was thus limited to the state-created harm that the voters sought to remedy. The voters did not have to enact an across-the-board limitation on the use of nonmembers' agency fees by public-sector unions in order to vindicate their more narrow concern with the integrity of the election process. We said in R.A.V. that, when totally proscribable speech is at issue, content-based regulation is permissible so long as "there is no realistic possibility that official suppression of ideas is afoot." We think the same is true when, as here, an extraordinary and totally repealable authorization to coerce payment from government employees is at issue. Even if it be thought necessary that the content limitation be reasonable and viewpoint neutral, the statute satisfies that requirement. Quite obviously, no suppression

of ideas is afoot, since the union remains as free as any other entity to participate in the electoral process with all available funds other than the state-coerced agency fees lacking affirmative permission. In sum, given the unique context of public-sector agency-shop arrangements, the content-based nature of § 760 does not violate the First Amendment.

We emphasize an important limitation upon our holding: we uphold § 760 only as applied to public-sector unions such as respondent. Section 760 applies on its face to both public- and private-sector unions in Washington. Since private-sector unions collect agency fees through contractually required action taken by private employers rather than by government agencies, Washington's regulation of those private arrangements presents a somewhat different constitutional question. We need not answer that question today, however, because at no stage of this litigation has respondent made an overbreadth challenge. Instead, respondent has consistently argued simply that § 760 is unconstitutional as applied to itself. The only purpose for which it has noted the statute's applicability to private-sector unions is to establish that the statute was meant to be a general limitation on electoral speech, and not just a condition on state agencies' authorization of compulsory agency fees. That limited contention, however, is both unconvincing and immaterial. The purpose of the voters of Washington was undoubtedly the general one of protecting the integrity of elections by limiting electoral spending in certain ways. But § 760, though applicable to all unions, served that purpose through very different means depending on the type of union involved: It conditioned public-sector unions' authorization to coerce fees from government employees at the same time that it regulated private-sector unions' collective-bargaining agreements. The constitutionality of the means chosen with respect to private-sector unions has no bearing on whether § 760 is constitutional as applied to public-sector unions.

. . . .

We hold that it does not violate the First Amendment for a State to require that its public-sector unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes. We therefore vacate the judgment of the Supreme Court of Washington and remand the cases for further proceedings not inconsistent with this opinion.

It is so ordered.

Citation: *Davenport v. Washington Education Association,* 127 S. Ct. 2372 (2007).

Davis v. Monroe County Board of Education

Acting on the complaint of a young girl whose classmate made inappropriate sexual overtures, the U.S. Supreme Court ruled in *Davis v. Monroe County Board of Education* (1999) that school boards could be held liable for such harassment under certain circumstances. Its ruling is based on Title IX of the Education Amendments of 1972, which states that "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance." In so doing, the Court applied Title IX to student-on-student sexual harassment.

Before this ruling, lower courts had asserted that school boards could not be liable for student-on-student sexual harassment under Title IX because they or their employees did not harass the student. Other courts held that school boards could be liable for students harassing other students. The Supreme Court granted the appeal to resolve this conflict among the circuits.

Facts of the Case

Davis began when Aurelia Davis, the mother of LaShonda, a fifth grader, brought a claim under Title IX seeking injunctive relief and compensatory damages for the alleged continuous sexual harassment of her daughter by a classmate. The plaintiff contended that school officials knew of the harassment but failed to take any meaningful action to prevent it from continuing.

Over a six-month period, a fifth-grade student identified as G. F. harassed or abused LaShonda (and

others) by attempting to fondle her, fondling her, and directing offensive language toward her, according to the complaint. An example of G. F.'s behavior occurred in December of 1992, when G. F. attempted to touch LaShonda's breasts and vaginal area, telling her "I want to get in bed with you," and "I want to feel your boobs." In another example, G. F. placed a doorstop in his pants and behaved in a sexually suggestive manner toward LaShonda.

LaShonda reported G. F. to her teachers and her mother after all but one of the incidents. LaShonda's mother called the teacher and the principal several times to see what could be done to protect her daughter. The requests for protection went unfulfilled. Even LaShonda's request to change seats because G. F. sat next to her was not allowed until after LaShonda had complained for over three months regarding G. F.

The case started in a federal trial court in Georgia and went on to the Eleventh Circuit Court of Appeals, with both rejecting the notion of board liability for student-to-student sexual harassment, before making its way to the U.S. Supreme Court. A total of 20 judges ruled on this case between the time Davis filed her suit in 1994 and the time of the Supreme Court ruling five years later.

The Court's Ruling

Justice O'Connor wrote the majority opinion for the Court. The question before the Court was "whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages" (p. 639). In a 5-to-4 vote, the majority answered in the affirmative.

The Supreme Court held that school boards are liable when officials are deliberately indifferent to sexual harassment of which they have actual knowledge, and the harassment is so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational program or activity provided by the school. Moreover, the Court also required that the harassment be serious enough to have a systemic effect of denying the victim equal access to an education. According to the majority, a systemic effect means that it is unlikely that a single act of one-on-one peer sexual harassment would meet the requisite level of systemic effect.

Justice Kennedy's dissent argued that an avalanche of litigation would follow the ruling. Even so, some legal commentators asserted that the avalanche of litigation would not occur because the standard was too high to provide meaningful protection for vulnerable students. Amid an ongoing stream of litigation with regard to student-to-student sexual harassment in schools, educators need to know both what kinds of behavior are unacceptable and that they have the power to protect students from actions that are harmful, even if they do not meet the test articulated in *Davis.*

Todd A. DeMitchell

See also Child Protection; *Franklin v. Gwinnett County Public Schools; Gebser v. Lago Vista Independent School District;* Sexual Harassment, Peer-to-Peer; Sexual Harassment of Students by Teachers

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Vance v. Spencer County Public School District, 231 F.3d 253 (6th Cir. 2000).

Davis v. Monroe County Board of Education (Excerpts)

Davis v. Monroe County Board of Education *stands out as the case wherein the Supreme Court established the standards for addressing peer-to-peer sexual harassment.*

Supreme Court of the United States

DAVIS

v.

MONROE COUNTY BOARD OF EDUCATION

526 U.S. 629

Argued Jan. 12, 1999.

Decided May 24, 1999.

Justice O'CONNOR delivered the opinion of the Court.

Petitioner brought suit against the Monroe County Board of Education and other defendants, alleging that her fifth-grade daughter had been the victim of sexual harassment by another student in her class. Among petitioner's claims was a claim for monetary and injunctive relief under Title IX of the Education Amendments of 1972 (Title IX). The District Court dismissed petitioner's Title IX claim on the ground that "student-on-student," or peer, harassment provides no ground for a private cause of action under the statute. The Court of Appeals for the Eleventh Circuit, sitting en banc, affirmed. We consider here whether a private damages action may lie against the school board in cases of student-on-student harassment. We conclude that it may, but only where the funding recipient acts with deliberate indifference to known acts of harassment in its programs or activities. Moreover, we conclude that such an action will lie only for harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.

I

Petitioner's Title IX claim was dismissed under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted. Accordingly, in reviewing the legal sufficiency of petitioner's cause of action, "we must assume the truth of the material facts as alleged in the complaint."

A

Petitioner's minor daughter, LaShonda, was allegedly the victim of a prolonged pattern of sexual harassment by one of her fifth-grade classmates at Hubbard Elementary School, a public school in Monroe County, Georgia. According to petitioner's complaint, the harassment began in December 1992, when the classmate, G.F., attempted to touch LaShonda's breasts and genital area and made vulgar statements such as "'I want to get in bed with you'" and "'I want to feel your boobs.'" Similar conduct allegedly occurred on or about January 4 and January 20, 1993. LaShonda reported each of these incidents to her mother and to her classroom teacher, Diane Fort. Petitioner, in turn, also contacted Fort, who allegedly assured petitioner that the school principal, Bill Querry, had been informed of the incidents. Petitioner contends that, notwithstanding these reports, no disciplinary action was taken against G.F.

G.F.'s conduct allegedly continued for many months. In early February, G.F. purportedly placed a door stop in his pants and proceeded to act in a sexually suggestive manner toward LaShonda during physical education class. LaShonda reported G.F.'s behavior to her physical education teacher, Whit Maples. Approximately one week later, G.F. again allegedly engaged in harassing behavior, this time while under the supervision of another classroom teacher, Joyce Pippin. Again, LaShonda allegedly reported the incident to the teacher, and again petitioner contacted the teacher to follow up.

Petitioner alleges that G.F. once more directed sexually harassing conduct toward LaShonda in physical education class in early March, and that LaShonda reported the incident to both Maples and Pippen. In mid-April 1993, G.F. allegedly rubbed his body against LaShonda in the school hallway in what LaShonda considered a sexually suggestive manner, and LaShonda again reported the matter to Fort.

The string of incidents finally ended in mid-May, when G.F. was charged with, and pleaded guilty to, sexual battery for his misconduct. The complaint alleges that LaShonda had suffered during the months of harassment, however; specifically, her previously high grades allegedly dropped as she became unable to

concentrate on her studies, and, in April 1993, her father discovered that she had written a suicide note. The complaint further alleges that, at one point, LaShonda told petitioner that she "'didn't know how much longer she could keep [G.F.] off her.'"

Nor was LaShonda G.F.'s only victim; it is alleged that other girls in the class fell prey to G.F.'s conduct. At one point, in fact, a group composed of LaShonda and other female students tried to speak with Principal Querry about G.F.'s behavior. According to the complaint, however, a teacher denied the students' request with the statement, "'If [Querry] wants you, he'll call you.'"

Petitioner alleges that no disciplinary action was taken in response to G.F.'s behavior toward LaShonda. In addition to her conversations with Fort and Pippen, petitioner alleges that she spoke with Principal Querry in mid-May 1993. When petitioner inquired as to what action the school intended to take against G.F., Querry simply stated, " 'I guess I'll have to threaten him a little bit harder.'" Yet, petitioner alleges, at no point during the many months of his reported misconduct was G.F. disciplined for harassment. Indeed, Querry allegedly asked petitioner why LaShonda "'was the only one complaining.'"

Nor, according to the complaint, was any effort made to separate G.F. and LaShonda. On the contrary, notwithstanding LaShonda's frequent complaints, only after more than three months of reported harassment was she even permitted to change her classroom seat so that she was no longer seated next to G.F. Moreover, petitioner alleges that, at the time of the events in question, the Monroe County Board of Education (Board) had not instructed its personnel on how to respond to peer sexual harassment and had not established a policy on the issue.

B

On May 4, 1994, petitioner filed suit in the United States District Court for the Middle District of Georgia against the Board, Charles Dumas, the school district's superintendent, and Principal Querry. The complaint alleged that the Board is a recipient of federal funding for purposes of Title IX, that "[t]he persistent sexual advances and harassment by the student G.F. upon [LaShonda] interfered with her ability to attend school and perform her studies and activities," and that "[t]he deliberate indifference by Defendants to the unwelcome sexual advances of a student upon LaShonda created an intimidating, hostile, offensive and abus[ive] school environment in violation of Title IX." The complaint sought compensatory and punitive damages, attorney's fees, and injunctive relief.

The defendants (all respondents here) moved to dismiss petitioner's complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief could be granted, and the District Court granted respondents' motion. With regard to petitioner's claims under Title IX, the court dismissed the claims against individual defendants on the ground that only federally funded educational institutions are subject to liability in private causes of action under Title IX. As for the Board, the court concluded that Title IX provided no basis for liability absent an allegation "that the Board or an employee of the Board had any role in the harassment."

Petitioner appealed the District Court's decision dismissing her Title IX claim against the Board, and a panel of the Court of Appeals for the Eleventh Circuit reversed *Davis v. Monroe Cty. Bd. of Educ.* Borrowing from Title VII law, a majority of the panel determined that student-on-student harassment stated a cause of action against the Board under Title IX. . . .

The Eleventh Circuit granted the Board's motion for rehearing en banc and affirmed the District Court's decision to dismiss petitioner's Title IX claim against the Board. . . .

. . . .

We granted certiorari in order to resolve a conflict in the Circuits over whether, and under what circumstances, a recipient of federal educational funds can be liable in a private damages action arising from student-on-student sexual harassment. We now reverse.

II

Title IX provides, with certain exceptions not at issue here, that

"[n]o person in the United States shall, on the basis of sex, be excluded from

participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Congress authorized an administrative enforcement scheme for Title IX. Federal departments or agencies

with the authority to provide financial assistance are entrusted to promulgate rules, regulations, and orders to enforce the objectives of § 1681 and these departments or agencies may rely on "any . . . means authorized by law," including the termination of funding to give effect to the statute's restrictions.

There is no dispute here that the Board is a recipient of federal education funding for Title IX purposes. Nor do respondents support an argument that student-on-student harassment cannot rise to the level of "discrimination" for purposes of Title IX. Rather, at issue here is the question whether a recipient of federal education funding may be liable for damages under Title IX under any circumstances for discrimination in the form of student-on-student sexual harassment.

A

Petitioner urges that Title IX's plain language compels the conclusion that the statute is intended to bar recipients of federal funding from permitting this form of discrimination in their programs or activities. She emphasizes that the statute prohibits a student from being "subjected to discrimination under any education program or activity receiving Federal financial assistance." It is Title IX's "unmistakable focus on the benefited class," rather than the perpetrator, that, in petitioner's view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers.

Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages. This Court has indeed recognized an implied private right of action under Title IX and we have held that money damages are available in such suits. Because we have repeatedly treated Title IX as legislation enacted pursuant to Congress' authority under the Spending Clause, however, private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue. . . .

Invoking *Pennhurst [State School and Hospital v. Halderman]*, respondents urge that Title IX provides no notice that recipients of federal educational funds could be liable in damages for harm arising from student-on-student harassment. Respondents contend, specifically, that the statute only proscribes misconduct by grant recipients, not third parties. Respondents argue, moreover, that it would be contrary to the very purpose of Spending Clause legislation to impose liability on a funding recipient for the misconduct of third parties, over whom recipients exercise little control.

We agree with respondents that a recipient of federal funds may be liable in damages under Title IX only for its own misconduct. The recipient itself must "exclud[e] [persons] from participation in, . . . den[y] [persons] the benefits of, or . . . subjec[t] [persons] to discrimination under" its "program[s] or activit[ies]" in order to be liable under Title IX. The Government's enforcement power may only be exercised against the funding recipient and we have not extended damages liability under Title IX to parties outside the scope of this power.

We disagree with respondents' assertion, however, that petitioner seeks to hold the Board liable for G.F.'s actions instead of its own. Here, petitioner attempts to hold the Board liable for its *own* decision to remain idle in the face of known student-on-student harassment in its schools. In *Gebser,* we concluded that a recipient of federal education funds may be liable in damages under Title IX where it is deliberately indifferent to known acts of sexual harassment by a teacher. In that case, a teacher had entered into a sexual relationship with an eighth-grade student, and the student sought damages under Title IX for the teacher's misconduct. . . .

Accordingly, we rejected the use of agency principles to impute liability to the district for the misconduct of its teachers. Likewise, we declined the invitation to impose liability under what amounted to a negligence standard-holding the district liable for its failure to react to teacher-student harassment of which it knew or *should have* known. Rather, we concluded that the district could be liable for damages only where the district itself intentionally acted in clear violation of Title IX by remaining deliberately indifferent to acts of teacher–student harassment of which it had actual knowledge. . . . By employing the "deliberate indifference" theory already used to establish municipal liability under 42 U.S.C. § 1983, we concluded in *Gebser* that recipients could be liable in damages only where their own deliberate indifference effectively "cause[d]" the discrimination. The high standard imposed in *Gebser* sought to eliminate any "risk that the recipient would be liable in damages not for its own

official decision but instead for its employees' independent actions."

Gebser thus established that a recipient intentionally violates Title IX, and is subject to a private damages action, where the recipient is deliberately indifferent to known acts of teacher–student discrimination. Indeed, whether viewed as "discrimination" or "subject[ing]" students to discrimination, Title IX "[u]nquestionably . . . placed on [the Board] the duty not" to permit teacher–student harassment in its schools and recipients violate Title IX's plain terms when they remain deliberately indifferent to this form of misconduct.

We consider here whether the misconduct identified in *Gebser*—deliberate indifference to known acts of harassment—amounts to an intentional violation of Title IX, capable of supporting a private damages action, when the harasser is a student rather than a teacher. We conclude that, in certain limited circumstances, it does. As an initial matter, in *Gebser* we expressly rejected the use of agency principles in the Title IX context, noting the textual differences between Title IX and Title VII. Additionally, the regulatory scheme surrounding Title IX has long provided funding recipients with notice that they may be liable for their failure to respond to the discriminatory acts of certain nonagents. The Department of Education requires recipients to monitor third parties for discrimination in specified circumstances and to refrain from particular forms of interaction with outside entities that are known to discriminate.

The common law, too, has put schools on notice that they may be held responsible under state law for their failure to protect students from the tortious acts of third parties. In fact, state courts routinely uphold claims alleging that schools have been negligent in failing to protect their students from the torts of their peers.

This is not to say that the identity of the harasser is irrelevant. On the contrary, both the "deliberate indifference" standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of sexual harassment can trigger some duty to respond on the part of funding recipients. Deliberate indifference makes sense as a theory of direct liability under Title IX only where the funding recipient has some control over the alleged harassment. A recipient cannot be directly liable for its indifference where it lacks the authority to take remedial action.

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. The statute's plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs. If a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference "subject[s]" its students to harassment. That is, the deliberate indifference must, at a minimum, "cause [students] to undergo" harassment or "make them liable or vulnerable" to it. Moreover, because the harassment must occur "under" "the operations of" a funding recipient, the harassment must take place in a context subject to the school district's control.

These factors combine to limit a recipient's damages liability to circumstances wherein the recipient exercises substantial control over both the harasser and the context in which the known harassment occurs. Only then can the recipient be said to "expose" its students to harassment or "cause" them to undergo it "under" the recipient's programs. We agree with the dissent that these conditions are satisfied most easily and most obviously when the offender is an agent of the recipient. We rejected the use of agency analysis in *Gebser,* however, and we disagree that the term "under" somehow imports an agency requirement into Title IX. As noted above, the theory in *Gebser* was that the recipient was *directly* liable for its deliberate indifference to discrimination. Liability in that case did not arise because the "teacher's actions [were] treated" as those of the funding recipient; the district was directly liable for its own failure to act. The terms "subjec[t]" and "under" impose limits, but nothing about these terms requires the use of agency principles.

Where, as here, the misconduct occurs during school hours and on school grounds—the bulk of G.F.'s misconduct, in fact, took place in the classroom—the misconduct is taking place "under" an "operation" of the funding recipient. In these circumstances, the recipient retains substantial control over the context in which the harassment occurs. More importantly, however, in this setting the Board exercises significant control over the harasser. We have observed, for example, "that the nature of [the State's] power [over public schoolchildren] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults." On more than one occasion, this Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the

schools." The common law, too, recognizes the school's disciplinary authority. We thus conclude that recipients of federal funding may be liable for "subject[ing]" their students to discrimination where the recipient is deliberately indifferent to known acts of student-on-student sexual harassment and the harasser is under the school's disciplinary authority.

. . . .

We stress that our conclusion here—that recipients may be liable for their deliberate indifference to known acts of peer sexual harassment—does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. We thus disagree with respondents' contention that, if Title IX provides a cause of action for student-on-student harassment, "nothing short of expulsion of every student accused of misconduct involving sexual overtones would protect school systems from liability or damages."

School administrators will continue to enjoy the flexibility they require so long as funding recipients are deemed "deliberately indifferent" to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances. . . .

. . . we acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority. To the extent that these restrictions arise from federal statutes, Congress can review these burdens with attention to the difficult position in which such legislation may place our Nation's schools. We believe, however, that the standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary action. A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.

While it remains to be seen whether petitioner can show that the Board's response to reports of G.F.'s misconduct was clearly unreasonable in light of the known circumstances, petitioner may be able to show that the Board "subject[ed]" LaShonda to discrimination by failing to respond in any way over a period of five months to complaints of G.F.'s in-school misconduct from LaShonda and other female students.

B

The requirement that recipients receive adequate notice of Title IX's proscriptions also bears on the proper definition of "discrimination" in the context of a private damages action. We have elsewhere concluded that sexual harassment is a form of discrimination for Title IX purposes and that Title IX proscribes harassment with sufficient clarity to satisfy *Pennhurst*'s notice requirement and serve as a basis for a damages action. Having previously determined that "sexual harassment" is "discrimination" in the school context under Title IX, we are constrained to conclude that student-on-student sexual harassment, if sufficiently severe, can likewise rise to the level of discrimination actionable under the statute. The statute's other prohibitions, moreover, help give content to the term "discrimination" in this context. Students are not only protected from discrimination, but also specifically shielded from being "excluded from participation in" or "denied the benefits of" any "education program or activity receiving Federal financial assistance." The statute makes clear that, whatever else it prohibits, students must not be denied access to educational benefits and opportunities on the basis of gender. We thus conclude that funding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.

The most obvious example of student-on-student sexual harassment capable of triggering a damages claim would thus involve the overt, physical deprivation of access to school resources. Consider, for example, a case in which male students physically threaten their female peers every day, successfully preventing the female students from using a particular school resource—an athletic field or a computer lab, for instance. District administrators are well aware of the daily ritual, yet they deliberately ignore requests for aid from the female students wishing to use the resource. The district's knowing refusal to take any action in response to such behavior would fly in the face of Title IX's core principles, and such deliberate indifference may appropriately be subject to claims for monetary damages. It is not necessary, however, to show physical exclusion to demonstrate that students have been deprived by the actions of another student or students of an educational opportunity on the

basis of sex. Rather, a plaintiff must establish sexual harassment of students that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities.

Whether gender-oriented conduct rises to the level of actionable "harassment" thus "depends on a constellation of surrounding circumstances, expectations, and relationships," including, but not limited to, the ages of the harasser and the victim and the number of individuals involved. Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults. Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

. . . . The dropoff in LaShonda's grades provides necessary evidence of a potential link between her education and G.F.'s misconduct, but petitioner's ability to state a cognizable claim here depends equally on the alleged persistence and severity of G.F.'s actions, not to mention the Board's alleged knowledge and deliberate indifference. . . .

Moreover, the provision that the discrimination occur "under any education program or activity" suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored. Even the dissent suggests that Title IX liability may arise when a funding recipient remains indifferent to severe, gender-based mistreatment played out on a "widespread level" among students.

The fact that it was a teacher who engaged in harassment in *Franklin* and *Gebser* is relevant. The relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX's guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher–student harassment.

C

Applying this standard to the facts at issue here, we conclude that the Eleventh Circuit erred in dismissing petitioner's complaint. Petitioner alleges that her daughter was the victim of repeated acts of sexual harassment by G.F. over a 5-month period, and there are allegations in support of the conclusion that G.F.'s misconduct was severe, pervasive, and objectively offensive. The harassment was not only verbal; it included numerous acts of objectively offensive touching, and, indeed, G.F. ultimately pleaded guilty to criminal sexual misconduct. Moreover, the complaint alleges that there were multiple victims who were sufficiently disturbed by G.F.'s misconduct to seek an audience with the school principal. Further, petitioner contends that the harassment had a concrete, negative effect on her daughter's ability to receive an education. The complaint also suggests that petitioner may be able to show both actual knowledge and deliberate indifference on the part of the Board, which made no effort whatsoever either to investigate or to put an end to the harassment.

On this complaint, we cannot say "beyond doubt that [petitioner] can prove no set of facts in support of [her] claim which would entitle [her] to relief." Accordingly, the judgment of the United States Court of Appeals for the Eleventh Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Citation: *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999).

Davis v. School Commissioners of Mobile County

Davis v. School Commissioners of Mobile County (1971) involved the adequacy of a desegregation plan for Mobile County, Alabama. The Supreme Court ruled that because the existing desegregation plan did not make use of all possible remedies, it was necessary to return the dispute to a lower court to work out a more realistic plan. *Davis* was one of the cases in which the Court showed its impatience with school boards that maintained segregated districts, more than 15 years after *Brown v. Board of Education of Topeka* struck the practice down.

Facts of the Case

With 73,500 pupils in 1969, the Mobile County school system was 58% White and 42% Black. The school system had transported over 22,000 students every day in 200 school buses during the previous school year.

Previously, the Fifth Circuit had declared that a desegregation plan based on unified geographic zones was inadequate to achieve a unitary school system by eliminating desegregation and the effects of past discrimination. A federal trial court then fashioned another plan, which left 18,623, or 60%, of the district's Black students in 19 schools that were one-race or almost one-race schools.

When the Fifth Circuit reviewed this plan, it found deficiencies with regard to faculty and staff desegregation. Accordingly, the court ordered the board of education to create a school system wherein the faculty and staff ratios in each school approximated the racial composition of the district as a whole. The Fifth Circuit also directed the board to eliminate the seven Black schools that existed under the trial court's plan. Under the revised plan, pairing schools and/or adjusting grade structures were to be the vehicles for achieving this goal without busing or split zoning.

Pursuant to the trial court's order, the school system treated the eastern and western parts of the county as distinct. The court noted that the board achieved desegregation in the western, but not eastern, section of the district, where 12 all-Black or almost all-Black schools still existed. The Fifth Circuit accepted a modified version of a Justice Department plan, which would have reduced the number of all or nearly all the Black schools but still treated the sections as separate entities.

The Court's Ruling

The U.S. Supreme Court began by holding that the Fifth Circuit's plan was based on inaccurate enrollment projections for Mobile County, because nine, not six, of the elementary schools consisted of all-Black or nearly all-Black student populations. In fact, the Court pointed out that over half of the Black junior and senior high school students were in all-Black or nearly all-Black schools. The Court reasoned that the trial court was not restricted to using only neighborhood school zoning. Once constitutional violations are discovered, the Court maintained, the trial court should have used every available remedy to restructure contiguous and noncontiguous attendance zones.

The Supreme Court found that the Fifth Circuit should have abandoned treating the eastern and western sections separately. The Court also declared that the Fifth Circuit gave inadequate attention to using bus transportation and split zoning as remedies. Citing *Green v. County School Board* (1968), the Court remanded with instructions to fashion a remedy that promised to work realistically at the present time.

The *Davis* Court thus made it clear to school boards that desegregation plans must be realistic and must work to create unitary school systems immediately.

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Fourteenth Amendment; *Green v. County School Board of New Kent County*

Legal Citations

Davis v. School Commissioners of Mobile County, 402 U.S. 33 (1971).

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Dayton Board of Education v. Brinkman, I and II

Dayton Board of Education v. Brinkman, I and *II* (1977, 1979) are judicially related school desegregation cases that originated in the city of Dayton, Ohio. In *Dayton Board of Education v. Brinkman I* (1977), minority student plaintiffs sued the Dayton school board asserting that, acting in concert with the State Board of Education of Ohio, it had implemented racially segregative policies and practices in violation of their constitutionally protected rights.

The legal doctrine established in *Dayton I* and *II* marked an era in the 1970s when the U.S. Supreme Court began to limit the scope of remedies for northern States in de jure desegregation cases and to reinforce the right of local control by school boards consistent with the principles it had enunciated in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) and *Keyes v. School District No.1, Denver, Colorado* (1973).

Litigation in *Dayton I* began in 1972 when the plaintiffs alleged the Dayton board repeatedly failed to comply with the Ohio law mandating that it establish an integrated system. More specifically, the plaintiffs claimed that the segregative policies and practices included

- discrimination in hiring Black teachers and assigning them to teaching positions;
- a designated Black high school, established in 1933, to which only Black teachers were assigned and that had a student enrollment that was all Black;
- the creation of optional attendance boundaries that perpetuated systemic racial imbalance throughout the district; and
- revocation of its previous resolutions acknowledging responsibility for perpetuating segregative racial policies and practices and committing to a remedial desegregation plan for the district.

The essence of the plaintiffs' claim was that the Dayton and state boards operated a racially segregated public school system in violation of the Fourteenth Amendment's Equal Protection Clause and the judicial doctrine established in *Brown v. Board of Education of Topeka* (1954) .

A federal trial court in Ohio held that the Dayton board historically engaged in racial discrimination in district operations and that de jure segregation was present in the schools as indicated by the following three-part "cumulative violation" of the Equal Protection Clause:

- substantial racial imbalance in student enrollment patterns;
- board utilization of optional attendance boundaries permitting some White students to avoid attending schools with predominantly Black enrollments; and
- board revocation, in 1972, of resolutions passed by the previous board acknowledging responsibility for creation of segregative racial patterns and a commitment to a corresponding remedial plan.

The defendants' initial appeals incorporated designs for school desegregation remedies that were comparatively narrow in scope. The Sixth Circuit directed the trial court to fashion a districtwide remedial plan, the scope and validity of which were appealed to the Supreme Court.

On further review, the Supreme Court addressed whether a districtwide remedy was appropriate where there was no verification that the student distribution characteristics were the result of the board's intentionally segregative acts. Writing for the Court in its 7-to-2 opinion, Justice Rehnquist ruled that consistent with *Keyes* (1973), if a school board's segregative acts are not shown to have a districtwide effect, the judiciary cannot impose a systemwide remedy. The Court indicated that in cases where legal and mandatory segregation of the races in schools has been terminated for a long time, it is the primary duty of lower federal courts to evaluate whether the actions of school boards were intended to discriminate against minority students, teachers, and staff, and whether they in fact did so. During such an inquiry, the Court explained, all parties should have the right to introduce additional evidence. In so ruling, the justices directed the lower courts to verify the effect of these violations on the current racial distribution in the district and to validate the scope of incremental segregative effect that they would have had on the racial demographics, absent verification of such constitutional violations.

In short, the Court decided that a desegregation remedy must correspond to the scope of an established violation. The Court found that the cumulative violation criteria applied by the lower court were ambiguous, and it ordered the lower courts to reconsider the facts and to render appropriate complex factual determinations. In conclusion, the Court vacated the Sixth Circuit's judgment and remanded the dispute for further proceedings.

In remanding *Dayton I,* the Supreme Court sent a strong message to the lower courts that the scope of desegregation remedies requires a strong correspondence to established constitutional violations. The trial court reviewed the case proceedings before dismissing the plaintiffs' discrimination complaints. The court reasoned that the plaintiffs failed to prove either that the Dayton board was liable for discrimination or that its acts of intentional discrimination, which were more than 20 years old, contributed to contemporary incremental segregative effects.

On further review, the Sixth Circuit reversed in favor of the plaintiffs, noting that at the time of *Brown,* the Dayton board operated an unconstitutional dual school system. Moreover, the court maintained that the board was constitutionally obligated to dismantle the dual system and eradicate its residual effects. At the same time, the court pointed out that the board had an affirmative duty not to take any action to impede dismantling the dual school system and its vestiges. Further, the court observed that the Dayton board implemented many post-*Brown* policies and practices that increased or perpetuated racial segregation. As such, the court directed the board to do more than abandon its previous discriminatory purposes and intentions. According to the court, the board had a responsibility to ensure that pupil assignment practices, configuration of attendance boundaries, grade structure and reorganization, and school construction and abandonment decisions did not have the effect of perpetuating or reestablishing a dual system consistent with the Supreme Court's analysis in *Wright v. Council of City of Emporia* (1972). The Supreme Court agreed to intervene, this time in *Dayton II.*

Following a comprehensive review of *Dayton I,* in *Dayton II,* the Supreme Court considered whether the school board have an affirmative duty to eliminate the effects of segregative acts, because it was found to have operated a dual school system in 1954. In *Dayton II,* the Court held that since there were no "prejudicial errors of fact or law [in it], the judgment appealed from must be affirmed" (p. 542). In writing for the Court in its 5-to-4 judgment, Justice White determined that purposeful discrimination in a substantial part of a school district provided a sufficient basis for an inferential finding of a districtwide discriminatory intent unless otherwise rebutted. Moreover, the Court asserted that because the board operated a dual school system, one could have inferred a connection between such a purpose and racial isolation in other parts of the district. To this end, the Court directed the board to fashion an appropriate remedy.

Dayton I and *II* make important contributions to school desegregation case law, because they helped to further clarify the criteria and scope of districtwide school desegregation and integration remedies. In *Dayton I,* the Supreme Court held that where past school board segregative acts were shown to have had districtwide effects, systemic remedies were inappropriate. However, in *Dayton II* the Court concluded that purposeful discrimination in a substantial part of the district provided a sufficient basis for an inferential finding of districtwide discriminatory intent, unless otherwise rebutted. The Court was thus satisfied that a districtwide desegregation remedy was both legal and appropriate in *Dayton II.* In addition, the Court decided that the Dayton board had a continuing duty to eradicate the effects of its segregative actions, because it operated a dual system at the time of the *Brown I.*

John F. Heflin

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment; *Keyes v. School District No. 1, Denver, Colorado;* Segregation, De Facto; Segregation, De Jure; *Swann v. Charlotte-Mecklenburg Board of Education*

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
Wright v. Council of City of Emporia, 407 U.S. 451 (1972).

Debra P. v. Turlington

At issue in *Debra P. v. Turlington* (1981) was the validity of student testing. In 1978, the Florida legislature conditioned the receipt of a high school diploma on passing a state competency examination. Black students had a disproportionate failing rate on this test. Students who failed or would fail filed suit, claiming that the use of this test violated the Fourteenth Amendment of the U.S. Constitution, Title VI of the Civil Rights Act, and the Equal Educational Opportunity Act (EEOA).

A federal trial court found that the content of this test was valid and its use for remediation purposes was legal. However, to avoid perpetuating past discrimination against Black students, the court enjoined using the test as a diploma sanction until the 1982–1983 school year, when the high school graduating class would be constituted entirely of students who had attended racially integrated schools from grade 1 on. The court also held that the test violated the students' due process rights insofar as they were not given sufficient notice of this requirement. Both the plaintiffs and the defendant appealed.

On further review, the former Fifth, now Eleventh, Circuit first upheld that the state had the power to make the receipt of a high school diploma contingent on the successful passage of a test. According to the court, because responsibility for education is reserved to the states under the Tenth Amendment, the state of Florida had a rational interest in ensuring an educated citizenry. The Court explained that state officials had the authority to determine the length, manner, and content of public education as long as it was consistent with the U.S. Constitution.

The court noted that students had an understanding that if they attended school and passed the required courses, they would be entitled to diplomas. The court pointed out that this expectation constituted a property interest protected by the Fourteenth Amendment of the U.S. Constitution.

The Fifth Circuit ruled that the state failed to provide students with due process protection when depriving them of their property interests. In so doing, the court affirmed that the students did not receive adequate notice and found that their right to due process was deeper than an issue of notice. The court believed that the test used was fundamentally unfair inasmuch as the students were not taught what was tested in Florida's classrooms, an issue of curricular validity. Even so, the Fifth Circuit still agreed with the trial court that the test items themselves were not biased.

As to disparate racial impact, the Fifth Circuit affirmed the trial court's holding on the Equal Protection Clause, Title VI, and EEOA. The court agreed that state officials were enjoined from immediately using the test for diploma sanctions, because doing so would have perpetuated past racial discrimination. At the same time, the court permitted the state to use the test for remediation, because it served as an affirmative step to remove the vestiges of past discrimination.

Three years later, the Eleventh Circuit was again asked to judge the constitutionality of the state competency test. After examining ample new evidence, the Eleventh Circuit upheld the use of the test as a requirement for high school graduation, because it found that the test was instructionally valid. Additionally, the court reasoned that there was no causal link between the performance of Black students and the effects of past discrimination and that the diploma sanction remedied the present effects of past discrimination.

Ran Zhang

See also Disparate Impact; Due Process; Federalism and the Tenth Amendment; Testing, High-Stakes

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Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981), 730 F.2d 1405 (11th Cir. 1984).

Defamation

Defamation is an injurious statement about a person's reputation; it usually involves a defamer, who imputes questionable character or inappropriate conduct about another, the defamed party. Defamation law covers false communications that have the effect of injuring a person's reputation and are accessible to a third party. Defamation law falls under the legal category of an intentional tort. Two types of tort actions are included under the broad legal construct of defamation law: libel and slander. Libel refers to a communication contained within a fixed medium of expression, such as a written memo to a third party, a blog, a billboard sign, or an image on the Internet. Slander refers to a communication expressed in a transitory manner, typically in oral form or depicted in a nonfixed medium such as verbal conversations or physical gestures conveyed to a third party. This entry looks at defamation law, its application in education, and potential remedies.

General Rules

Although the law with respect to defamation varies by state, some general principles have been established. In order for a cause of action based on defamation to proceed, a plaintiff must prove four elements: a false communication that has the effect of injuring his or her reputation; unprivileged communication that is accessible or published to a third party; fault based on some standard such as negligence, actual malice, or common law malice; and a requirement of special harm (e.g., defamation *per quod*), except under certain circumstances (e.g., defamation *per se*).

Under the law of defamation, statements of opinion and hyperbole are generally not defamatory; however, false statements that imply assertions of underlying facts are actionable. Further, the truth is a defense as long as a communication is substantially true.

Privileged Information

While some statements may be classified as defamatory, they may be privileged. Privilege is an affirmative defense made to counter a defamation cause of action, and the judge makes the determination of the privilege applicability as a matter of law. The issue of privilege is critical for school administrators and teachers who comment on student progress. Likewise, administrators and school boards assert privilege when discussing teacher evaluations.

Two forms of privilege exist: absolute, and qualified or conditional. *Absolute privilege* provides protection over communication, regardless of truth or even malice, and applies to relevant communications that are related to one's position. Statements made by judges, legislators, governors, and other high-ranking government officials in their positions are covered as absolutely privileged. In most jurisdictions, communications from a state superintendent of public instruction fall under absolute privilege. In addition, according to the U.S. Supreme Court, all federal employees, regardless of rank, are clothed with absolute privilege over statements made pursuant to their positions.

Qualified privilege, also referred to as *conditional privilege,* applies to communications related to special roles or interests in statement. The communications must be made in good faith and asserted without reckless disregard for the truth. Statements made by board staff, administrators, and teachers in the course of their duties are typically classified as qualified privilege, provided that they are made in good faith and without reckless disregard for the truth.

Fault Standards

Depending on the case, three types of fault standards are followed for defamation law cases: (1) negligence, (2) actual malice, and (3) common law malice. The fault standard dictates whether a case meets the jurisdiction's defamation law requirements.

The appropriate standard has been set in state statutes, constitutional law, and common law. The default rule requires at least negligence as the standard. In other words, a prudent person would not have published or not published without further investigation. In some cases, typically in matters that involve a public official or public figure, actual malice, which is derived from constitutional doctrine, is the rule. Actual malice is demonstration of clear and convincing evidence that the false communication was conveyed with knowledge of falsity or with reckless disregard of whether it was false or not. Finally, common law malice requires evidence of ill will, hostility, or an evil intent to defame or injure another.

Often, the standard makes a difference in the type of damages available. For instance, some states require a showing of negligence to recover compensatory damages from a defamation lawsuit; however, the standard of common law malice—or in some states, actual malice—must be shown to receive an award of punitive damages.

Defamation of Public Officials

The legal standard for defamation is different for public figures and public officials. When cases of defamation relate to public officials and public figures, the standard is raised to factor in the communicator's First Amendment free speech rights.

Based on the hierarchy of public employees, persons are deemed public officials when they have or appear to have "substantial responsibility for or control over the conduct of government affairs" (*Rosenblatt v. Baer,* 1966, p. 85). Put another way, there are three ways in which one may be recognized as a public figure. Through one's general fame and notoriety in the community, a person may be a public figure for all purposes and in all contexts. In addition, there are two types of limited public figures. One may become a limited public figure when one voluntarily injects oneself into a public controversy. For matters related to that context and issue, the person becomes a public figure. A limited public figure may also arise when, through acts of a public official, an individual who is otherwise a private figure is involuntarily thrust into the public eye, because the official's actions affect that person. Whether one is a public official or public figure is a matter of law.

Under constitutional standards, an assertion that a statement about a public official or figure was untrue is by itself insufficient to hold a party liable for defamation. Instead, the subject of a defamatory statement must demonstrate through clear and convincing evidence that the false communication was made with actual malice. Under the law of defamation, actual malice is interpreted as communication conveyed with knowledge of falsity or with reckless disregard of whether it was false or not. Put another way, the defamer has to know that the communication is false or at least entertain serious doubts about the veracity of the communication.

Generally speaking, the courts have classified superintendents as limited public figures. Similarly, selected cases have concluded the same for coaches and athletic directors. In those cases, defamatory statements about superintendents or athletic coaches in relation to their jobs requires a showing of clear and convincing evidence that the false communication was made with actual malice; otherwise, the superintendent or coach may not recover damages.

The status of teachers and principals varies by jurisdiction. Depending on classifications, teachers and principals may need to prove defamation with a higher standard (i.e., clear and convincing evidence that the false communication was made with actual malice), while in other states teachers and principals need only to follow the general rule of defamation, which, depending on the jurisdiction, may simply be showing the defamer's negligence.

Special Harm: Defamation Per Se Versus Defamation Per Quod

In some cases, the showing of special harm is not necessary, while in others it is a requisite for defamation. For instance, some communications can be so harmful to one's reputation that courts recognize instances in which statements are defamation per se. That is, even without showing harm, statements on their face may be actionable per se. The courts acknowledge four instances of defamation per se: (1) communication imputing a criminal offense onto another;

(2) communication claiming an individual suffers from a loathsome disease; (3) communication that affects one's fitness to conduct business, trade, profession, or office; and (4) communication alleging serious sexual misconduct.

By contrast, defamation per quod is not summarily viewed as actionable. Instead, the context and the interpretation of the third party play a role in determining whether the communication is actionable. Insofar as a communication itself is not sufficient to demonstrate defamation, extrinsic evidence is required to prove the publication of a false, defamatory statement as well as the defamed party's actual harm.

Remedies

Under defamation claims, remedies exist such as damages associated with defamation, retraction of the defamatory communication, and injunctive relief to stop continued defamatory publications. Typically, defamation cases involve compensatory damages. Under compensatory damages, the defamed is awarded a monetary value based on the harm that resulted from the false, defamatory communication. Alternatively, presumed damages or nominal damages may be sought. In addition, punitive damages may be asserted as a way to punish the defamer for outrageous conduct and to deter others from such behavior. The types of damages depend on the types of defamation and the standards used to hold defendants/defamers liable.

Jeffrey C. Sun

See also First Amendment

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Rosenblatt v. Baer, 383 U.S. 75 (1966).

DeFunis v. Odegaard

In *DeFunis v. Odegaard* (1974), a law school applicant challenged the University of Washington Law School's race-conscious admission policy, charging that his rejection constituted discrimination. *DeFunis* is important because it was the first dispute to reach the Supreme Court involving voluntary affirmative action or admission policy in a postsecondary school context. The justices had addressed court-ordered affirmative action policies in formerly segregated colleges and universities. By the time the *DeFunis* case reached the Court, the applicant who challenged the policy had nearly completed his studies, so the justices declared the case moot and made no ruling on the merits.

Facts of the Case

Marco DeFunis, a White male, applied for admission to the state-operated University of Washington but was denied. The university's law school received 1,600 applications for approximately 150 seats in the first-year class. Therefore, as a selective institution, the law school had an admission policy to determine who would be offered admission. The policy used a formula to predict each applicant's first-year grades. The formula included an applicant's score on Law School Admission Test (LSAT) and undergraduate grades. Applicants were placed into two groups. Applicants who indicated they were "Black, Chicano, American Indian, or Filipino" were placed in a separate group and were never directly compared to applicants who were not minorities.

DeFunis filed suit in state court, arguing that the selection process discriminated against him on account of his race in violation of the Equal Protection Clause of the Fourteenth Amendment. A state trial court agreed and ordered the law school to admit Mr. DeFunis. By the time he was in his second year of the three-year program, the Supreme Court of Washington

overturned the original decision, finding that the law school's admission policy was constitutional. Mr. DeFunis next appealed to the U.S. Supreme Court.

The Court's Ruling

In a per curiam opinion in *DeFunis,* the Supreme Court refused to address whether the admission policy violated the plaintiff's rights under the Equal Protection Clause on the ground that the case was "moot," meaning that there was no longer a question that it could answer. In *DeFunis,* the majority ruled that because Mr. DeFunis was in his final quarter of law school and about to graduate when the court heard the case, he was no longer injured by the admission policy, and, therefore, there was nothing that it was being asked to decide. Four justices dissented on the basis that because the university was still applying the race-based admission policy, the Court should have resolved, on the merits, whether the law school's voluntary affirmative action program was constitutional.

The Court's unwillingness in *DeFunis* to judge the merits of the University of Washington Law School's policy notwithstanding, Justice Douglas, in a dissent, analyzed its content. He pointed out that the law school contended that it considered the race and ethnicity of applicants as one factor in the admission process due to its concern that minorities were discriminated against in law school admissions in the past and because there was a lack of minority lawyers in Washington. Justice Douglas was concerned that even though a precise number of seats were not set aside for minority students, the policy accorded a preference.

Although Justice Douglas did not conclude that the policy was unconstitutional, he advocated for a new trial to determine whether the LSAT should have been eliminated as a criteria for racial minorities. He noted that standardized tests had been used in the past to disqualify Jewish applicants and his concern that the LSAT might have the same impact on other minority groups.

Four years after DeFunis, the Supreme Court would have to confront the question of a race-based admissions policy directly in *Regents of the University of California v. Bakke* (1978). The facts of *DeFunis* and *Bakke* are similar. Both cases involved admissions policies where minorities were considered separately from White applicants. In *Bakke,* also a per curiam opinion, the Court struck down the University of California's program on the ground that it was an impermissible race discrimination but left open the question of whether the goal of diversity was a permissible reason to consider the race of applicants. It was not until 2003, in *Grutter v. Bollinger* and the companion case *Gratz v. Bollinger,* that the Court finally found that the educational benefit of a diverse student body is a compelling state interest that justifies the consideration of race in university admissions if the use of race is narrowly tailored to meet the compelling governmental goal of diversity.

Karen Miksch

See also Affirmative Action; Equal Protection Analysis; *Gratz v. Bollinger; Grutter v. Bollinger; Regents of the University of California v. Bakke*

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DeFunis v. Odegaard, 416 U.S. 312 (1974).
Grutter v. Bollinger, 539 U.S. 306 (2003).
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Denominational Schools in Canada

Because the Dominion of Canada initially included separate areas with English-speaking and French-speaking majorities, constitutional legal protections were provided for denominational schools as a safeguard for minority-religion schools. Nearly 150 years later, such constitutionally protected schools continue to exist in three Canadian provinces. The background of their existence and current legal issues related to their protection are discussed in this entry.

Historical Background

In 1867, the English-speaking Protestant majority of Upper Canada (Ontario) and the French-speaking

majority in Lower Canada (Quebec) entered into a constitutional compromise to confederate their jurisdictions and thus create the Dominion of Canada. The parliament of the United Kingdom duly passed the British North America Act, 1867 (now referred to as the Constitution Act, 1867), which ratified that confederation. Under that act, jurisdiction for education rested with the provinces, but, in accord with the compromise, denominational (religiously based schools) were constitutionally protected to ensure the legal protection of the English language (Protestant faith) schools in Quebec and the French language (Roman Catholic faith) schools in Ontario. These constitutionally protected and publicly funded minority schools are referred to as separate denominational schools.

As provinces joined the confederation, any denominational schools that were previously legally recognized within their territory also gained this constitutional protection. Today, the province of Ontario has constitutionally protected and publicly funded separate Catholic schools from grades 1 through 8 and, through a modus vivendi between the government of Ontario and the Ontario Catholic School Trustees' Association, public funding for separate Catholic schools for students in grades 9 through 12. The provinces of Alberta and Saskatchewan, which were legislatively carved out of the existing Northwest Territories in 1905 by the Canadian federal government, have constitutionally protected publicly funded Catholic elementary and Catholic high schools. The denominational rights of those schools are derived from the *Ordinances of the North-West Territories,* which existed prior to 1905.

It is a legal anomaly that when Catholics are the majority in an urban or rural municipality in Alberta or Saskatchewan, non-Catholic ratepayers are legally entitled to create a non-Catholic separate school, and such groups have done so in a few circumstances. This right exists in Ontario but has not been generally exercised.

When the British government in effect granted legal independence to Canada in 1982, the relevant legislation, including the *Canadian Charter of Rights and Freedoms,* protected existing denominational rights from any resulting impact. Utilizing the constitutional amending process described in the Constitution Act of 1982, the provinces of Newfoundland and Labrador (1987) and Quebec (1997) amended their provincial educational system to eliminate their denominationally based school systems in favor of public school systems.

Catholic schools exist in all Canadian provinces, including the Yukon, the Northwest Territories, and Nunavut. However, except for Ontario, Alberta, and Saskatchewan, these schools are independent, and any public funding that they receive is at the pleasure of the provincial or territorial governments.

Significance

Constitutionally protected Catholic separate schools are of great significance to Canadian education. In particular, the tenets of that religion constitute the legal basis for the protected inclusion in schools of prayer, religious services, a religious-based curriculum, and religious symbols, and they also support the legally enforceable expectations of the Catholic school boards regarding teachers' private and public lifestyles and, to a degree, student behavior. Civil litigation surrounding the relationship of the Catholic school systems and their teachers' lifestyle choices predate the 1982 *Charter of Rights and Freedoms;* however, in most cases before and after the advent of the *Charter,* the religious raison d'etre of Catholic schools has resulted in the courts holding in favor of Catholic school boards.

School Boards

In the provinces of Alberta and Saskatchewan, Catholic separate schools receive their funding from two sources: the municipal government and the municipal tax base paid by registered Catholic ratepayers within the urban or rural municipality. In Ontario, funding for Catholic schools comes from the provincial government. School board trustees must be Catholic, and only Catholics are permitted to vote for those trustees. It is the board's responsibility to govern the local Catholic school district, but under the Catholic church's *Code of Canon Law,* the local Catholic bishop is ultimately responsible for religious education and the Catholic identity of the Catholic schools.

Administrators and Teachers

Some Catholic teachers and Catholic students have employed their *Charter* rights to freedoms of conscience, religion, thought, belief, opinion, expression, assembly, and association to challenge denominational restrictions on their conduct.

In the case of teachers, the Vatican document *Lay Catholics in Schools: Witnesses to Faith* provides the religious or denominational expectations for Catholic schoolteachers and school administrators. If a Catholic school administrator or teacher is found to be living contrary to the tenets of the Catholic faith, the school board may dismiss that teacher for denominational cause, or it may demand remediation and monitor future conduct to ensure ongoing compliance.

Catholic teachers have challenged Catholic school districts' denominational policies, using both provincial human rights codes and the *Charter,* in matters of marrying in civil ceremonies and pregnancy outside of marriage. However, most matters are resolved informally, which is in concert with the pastoral role of those in positions of authority in Catholic institutions.

Students

One Catholic school student has recently confronted a Catholic school board with the legal argument that his *Charter* rights have been infringed by the restrictions put upon him by a Catholic school board. In *Hall (Litigation Guardian of) v. Powers* (2002), a gay Catholic high school student challenged his school board's decision to prohibit him from taking his male partner to the high school prom. The student filed a Statement of Claim on the basis that his constitutional *Charter* rights were being infringed by the school board's action. The school board claimed that to allow such an action by the student would be contrary to the values inherent to Catholic education, as it would be seen as accepting homosexual behavior in Catholic schools.

As part of his application, the student successfully sought an injunction, which in effect stayed the board's decision. The student attended the prom with his partner and subsequently withdrew his claim prior to trial. The issue therefore remains whether the Canadian courts will allow that the acceptance by some in the Catholic community of certain actions, which are not acceptable from a formal Catholic Church perspective, is sufficient to ground a wider legal understanding of the norms of the Catholic faith and hence the reasonable expectations of Catholic school boards toward their employees and students.

The Future of Denominational Schools

The issue of Catholic schools' continued existence as constitutionally protected school systems is under debate in Ontario, Alberta, and Saskatchewan. This is perhaps understandable, as the reason for the original constitutional compromise—two cultures and two religions—no longer exists in the cultural and religious mosaic that is the Dominion of Canada. Further, with the loss of Catholic schools' constitutional status in Newfoundland and Labrador and the advent of articulated individual rights in the *Charter* and provincial codes of human rights, the supporters of constitutionally protected Catholic schools likely will continue to face pressure to justify the continued existence of separate Catholic school systems in Ontario, Alberta, and Saskatchewan.

J. Kent Donlevy

See also *Canadian Charter of Rights and Freedoms*; Catholic Schools; Nonpublic Schools

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Deposition

A deposition is a method of discovery that is used to gather or obtain facts and information that may be relevant to a pending lawsuit. During a deposition, one party to a suit, or, more commonly, the party's lawyer, asks questions of the other party, the other party's witnesses, or any other person who may have knowledge or information that is relevant to the case. Although depositions may be conducted through written questions or orally, they are almost always taken orally rather than in writing. Depositions generally take place outside the courtroom. Most often, depositions are conducted in a lawyer's office.

The person that is asked the questions during the deposition is referred to as the "deponent." The deponent's testimony is given under oath and, more often than not, in the presence of his or her own lawyer. A transcript, a word-for-word account of the entire proceeding, is prepared by a court reporter, who is also present at the deposition and usually authorized to administer the oath. The deponent's lawyer may pose objections to the questions that are asked of his or her client; however, because the permissible scope of the deposition is very broad and, absent some very limited exceptions, the rules of evidence do not apply during depositions, the grounds for objection are relatively narrow.

To this same end, the only time the deponent's lawyer may instruct the deponent not to answer a question is when it is necessary to preserve a privilege or to enforce certain limitations that may have been previously imposed by the court. The deponent is subject to cross examination, in that the deponent's own lawyer as well as any other lawyer present may ask questions of the deponent. Once the deposition is completed and the transcript is prepared by the court reporter, the deponent may be given an opportunity to review the transcript and request that the court reporter make any corrections that the deponent believes are necessary. Even so, in order to make a correction to the transcript, the deponent must offer justifications as to why he or she believes the correction is necessary. The court reporter will disregard any correction that is unsupported by a valid justification.

As noted above, a deposition is a method of discovery. It, along with written interrogatories, requests for documents, requests for admissions, and mental and physical examinations, takes place before trial during the discovery phase of a lawsuit. The so-called discovery phase begins after the filings of the initial pleadings, that is, after the plaintiff's complaint and the defendant's answer. This phase is the period in which the parties gather facts, testimony, documents, and other physical evidence that may be useful for trial or for preparing dispositive motions such as requests for summary judgment.

As a method of discovery, depositions serve a number of useful purposes and can be expected in almost every lawsuit that proceeds into the discovery phase. They are used by the parties to determine the full extent of a particular witness's knowledge, and because deposition testimony may be admissible at trial, to commit a witness to a certain position. If at trial witnesses give testimony that is inconsistent with their deposition testimony, they may be impeached and the credibility of their testimony attacked. Moreover, depositions allow the parties to understand and anticipate the facts and evidence that will be used by their opponents, which allows them to evaluate the strength of their own cases. In allowing parties to evaluate the strength of their own cases relative to those of their opponents, testimony or information obtained through depositions also allows parties to assess whether settlement or even dismissal are preferable to trial.

Insofar as depositions are so widely used to gather facts, information, and testimony before trial, they should be expected to occur in any education-related

lawsuit that proceeds to the discovery phase. Teachers, administrators, and other school officials that may have facts or information regarding the incident or incidents that prompted the lawsuit may be deposed. Those same individuals may also be asked to review the deposition testimony of other witnesses to evaluate whether their understandings of relevant events matches that of deponents.

Christopher D. Shaw

See also Electronic Document Retention; Interrogatory

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Digital Millennium Copyright Act

The Digital Millennium Copyright Act (DMCA), passed in 1998 and effective in 2000, updates federal copyright law to meet the demands of the electronic age, particularly in regard to copyright infringement on the Internet. The DMCA contains two pieces of legislation, both of which are discussed in this entry, along with applications to education and related legal cases.

The Law

The first part of the legislation, the World Intellectual Property Organization (WIPO) Copyright and Performances and Phonograms Implementation Act, prohibits the circumvention of technologies that have been installed to prevent online infringement. For example, copyright holders often install programs that require computer users to enter passwords in order to access certain files or applications. Further, copyright holders may encrypt data or files to prohibit access by outsiders. The DMCA prohibits circumvention of these "technological protection measures."

Section 1201 of the Copyright Act distinguishes between technological measures that restrict *access* to copyrighted works and those that restrict *copying.* This categorization is designed to ensure the continuation of fair use. In some situations, copying works is considered fair use, while in others, unauthorized access may be deemed unfair.

The DMCA targets the manufacture, distribution, and use of computer programs designed to circumvent or decrypt protection devices. Even so, there are four prominent exceptions applicable in education settings. In other words, no liability will attach under the DMCA if, in good faith, users as outlined below access material that would otherwise be inaccessible under the law. First, the law allows circumvention by nonprofit libraries, archives, or educational institutions in cases where the sole purpose of the circumvention is to determine whether to obtain authorized access to works. This exception applies only when libraries are open to the public; as such, it applies most likely to higher education settings and not in K–12 settings.

Second, the law permits encryption research. Third, the law allows testing of technological devices that are designed to prevent access by minors to certain Internet material. This exception may be particularly applicable in K–12 settings, where school officials are trying out filtering software at school. Finally, the law permits testing the security of computers, computer systems, or computer networks.

The second piece of legislation in the DMCA is the Online Copyright Infringement Liability Limitation Act, which protects Internet service providers (ISPs) against infringement liability for the acts of their subscribers. Under this part of the law, computer users who store (long term or short term) or transmit material unlawfully obtained from the Internet face liability for infringement; the users' ISP is not liable as long as the ISP plays no role in the infringing conduct. Once the ISP discovers the infringing activity, it must act to remove the content and disable the access to it. Limitations on liability apply only to those ISPs that have established and implemented policies, such as school acceptable use policies, that provide for the termination of accounts, subscriptions, and computer use privileges of repeat violators.

Legal Cases

Litigation under the DMCA is limited, especially in educational settings. However, it is instructive. For the most part, the challenges have been from computer programmers and software developers who argue that the DMCA violates the First Amendment free speech clause. And, while courts have agreed that circumvention software developed, distributed, and used constitutes speech, they have held that the provisions of the DMCA are valid restrictions on that speech, in that the DMCA is designed to support the rights of copyright holders and overall ethics in commerce (*Universal City Studios, Inc. v. Corley,* 2001).

A party that is injured under the DMCA is entitled to injunctive relief and monetary damages. Note, though, that special protection exists for nonprofit libraries, archives, and educational institutions, where monetary damages may be limited or negated when the violator proves that he or she had no knowledge or reason to know of the infringement. School leaders should pay attention to the provisions of the DMCA, because there are technologically savvy students who may take advantage of their schools as ISPs. Unauthorized copying and downloading of material such as music and movies is rampant among students, as facts in the well-known *A&M Records v. Napster* (2001) and *In re Aimster Copyright Litigation* (2003) cases reveal. Only those ISPs actively enforcing policies that promote compliance with copyright laws can take advantage of the DMCA's limitations on liability.

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See also Acceptable Use Policies; Copyright; Fair Use; Intellectual Property

Further Readings

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Disabled Persons, Rights of

The rights of individuals with disabilities in the educational context are governed by three federal laws and numerous state laws. The federal laws are known as the Individuals with Disabilities Education Act (IDEA), Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act (ADA). The IDEA governs the provision of special education and related services to students up to the age of 21. Section 504 and the ADA are antidiscrimination laws that protect the rights of employees and parents with disabilities as well as students.

Individuals with disabilities have considerable rights in an educational setting. Students, employees, and parents are all protected from discrimination in regard to employment and services by Section 504 and the ADA. The IDEA, however, provides students with disabilities with greater access to special education and related services. This entry looks at those laws and their application in school settings.

Individuals with Disabilities Education Act

In 1975, Congress passed, and President Gerald Ford signed, landmark legislation known as the Education for All Handicapped Children Act (EHCA). At that

time, the EHCA was the most comprehensive federal legislation that provided educational rights for students with disabilities. The EHCA was not an independent act but was an amendment to previous legislation that provided funds to the states for educating students with disabilities. An important feature of the EHCA, as opposed to previous legislation, was that it was permanent, whereas earlier special education statutes expired if they were not reauthorized.

The EHCA was enacted partly in response to a number of federal lawsuits that had been filed seeking to secure educational rights for students with disabilities. In passing the EHCA, Congress found that the educational needs of millions of children with disabilities had not been met, because their disabilities had not been properly diagnosed, and appropriate educational services were not available; many children were excluded from the educational system, and resources within the public schools were not adequate.

The EHCA was given its current title, the IDEA, in 1990. As it now stands, the IDEA mandates a free appropriate public education (FAPE) in the least restrictive environment (LRE) for all students with disabilities between the ages of 3 and 21. The law requires school personnel to develop individualized education programs (IEPs) in meetings with students' parents for any children who require special education and related services. The IDEA is very explicit as to how IEPs are to be developed and what they must contain. Further, the IDEA includes a detailed system of due process safeguards to protect the rights of students and guarantees that its provisions are enforced.

The IDEA has been amended every few years since the original enactment of the EHCA in 1975. An early amendment, the Handicapped Children's Protection Act (1986), added a clause to allow parents who prevail in litigation against their school boards to recover legal expenses. A second amendment passed that same year, the Education of the Handicapped Amendments of 1986, provided grants to states to provide services to children with disabilities from birth to age 2. The 1990 amendments, in addition to changing the statute's name, also included a provision to abrogate the states' Eleventh Amendment immunity to litigation.

One of the most important and controversial revisions, the Individuals with Disabilities Education Act Amendments of 1997, incorporated disciplinary provisions into the statute. The most recent modification, the Individuals with Disabilities Education Improvement Act of 2004, altered the 1997 disciplinary provisions and brought the IDEA in line with other federal legislation.

Procedural Safeguards

One of the unique aspects of the IDEA is that it includes a system of due process safeguards designed to make sure that students with disabilities are properly identified, evaluated, and placed according to the law's mandates. The statute states that the parents or guardian of a child with disabilities must be provided with the opportunity to participate in the development of the IEP for and placement of their child. The IDEA also requires school boards to provide written notice and obtain parental consent prior to evaluating the child or making an initial placement. After a student has been placed in special education, the school board must provide the parents with proper notice before initiating a change in placement. Even so, while an administrative or judicial action is pending, the school board may not change a student's placement without parental consent, a hearing officer's order, or a court decree (*Honig v. Doe,* 1988).

A student's situation must be reviewed at least annually after the initial placement, and the student must be reevaluated at least every three years. A student with disabilities may be entitled to an independent evaluation at public expense if the student's parents disagree with the school board's evaluation. However, a school board may challenge the request for an independent evaluation in an administrative hearing, and if it is determined that the school board's evaluation was appropriate, the parents are not entitled to have the independent evaluation at public expense.

The IDEA requires that an IEP must contain statements of a student's current educational performance, annual goals and short-term objectives, the specific educational services to be provided, the extent to which the child can participate in general education,

the date of initiation and duration of services, and evaluation criteria to determine if the objectives are being met. IEPs must also include statements concerning how students' disabilities affect their ability to be involved in and progress in the general educational curriculum along with statements regarding any modifications that may be needed to allow the child to participate in the general curriculum.

Dispute Resolution Procedures

Although Congress envisioned that parents and school officials would work together to develop IEPs for students with disabilities, it recognized that they would not always agree. For that reason, Congress included dispute resolution procedures within the statute. When parents disagree with any of the school officials' decisions regarding a proposed IEP or any aspect of a FAPE, they may request an impartial due process hearing. In *Schaffer ex rel. Schaffer v. Weast* (2005), the U.S. Supreme Court placed the burden of proof in an administrative proceeding on the party challenging the IEP. Inasmuch as this is generally the parents, the burden of proof has effectively been placed on them in due process hearings.

Any party not satisfied with the final outcome of administrative proceedings may appeal to state or federal courts; however, all administrative remedies must be exhausted prior to resort to the courts unless it is futile to seek such relief. The IDEA empowers the courts to review the record of the administrative proceedings, hear additional evidence, and "grant such relief as the court determines is appropriate" based on the preponderance of evidence standard. Even so, the Supreme Court cautioned judges not to substitute their views of proper educational methodology for that of competent school authorities (*Board of Education of Hendrick Hudson Central School District v. Rowley,* 1982). A party appealing a final administrative decision has 90 days to do so unless state law provides a different statute of limitations.

Administrative due process hearings and judicial actions are not the only means for dispute resolution under the IDEA. In 1997, Congress amended the IDEA to insert language that provides for the resolution of disputes through a mediation process as an alternative to an adversarial proceeding. Mediation is voluntary, however, and may not be used to deny or delay the parent's right to an administrative hearing. The 2004 IDEA amendments also added a new provision requiring school authorities to schedule a resolution session with the parents within 15 days of the receipt of a complaint.

Free Appropriate Public Education

School boards must maintain a "continuum of alternative placements" to meet the needs of students with disabilities for special education and related services. That continuum of placements ranges from the general education environment to a private residential facility; it includes homebound services. Nevertheless, the placement chosen for any given student has to be in the LRE for that child, and removal from general education can occur only to the extent necessary to provide special education and related services. All placements must be at public expense and also need to meet state educational standards. Each placement should be reviewed at least annually and revised when necessary.

The Rowley Standard

The IDEA does not precisely define what constitutes an appropriate education. In 1982, in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* the first IDEA case to reach the U.S. Supreme Court, the justices defined the term *appropriate* as used in the statute. The dispute in *Rowley* involved the special education and related services to be provided to a young student who had minimal residual hearing but was an excellent lip-reader. School personnel placed her in a regular kindergarten class on a trial basis when she entered the public schools. To prepare for her arrival, the school's staff took sign-language courses and installed a teletype machine to communicate with her parents, who were also deaf. During the trial period, the student had a sign-language interpreter, but the interpreter eventually reported that these services were not needed.

When the student's IEP for her first-grade year was prepared, school personnel proposed a regular class placement along with an FM hearing aid to amplify

the spoken words of her teacher and classmates, one hour per day of instruction from a tutor for the deaf, and three hours per week of speech therapy. The parents essentially agreed to the IEP but requested that the assistance of the sign-language interpreter be continued. The parents filed for a due process hearing after the school board declined their request to continue the interpreter services. Even though the school board prevailed in administrative hearings, the federal trial and appeals courts ruled in favor of the parents. The courts basically decided that the proposed IEP was not appropriate, because it didn't provide the student with an opportunity to achieve her full potential commensurate with the opportunity provided to students who were not disabled. The school board appealed to the Supreme Court.

The question presented to the Supreme Court was this: What level of services must school systems provide in an IEP, and thus a student's educational placement, to be appropriate under the IDEA? In a split decision, the Court reversed the lower courts and ruled in favor of the school board. The majority opinion stated that the lower courts erred when they held that the standard was that the potential of students with disabilities must be maximized commensurate with the opportunity provided to students who are not disabled.

The Court emphasized that school boards satisfy the IDEA's requirement of providing a FAPE when they offer personalized instruction with the support services needed to permit the child to benefit educationally from that instruction. The Court added that IEPs must be formulated in accordance with the IDEA's requirements. Inasmuch as the student in *Rowley* was performing better than average and was receiving personalized instruction that was reasonably calculated to meet her educational needs, the Court found that the requested sign-language interpreter was not required.

Least Restrictive Environment

A key component of the IDEA, which was specifically noted by the Supreme Court in *Rowley,* is its requirement that students with disabilities be educated in the LRE. In particular, the IDEA requires states, and thus local school boards, to establish procedures to assure that students with disabilities are placed with children who do not have disabilities to the maximum extent appropriate. Further, the IDEA allows school personnel to place children with disabilities in special classes or separate facilities, or bring about other removals from the general education environment, only when the nature or severity of their disabilities is such that instruction in general education classes cannot be achieved satisfactorily, even with supplementary aids and services.

Federal appellate courts in several circuits have issued decisions that collectively show that placement in the LRE is a mandatory component of an appropriate education. On the other hand, the IDEA's LRE provision does not mandate that all students with disabilities are to be educated within the general education environment. Rather, the task for school officials is to determine the maximum extent to which students with disabilities can effectively be educated in a general education setting. The Ninth Circuit combined elements of decisions from several other circuits to provide a general summary of a school board's obligations in this regard (*Sacramento City Unified School District, Board of Education v. Rachel H.,* 1994). In effect, the Ninth Circuit affirmed that school officials must consider the following four factors when determining the LREs for students: (1) the educational benefits of placement in a regular classroom, (2) the nonacademic benefits of such a placement, (3) the effect a student would have on the teacher and other students in the class, and (4) the costs of inclusion.

Related Services

Another important element of the IEPs of many students with disabilities is the provision of related services. Related services are defined as supportive, developmental, and corrective services that assist students with disabilities in benefiting from their special education. The IDEA specifically lists transportation, speech-language pathology, audiology, interpreting services, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, school nurse services, counseling services (including

rehabilitation counseling), orientation and mobility services, and medical services (for diagnostic or evaluative purposes only) in its definition of related services.

However, because this list is not exhaustive, other services could be considered to be related services if they help students with disabilities to benefit from special education. In that respect, services such as artistic and cultural programs or art, music, and dance therapy could be related services under the appropriate circumstances. The only limit placed on what school officials must provide as related services is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The 2004 IDEA amendments clarified that the term does not include a medical device that is surgically implanted or the replacement of such a device.

School systems are required to provide related services only to students who are receiving special education services. By definition, children have disabilities under the IDEA only if they require special education services. Thus, there is no requirement to provide related services to students who are not receiving special education. Even so, because many special education services could qualify as accommodations under Section 504, it is not unusual for school boards to provide related services to students who are qualified to receive assistance under Section 504 but do not qualify for special education services under the IDEA.

The Supreme Court has resolved two cases involving the IDEA's related services mandate. In 1984, in *Irving Independent School District v. Tatro,* the Court wrote that catheterization was a required related service. The student in this case could not voluntarily empty her bladder because of spina bifida. Therefore, according to the Court, she had to be catheterized every three to four hours. In its decision, the Court emphasized that services that allow a student to remain in class during the school day, such as catheterization, are no less related to the effort to educate than services that allow the student to reach, enter, or exit the school. Insofar as the catheterization procedure could be performed by a school nurse or trained health aide, the Court postulated that Congress did not intend to exclude these services as medical services.

Tatro stands for the proposition that services that may be provided by school nurses, health aides, or even trained lay-persons fall within the IDEA's mandated related-services provision. Then again, the fragile medical conditions of some students require the presence of full-time nurses. In its second case dealing with the IDEA's related-services provision, the Court, in *Cedar Rapids Community School District v. Garret F.* (1999), held that a school board was required to provide full-time nursing services for a student who was quadriplegic. The Court was of the opinion that even though continuous services may be more costly and may require additional school personnel, that does not make them more medical. Noting that cost was not a factor in the definition of related services, the Court insisted that even costly related services must be provided to help guarantee that students with significant medical needs are integrated into the public schools.

Discipline

Until Congress amended the IDEA in 1997, neither the statute nor its regulations specifically addressed the controversial topic of disciplining students with disabilities. In spite of this omission, courts applied many of the act's provisions to instances when students with disabilities were subject to disciplinary action. In the early years of the IDEA, courts determined that students with disabilities had additional due process rights when faced with disciplinary action. In these courts' opinions, sanctions such as expulsions or long-term suspensions deprived students with disabilities of educational opportunities and consequently their IDEA rights. In the 1997 IDEA amendments, Congress added specific disciplinary provisions that were refined in the 2004 amendments. The IDEA now contains comprehensive guidelines governing the disciplinary process.

Many of the current disciplinary provisions are an outgrowth of the body of case law that developed prior to 1997, including a U.S. Supreme Court decision. In *Honig v. Doe* (1988), the Court ruled that students with disabilities could not be expelled for behavior that was a manifestation of, or related to, their disabilities. The high Court acknowledged that

in passing the IDEA, Congress intended to specifically limit the authority of school officials to exclude students with disabilities, even for disciplinary purposes. The Court did, however, recognize that school officials could suspend students with disabilities for up to 10 days and, if necessary, could seek court injunctions to exclude dangerous students from the general education environment.

The IDEA now clearly stipulates that school authorities may remove students with disabilities who violate school rules to appropriate interim alternative settings, or other settings, or suspend them for up to 10 school days. School administrators may implement such measures only to the extent that they use similar sanctions when disciplining students who do not have disabilities. However, special procedures must be followed when students with disabilities are disciplined. Although these procedures are over and above usual disciplinary procedures, they are in place to protect the right of each student with disabilities to receive a FAPE.

The IDEA further requires school officials to conduct functional behavioral assessments (FBAs) and implement behavioral intervention plans (BIPs), if they are not already in place, under certain circumstances. In particular, officials must perform FBAs and implement BIPs whenever students with disabilities are removed from their current placements for disciplinary reasons for more than 10 school days. Moreover, school personnel must complete FBAs and BIPs it they determine that misbehavior is a manifestation of students' disabilities. If FBAs and BIPs have been implemented, they should be reviewed for each new infraction that will result in a removal from school.

As stated above, the IDEA currently gives school personnel the unequivocal authority to suspend special education students for up to 10 school days as long as a similar sanction would apply to children who do not have disabilities under similar circumstances. When doing so, school officials must conduct an FBA for students if one has not already been completed and take steps to address the misconduct. School authorities also have the power to remove children with disabilities who violate school codes of conduct in their current placements to appropriate interim alternative educational settings or other settings to the same extent those alternatives are applied to children without disabilities. Specifically, the IDEA permits the placement of students with disabilities in interim alternative educational settings for up to 45 school days for weapons and drug violations or for causing serious bodily injury.

When students are placed in interim settings for possession of drugs, weapons, or having caused bodily harm, the requirements placed on school personnel to conduct FBAs and implement BIPs are relaxed. However, school officials are still required to notify the parents of any decisions and provide them with notice of their procedural safeguards on the date on which educators decide to make a removal that constitutes a change of placement of a child with a disability because of a violation of a code of student conduct. When parents disagree with the placements in interim alternative settings and request hearings, students must remain in the alternative settings pending the decisions of hearing officers or until the expiration of the 45-day period or the parties agree otherwise. At the expiration of the 45-day period, students are entitled to return to their former placements, even if hearings over school board proposals to change their placements are pending.

The IDEA also allows school authorities to expel students with disabilities as long as the behaviors that gave rise to the violations of school rules are not manifestations of their disabilities. Again, though, under these circumstances expulsions must be treated in the same manner and be for the same duration as they would be for students who are not disabled. Even so, the IDEA makes it clear that special education services must continue during expulsion periods. When school officials contemplate the expulsion of special education students, the IDEA requires them to first ascertain whether the students' misbehaviors are manifestations of their disabilities. If officials agree that there is no connection between a disability and misconduct, they may expel a student.

It is highly likely that expulsions will be challenged, so it is imperative for school officials to follow proper procedures when making manifestation determinations. The IDEA now specifies the criteria that IEP teams should consider in evaluating whether

misconduct is a manifestation of a student's disability. Specifically, IEP teams must review all relevant information in student files, including IEPs, teacher observations, and other relevant information from parents that can be used to evaluate either whether a child's conduct was caused by, or had a direct and substantial relationship to, his or her disability; or whether the conduct in question was a direct result of a school board's failure to implement the IEP.

Section 504 of the Rehabilitation Act

Section 504 of the Rehabilitation Act of 1973 reads as follows:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 504 was the first civil rights law that expressly guaranteed the rights of individuals with disabilities. Section 504's provisions prohibiting discrimination against individuals with disabilities in programs receiving federal funds are similar to those in Titles VI and VII of the Civil Rights Act of 1964, which forbids employment discrimination in programs that receive federal financial assistance on the basis of race, color, religion, sex, or national origin. Section 504 effectively prohibits discrimination by any recipient of federal funds in the provision of services or employment. Individuals are covered by Section 504 if they have physical or mental impairments that substantially limit one or more major life activities, have a record of such impairments, or are regarded as having impairments. Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (28 C.F.R. § 41.31).

Individuals are otherwise qualified for purposes of Section 504 if they are capable of meeting all of a program's requirements in spite of their disabilities (*School Board of Nassau County v. Arline,* 1987; *Southeastern Community College v. Davis,* 1979). To be considered *otherwise qualified,* individuals with disabilities must be able to participate in programs or activities in spite of their impairments as long as they can do so with reasonable accommodations. If individuals are otherwise qualified, recipients of federal funds must make reasonable accommodations to allow them to participate in programs or activities unless doing so would create undue hardships on the programs. The requirement to provide reasonable accommodations does not mandate that a recipient of federal funds must lower its standards. Reasonable accommodations do require adaptations to allow access, but they do not require program officials to eliminate essential prerequisites to participation. Reasonable accommodations may involve physical plant modifications such as constructing a wheelchair ramp to allow an individual to access the school or allowing a student to be accompanied to school by a service dog (*Sullivan v. Vallejo City Unified School District,* 1990).

Application to Students

Section 504 offers protection against discrimination to students who have disabilities but are not eligible to receive services under the IDEA. Under the IDEA, students must fall into one of the categories of disabilities outlined within the statute, and must require special education services as a result of that disability, to receive services. On the other hand, the protections of Section 504 reach a much wider population. A good example of the broader reach of Section 504 involves students with infectious diseases. Under the IDEA, students with infectious diseases are entitled to special education services only if their academic performance is adversely affected by their afflictions. Conversely, under Section 504, students with infectious diseases such as HIV or AIDS cannot be discriminated against or excluded from schools unless there is a high risk of transmission of their diseases.

For example, a federal trial court in Illinois decided that a student who had been diagnosed with AIDS was entitled to the protection of Section 504, because he was regarded as having a physical impairment that substantially interfered with his life activities (*Doe v. Dolton Elementary School District,* 1988). The court

added that because there was no significant risk that the student would transmit AIDS in the classroom setting, he could not be excluded from school.

Once identified, qualified students are entitled to an appropriate public education, regardless of the nature or severity of their impairments. To assure that an appropriate education is made available, Section 504's regulations include due process requirements for evaluation and placement similar to those under the IDEA. In making accommodations for students, school personnel must provide aid, benefits, and/or services that are comparable to those available to children who do not have impairments. As such, qualified students must receive comparable materials, instruction of comparable quality, and comparable daily hours of instruction for a comparable school term. In addition, programs for qualified children should not be separate from those available to students who are not impaired unless such segregation is necessary for instruction to be effective for these children. While school officials are not prohibited from offering separate programs for students who have impairments, these children cannot be required to attend such classes unless they cannot be served adequately in other settings. If such programs are offered separately, facilities must, of course, be comparable.

Application to Employees

School boards cannot discriminate against an employee with a disability, as long as the employee is otherwise qualified for the position. A school board must, however, provide reasonable accommodations that will allow the employee to perform the job in question. The prohibition against discrimination extends to applicants for positions as well.

To maintain a discrimination claim under Section 504, employees with disabilities must show that they were treated differently than other employees or that an adverse employment decision was made because of their disability. Employees with disabilities cannot maintain a discrimination claim if they do not have the skills to perform the job in question even when provided with accommodations. Courts do not uphold discrimination claims when the school board can show that an adverse employment decision was made for nondiscriminatory reasons. Further, employees cannot maintain discrimination claims if their alleged disabilities are not covered by Section 504.

As stated above, the Supreme Court has said that a person with a disability is otherwise qualified if that person can perform all essential requirements of the position in question in spite of the disability. Thus, someone who cannot perform essential functions of the position, even with reasonable accommodations, is not otherwise qualified. For example, an essential requirement of most positions, especially those in school systems, is regular attendance. Section 504 does not protect excessive absenteeism, even when it is caused by a disability. Classroom teaching would be considered an essential function of a teacher's job, and an inability to be physically present and to teach in a classroom would indicate that the individual could not meet all requirements of a teaching position in spite of his or her disability.

Failure to meet teacher certification requirements may disqualify an individual even if the failure is allegedly due to a disability. For example, a teacher from Virginia who claimed to be learning disabled but had not passed the communications section of the National Teachers Examination after several attempts was not deemed to be otherwise qualified for teacher certification (*Pandazides v. Virginia Board of Education,* 1992). In this case, the court determined that the skills measured by the communications part of the examination were necessary for competent performance as a classroom teacher. Section 504 also does not protect misconduct, even when it can be attributed to a disability.

A school board must provide reasonable accommodations so that otherwise qualified employees with disabilities can work and compete with their colleagues who do not have disabilities. Accommodations may extend from simple alterations to the physical environment to adjustments to an employee's schedule, or even minor changes in the employee's job responsibilities. On the other hand, a school board is not required to furnish an accommodation if doing so would place an undue burden on the board. For the most part, it is the school board's responsibility to show that requested accommodations would create an undue financial or administrative burden.

A school board also is not required to make accommodations that would essentially change the nature of the position. However, a board could be required to reassign employees with disabilities to other vacant positions that involve tasks that the employees are able to carry out. Reassignment is not required, however, when no other positions are available for which the employees are qualified. A board also is not required to create new positions or accommodate employees with disabilities by eliminating essential aspects of their current positions.

Application to Parents

School boards must provide reasonable accommodations for parents who have disabilities so that they can participate in activities essential to their children's educations. For example, a federal trial court in New York required a school board to provide a sign-language interpreter so that parents who were hearing impaired could take part in school-initiated conferences related to the academic and disciplinary aspects of their child's educational program (*Rothschild v. Grottenthaler,* 1989). Conversely, school boards would not be required to provide accommodations for other school functions in which parental participation is not necessary, such as school plays or even graduation ceremonies. Even so, school boards must allow parents to provide their own accommodations.

Americans with Disabilities Act

The Americans with Disabilities Act (ADA), enacted in 1990, prohibits discrimination against individuals with disabilities in the private sector, effectively extending the reach of Section 504 to programs and activities that do not receive federal funds. The ADA's preamble explains its purpose as acting "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" (42 U.S.C. § 12101).

Even though the ADA is aimed primarily at the private sector, public agencies may still be held to its provisions. Compliance with Section 504 will generally translate to compliance with the ADA, but due to the more extensive nature of the latter act, there are differences. The legislative history of the ADA indicates that it also addresses what the judiciary had perceived as shortcomings or loopholes in Section 504.

State Statutes

Inasmuch as education is a function of the states, special education is governed by state laws in addition to the federal statutes discussed above. State special education laws must be consistent with the federal laws so that they cannot require less than the federal statutes require. In this respect, however, states can provide greater protection for children with disabilities. While most states have laws that are similar in scope and language to the IDEA, several include provisions in their statutory and regulatory scheme that exceed the IDEA's requirements. For example, some states have higher standards of what constitutes an appropriate education for a student with disabilities, whereas others have stricter procedural requirements. Most have established procedures for program implementation that are either not covered by federal law or have been left to the states to determine for themselves. If a conflict develops between provisions of the federal law and a state law, the federal law is considered to be supreme under Article VI of the U.S. Constitution.

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See also Americans with Disabilities Act; Civil Rights Act of 1964; Free Appropriate Public Education; Least Restrictive Environment; Rehabilitation Act of 1973, Section 504; Related Services

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Disparate Impact

Actions that negatively affect individuals in particular groups as defined by race, color, religion, sex, or national origin are referred to as having a disparate or disproportionate impact. The concept of disparate impact flows from Title VII of the Civil Rights Act of 1964 and the large amount of litigation it fostered. Much of the litigation surrounding disparate impact is based on statistical proof of the discriminatory effects of employment practices.

In *Griggs v. Duke Power Company* (1971), the U.S. Supreme Court explained that the purpose of Title VII was to remove unnecessary barriers that inadvertently discriminated on the basis of impermissible classifications. In *Griggs,* the Court held that facially neutral employment practices may be included under Title VII if they led to the disproportionate representation of individuals based on race, ethnicity, or gender. The Court also ruled that actions that had an adverse effect on employees in protected classes, even if there was no intent to harm certain groups, was a violation of the Civil Rights Act of 1964. Yet, in 1976 the Court held in *Washington v. Davis,* a dispute over the hiring of police officers, that discriminatory intent must also be proven in order for a plaintiff or plaintiffs to prove a constitutional violation.

Under the law of disparate impact, parties claiming that comparable or similar actions have led to an unconstitutional discriminatory effect must show that the actions disproportionately caused them harm. As such, a discriminatory effect within a disparate impact case stems from what is referred to as *facially neutral* policy. This simply means that there was no overt, deliberate intent to discriminate in a policy, but the policy's implementation had a discriminatory effect on individuals based on race, ethnicity, or gender.

Disparate impact cases are based on statistical data that demonstrate the extent to which the implemented neutral policy negatively impacted a particular demographic group, E. W. Shoben has pointed out. The results of this negative impact are referred to as *adverse impact.* Adverse impact is a substantially different rate of selection in hiring, promotion, or other employment decisions that may disadvantage members of a particular racial, ethnic, or gender group, Shoben notes. A selection rate for any group that is less than 80% is deemed adverse impact.

Insofar as disparate impact analysis is not a heavily used theory of discrimination, many questions remain unanswered. For example, it is unclear how disparate impact theory can be used to help institutions, whether in K–12 or higher education settings, to prevent or deter adverse impact on protected groups. Further, even though disparate impact theory has not been applied often to K–12 or higher education, it does reveal great promise for addressing discrimination and inequities in the educational arena, both for employees and students.

Paul Green

See also Affirmative Action; *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Title VII

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Distance Learning

Among the numerous definitions for distance learning, three in particular stand out. The first is provided by the Instructional Technology Council:

> the process of extending learning, or delivering instructional resource-sharing opportunities, to locations away from a classroom, building or site, to another classroom, building or site by using video, audio, computer, multimedia communications, or some combination of these with other traditional delivery methods.

A second definition, this one from the International Association for Continuing Education & Training's website, suggests that "distance learning is a process through which knowledge and skills are acquired through distributed information and instruction." Instead of meeting at a common place and time, learners and teachers interact using a variety of technologies, alone or in combination. These modes of interaction range from written correspondence courses to audio, video, and computer media.

The third definition of distance learning, from the United States Distance Learning Association, suggests that it is "the acquisition of knowledge and skills through mediated information and instruction, encompassing all technologies and other forms of learning at a distance."

Methodologies

Distance learning can be administered in a variety of methods. For example, eArmyU, created in 2004, enables eligible members of the armed services to work toward college degrees and certificates "anytime, anywhere" at 28 regionally accredited colleges and universities offering 145 certificate and degree programs. In another example, the Board of Regents of the University System of Maryland, confronted with space limitations on campuses, mandated that all of its universities encourage students to take at least 12 of their credits outside of the classroom, preferably online. Further, in Mississippi, an e-learning center sponsored by Delta State University is making college preparatory courses available to students whose high schools are unable to offer them.

Changes in the educational environment are demonstrated by the fact that American high school and college students are signing up for online tutorials in mathematics and science being offered by an educational service that draws on academics thousands of miles away in India. To this end, *The Washington Post* reported in May that an anticipated 1.775 million college and university students may be enrolled in online programs today.

Current distance learning technologies include but are not limited to voice-centered technology, such as CD or MP3 recordings or Webcasts; video technology, such as instructional videos, DVDs, and interactive videoconferencing; and computer-centered technology delivered over the Internet or a corporate intranet.

Legal Issues

Accreditation and licensure standards, which have been built around the traditional classroom paradigm for delivery of higher education, must shift radically to accommodate the use of new distance learning

technologies. Researchers in the area have noted a need for new accreditation and licensure strategies to ensure accountability, program quality, and consumer protection, while at the same time permitting distance learning programs to grow.

New legal questions arise regarding distance learning, because it is different from learning in a traditional classroom, and there is a lack of reliable and consistent answers at either the state or federal levels. Questions include the following: What instrument is used to assess the quality of a program, and how is assessment conducted? What entity receives accreditation—is it an institution, a program of study, a delivery system, or something else? Who is doing the accrediting and what are their qualifications to do so? How are the students evaluated? Is the delivery system accessible to disabled students? What instructional designs best fit with the mode of education delivery? How are privacy of student data, verification of student identity, and protection of intellectual property secured?

Each state has legal authority to regulate education within its own jurisdiction. The numerous state regulations present difficult problems for distance learning programs and educational institutions who wish to offer courses across jurisdictional lines. Identification of the applicable regulations, multiple applications and fees, periodic audits, and reporting to each jurisdiction are just a few obstacles to be overcome. Additionally, most states do not mention distance learning in their regulations.

New federal laws offer guidelines on how to use copyrighted material in the digital classroom. The Digital Millennium Copyright Act (1998) put narrow limits on how copyrighted materials may be used in distance learning, and the Technology, Education, and Copyright Harmonization Act (TEACH Act, 2002) loosened these restrictions if certain conditions are met. Still, teachers using copyrighted materials face a challenge in obtaining, keeping records of, and updating permissions.

Legal issues will continue to arise as the use of distance learning develops a stronger presence not only in educational institutions, but also in business and military settings.

Kenneth E. Lane

See also Electronic Communication; Technology and the Law

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Dogs, Drug Sniffing

See Drugs, Dog Searches for

Douglas, William O. (1898–1980)

Justice William O. Douglas holds the record for service on the U.S. Supreme Court, 36 years and 7 months, longer than any other justice in Court history. During his career, he gained a reputation as one of the Court's leading defenders of civil liberties. However, by many accounts, Douglas was harsh on his clerks and difficult to work with, and he led a notorious personal life. His life, career, and contributions to the Court are reviewed in this entry.

Early Years

Douglas was born in Minnesota in 1898, but for most of his early years, he lived near Yakima, Washington. His father died when Douglas was only 6 years old, and as a child Douglas had to overcome illness and poverty. He suffered from polio, and for therapy he often took long hikes in the mountains, which he frequently claimed was the basis of his passion for the outdoors and the environment. In the case of *Sierra*

Club v. Morton (1972, dissent), Douglas asserted that "trees" have standing to sue.

Douglas worked his way through high school and college and was a schoolteacher for a short time before enrolling at Columbia University Law School. Despite having to work at various jobs and as a tutor, he graduated as one of the top students in his class. After graduation from law school, Douglas briefly worked at a Wall Street law firm. Restless with law practice, he left to teach at Columbia Law School. He then went on to become one of the youngest professors to hold a chair at Yale Law School, where he specialized in business and corporate law.

A staunch New Dealer, Douglas was appointed by President Franklin D. Roosevelt as a member of the Securities and Exchange Commission (SEC) and subsequently was elevated by Roosevelt to be SEC chair. In 1944, Roosevelt considered the possibility of choosing Douglas as his vice presidential running mate before finally selecting Harry S Truman.

On the Bench

In 1939, Roosevelt appointed Douglas to fill the vacancy on the Supreme Court left by the retirement of Justice Louis Brandeis. At the age of 41, he was one of the youngest justices in Supreme Court history. During Douglas's long career on the Supreme Court, he became one of its most liberal members and gained a reputation as a great civil libertarian, particularly in the area of free speech.

During the Joseph McCarthy "red scare" era, he filed dissents in cases such as *Dennis v. United States* (1951), where the Supreme Court upheld convictions of American Communist Party members for conspiring to teach and advocate overthrow of the government. Douglas, along with fellow Justice Hugo Black, often took a so-called absolutist view of the First Amendment, interpreting it to mean that "no law" abridging the freedom of speech or press literally meant that these constitutional guarantees were absolute and could not be infringed upon or violated by governmental action.

During the 1970s, Douglas's alleged conflicts of interest, his supposedly extreme positions on issues such as obscenity, and his unconventional lifestyle led Republicans in Congress such as House Minority Leader Gerald R. Ford to call for his impeachment. (Douglas was divorced and remarried three times. His last wife was 22 and he was 66 when they married.) Some felt that the move to impeach Justice Douglas was motivated by Republican retaliation for the Senate's rejection of President Nixon's first two nominees to fill the vacancy on the Supreme Court left by the resignation of Justice Abe Fortas. The impeachment resolution died in committee, but perhaps it sent a political message to Congress and the Supreme Court.

Perhaps the most famous opinion written by Justice Douglas was in the contraceptive case, *Griswold v. Connecticut* (1965). In striking down the state statute prohibiting counseling of married couples to use contraceptives, the Supreme Court recognized a constitutional "right to privacy." Although nowhere expressly stated in the Constitution, Douglas found the right to emanate from "penumbras" of specific guarantees such as the First, Third, Fourth, Fifth, and Ninth amendments to the Constitution.

In 1974, Douglas suffered a severe stroke that partially paralyzed him and from which he never fully recovered. Even so, Douglas did not step down despite his poor health and impaired functioning, and he returned to the Court for the next term. A shadow of his former self, Douglas reluctantly submitted his letter of resignation on November 12, 1975. Douglas died on January 19, 1980.

Justice Douglas left a mixed legacy. He was brilliant but idiosyncratic. Douglas was a prolific author who often wrote his own opinions, producing them much more quickly than his colleagues. However, his opinions were not always tightly reasoned and often tended to reflect his own personal views of the Constitution. Admirers praised Douglas's defense of civil liberties and commitment to individual rights. Critics felt that his views were not consistent and that he often took positions out of self-aggrandizement rather than principle.

Record on Education

During his tenure on the Supreme Court, Justice Douglas's major contributions to education law were

in the areas of school desegregation, minority rights, and separation of church and state. Although Douglas was noted for advocating the rights of dissidents and minorities, he occasionally in times of patriotic fervor supported repressive government actions. In the first flag-salute case, *Minersville School District v. Gobitis* (1940), Douglas joined with the majority in upholding compulsory flag-salute laws. However, he recanted his earlier position and joined in the reversal of *Gobitis* three years later in *West Virginia State Board of Education v. Barnette* (1943). In the now-infamous *Korematsu v. United States* (1944), he joined with fellow liberal Justice Black in upholding the exclusion of Japanese Americans from their homes in so-called "military zones."

On Discrimination

Douglas strongly supported desegregation of American schools. He concurred with all of the major Warren Court desegregation decisions, including *Brown v. Board of Education of Topeka* (1954) and *Cooper v. Aaron* (1958). When the Burger Court began retreating on court-ordered desegregation remedies in the case of *Milliken v. Bradley* (1974), Douglas dissented.

Justice Douglas wrote the opinion of the Court in *Lau v. Nichols* (1974), holding that the failure of the San Francisco school system to provide English language instruction to students of Chinese ancestry who did not speak English, or to provide them with other adequate instruction procedures, denied them a meaningful opportunity to participate in public education, in violation of Title VI of the Civil Rights Act of 1964, which banned discrimination on the grounds of race, color, or national origin in programs receiving federal financial assistance.

On Church and State

In First Amendment free exercise cases, Douglas typically supported freedom of religion. He joined the Court's opinion reversing the conviction of a Jehovah's Witness for solicitation in *Cantwell v. Connecticut* (1940). He concurred in *Sherbert v.Verner* (1963), the dispute involving the rights of Seventh-Day Adventists to unemployment compensation. Here the Court enunciated the *Sherbert* test requiring a compelling state interest for government to interfere with the free exercise of religion. In *Wisconsin v. Yoder* (1972), which exempted Amish parents from state compulsory attendance laws, Douglas was the sole dissenter, arguing that the rights of students should also be considered as well as of the rights of parents and the interest of the state.

Douglas was generally a proponent of separation of church and state. He concurred in the Court's opinion in the companion cases of *Abington Township School District v. Schempp, Murray v. Curlett* (1963), striking down required recitation by students of Bible verses and the Lord's Prayer. He also concurred in *Everson v. Board of Education of Ewing Township* (1947), upholding reimbursement to parents for the costs of public transportation to parochial schools. However, in dissenting from the Court's opinion in *Board of Education. v. Allen* (1968), upholding loaning of secular subject textbooks to parochial school students, Douglas commented that "there is nothing ideological about a bus. . . . [But] the textbook goes to the heart of education in a parochial school" (p. 257).

Justice Douglas concurred in *Illinois ex rel. McCollum v. Board of Education* (1948), in which the Supreme Court found a program releasing public school students during class time to attend religious classes in public school buildings unconstitutional. Yet, he authored the opinion of the court in *Zorach v. Clauson* (1952) upholding the practice of allowing released time for public school students to receive religious instruction during school hours if taken outside public school grounds. The dictum by Douglas in the opinion that "We are a religious people whose institutions presuppose a Supreme Being" (p. 313) is often quoted by opponents of a strict separationist approach to Establishment Clause jurisprudence.

Michael Yates

See also Limited English Proficiency; Prayer in Public Schools; Released Time; Religious Activities in Public Schools

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Dowell v. Board of Education of Oklahoma City Public Schools

Dowell v. Board of Education of Oklahoma City Public Schools is the name given to a series of cases that moved back and forth through the federal courts for more than three decades as Oklahoma schools worked to achieve desegregation to the court's satisfaction. The significance of *Dowell* is that the Supreme Court upheld the authority and discretion of lower courts to address issues relating to school desegregation. The Court also made clear that desegregation decrees were temporary measures to remedy past discrimination and conveyed that school desegregation was a local concern.

Facts of the Case

Dowell began in 1961 when African American parents and students sued the Board of Education of Oklahoma City to end de jure (purposeful or intentional) segregation. A federal trial court found that officials in Oklahoma City purposely segregated both schools and housing while maintaining a dual school system intentionally segregated by race. Consequently, the court approved an order directing the board to revise its school attendance boundaries using neighborhood zoning. However, the Tenth Circuit summarily rejected the plan. On further review, a unanimous Supreme Court (1969), in a one-page per curiam opinion, vacated the decision of the Tenth Circuit.

Relying on the Fourteenth Amendment and the need to desegregate schools immediately, the justices pointed out that the trial court's approval of the board's plan was not inappropriate prior to consideration and adoption of a comprehensive plan for complete desegregation of school systems (*Dowell,* 1969). The justices added that insofar as the trial court ordered the desegregation measures into effect and the parties had not raised an objection made to their scope, the Tenth Circuit should have permitted their implementation pending argument and further review.

By 1972, the trial court recognized that the school board's efforts had not eliminated state-imposed segregation. To this end, the court directed school officials to adopt a plan involving student reassignments and busing to achieve desegregation (*Dowell,* 1972). The Tenth Circuit affirmed (1972b), and the Supreme Court refused to hear a further appeal (1972c). Five years later, the trial court, in an unpublished opinion, granted the board's motion to close the case on the basis that the district had achieved unitary status.

Due to changes in demographics, the board in Oklahoma City instituted a student reassignment plan in 1985 that resulted in a return to primarily one-race schools in some formerly desegregated schools. As a result, the plaintiffs unsuccessfully made a motion to reopen the litigation, claiming that the district had not

achieved unitary status and that the school system was returning to a segregated system (*Dowell,* 1985). However, the Tenth Circuit reversed (*Dowell,* 1986a), declaring that the 1977 order that the district achieved unitary status was binding. In addition, the court indicated that because the 1972 desegregation decree was still in effect, the parents could challenge the student reassignment plan. The Supreme Court refused to intervene (*Dowell,* 1986b). On remand, the trial court *(Dowell,* 1987) noted that the demographics and residential segregation, though not purposeful, meant that while the desegregation plan was no longer viable, the court had no choice but to vacate the earlier injunction and return the district to local control. The Tenth Circuit (*Dowell,* 1989) again reversed, but this time the Supreme Court agreed to hear an appeal (*Dowell,* 1990).

The Court's Ruling

The primary issue in *Dowell* (1991), the last desegregation case in which Justice Thurgood Marshall participated, was the terms and conditions for dissolution of desegregation decrees. Due to concerns about the lack of clarity concerning the definition of unitary status and the Fourteenth Amendment requirements of equal protection under the law, the Supreme Court decided that school boards are entitled to clear-cut statements of their obligations under desegregation decrees.

In reversing and remanding the Tenth Circuit's judgment for further consideration, the Supreme Court dissolved a desegregation order that had been in place since 1972. The justices maintained that because desegregation orders "are not intended to operate in perpetuity" (p. 248), federal trial courts could terminate such decrees if educational officials proved that they "complied in good faith with the desegregation decree since it was entered" (pp. 249–250), eliminated "the vestiges of past discrimination . . . to the extent practicable" (p. 250), and exhibited a commitment not to "return to [their] former ways" (p. 247). As soon as boards proved that they had met these conditions, the Court asserted that they would have achieved unitary status. The Court further reasoned that in making such a finding, a trial court should not view a board's adoption of a plan as a breach of good faith, even if it was technically flawed, as long as it was not intended to operate in perpetuity.

As it considered whether the board eliminated the vestiges of segregation, the Court continued to rely on the six factors it enunciated in *Green v. County School Board of New Kent County* (1968). The *Green* factors used to evaluate whether school systems have achieved unitary status are the composition of the student body, faculty, and staff; transportation; extracurricular activities; and facilities; these principles have been applied in a plethora of school desegregation cases. The Court was thus satisfied that the board achieved unitary status with regard to student assignments, transportation, physical facilities, and extracurricular activities; it agreed that the trial court properly returned control over these areas to the school board.

Darlene Y. Bruner

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *Green v. County School Board of New Kent County;* Segregation, De Facto; Segregation, De Jure

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Dress Codes

School dress codes have their origins in English private schools but only recently became common in American public schools. Primarily due to favorable economic conditions in the 1950s and 1960s leading

to an increase in disposable income, clothing designers and marketers began to target a generation of fashion-conscious students. Combined with the social upheaval of the 1960s, student grooming and dress began to challenge traditional educational expectations. Student dress became a means of individual and political expression. Consequently, educational policymakers devised dress policies, or dress codes, to inculcate their values upon an increasingly diverse student population. This entry looks at Court rulings that have been applied to student dress codes, looks briefly at their effectiveness, and provides guidelines for educators.

Relevant Cases

Student dress received national attention in 1969 when the U.S. Supreme Court granted students the broad First Amendment right to freedom of expression. In *Tinker v. Des Moines Independent Community School District,* the Court considered whether a school policy banning the wearing of armbands by students in protest of the Vietnam War violated the students' freedom of expression. Noting that the school officials had no evidence that the wearing of the armbands was potentially disruptive or would substantially interfere with the educational process, the Court held that because the circumstances of the case were close to "pure speech," the students were entitled to First Amendment protection.

Largely due to *Tinker* and subsequent court decisions, school district dress guidelines began to consider students' expression rights. Subsequently, dress code litigation has been influenced by two other student speech cases. The first, *Bethel School District No. 403 v. Fraser* (1986), centered on a speech that the plaintiff delivered to the student body. The speech included a graphic, explicit sexual metaphor, and as a consequence, the student was disciplined. Although the Court affirmed that students had the right to advocate unpopular viewpoints, the Court noted that the expression of those views may be balanced against reasonable standards of civil conduct as established by the school district. In essence, the *Fraser* standard evidences that student speech may be restricted if it is lewd, offensive, or inappropriate in the school setting.

The second influential case, *Hazelwood School District v. Kuhlmeier* (1988), involved the publication of a high school student newspaper. The Supreme Court held that the school newspaper was not a public forum and as such did not receive the same pure-speech protection as did the armbands in *Tinker.* In essence, the Court modified the *Tinker* standard, noting that if the speech would materially disrupt class work or invade the rights of others, then the school could impose reasonable constraints over the speech. Accordingly, the *Hazelwood* standard establishes that school officials may restrain student speech if there is a legitimate pedagogical reason to do so.

More recently, the courts have used the *Tinker, Fraser,* and *Hazelwood* rulings to craft guidelines for student speech and consequently, student dress codes. As a result, rulings across the different circuits have been inconsistent. For example, a student in the Ninth Circuit was inappropriately disciplined for wearing a T-shirt with a reference to drugs, but the message was not found to be offensive or counter to the school's antidrug mission. Yet, other circuits have held that "plainly offensive" speech, as noted in *Fraser,* is broader than lewd and vulgar speech. Accordingly, the offensive speech may extend to hate speech, or even to references to drug and alcohol use.

Specific dress codes for students are universal. Policymakers tend to encourage dress codes and, typically, the right to establish and enforce the codes is sustained by the courts. Commonly, dress codes attempt to prevent the promotion of drug and alcohol use, gang-related insignias, sexually provocative clothing, and hate-related clothing.

Effectiveness of Dress Codes

Research regarding the effectiveness of dress codes is inconclusive. Opponents of dress codes claim that dress codes are discriminatory, primarily toward females and minorities. Further, opponents claim that dress codes are an assault on the fundamental First Amendment right to free speech. Proponents of dress codes respond that codes improve the learning environment, enhance student safety, place less stress on students' families—particularly low-income families, and eliminate student preoccupation with fashion.

Although the *Tinker* Court held that students do not shed their constitutional rights when they enter the school, the Court also noted that the case did not address student dress policies such as skirt length or clothing restrictions. The Fifth Circuit in *Canady v. Bossier Parish School Board* (2000) determined that a school policy regulating student dress is constitutional as long as it furthers an important governmental interest, the interest is not related to student expression, and First Amendment restrictions are minimal.

School Uniforms

With the growth in conservatism in the 1980s and the rising public concern about student discipline and safety in the schools, the courts became more receptive to increasingly dogmatic school dress policies, such as school uniform policies. The courts have supported dress code regulations necessary to maintain an environment free from disruption and distraction. Although the idea of implementing school uniform policies in the public schools began in the late 1980s, President Clinton added credence to the practice in 1996 when he endorsed school uniform policies as a means of reducing school violence and disciplinary problems.

Often controversial, school uniform policies have become popular with state-level policymakers. Currently, many states allow, or specifically encourage, local public school policymakers to implement school uniform policies. Much like the research regarding dress codes in general, the research on the effectiveness of school uniforms is inconclusive. Whereas dress code policies are often viewed as restrictive, detailing what may not be worn, school uniform policies are often viewed as directive, detailing what must be worn. This minor distinction can play a significant role in how the courts view the legality of uniform policies.

Educator Guidelines

School officials possess the authority to establish dress codes. Dress codes that do not suppress political speech will receive more judicial support than those that do. Yet, in a time when school violence is prominent, the courts are inclined to leave dress code regulations to school officials as long as the regulations are specific enough to provide notice to the students. Additionally, when the guidelines are restrictive, school officials would be well served to have a clearly legitimate interest (e.g., safety) as a rationale for implementing the guidelines.

Acceptable student dress codes are flexible and avoid restricting constitutionally protected freedoms like religious expression. Dress codes devised as an attempt to affect disciplinary problems or gang violence should be developed as part of an overall school safety program. If the dress code has economic implications, some assistance may need to be provided to economically disadvantaged students.

Mark Littleton

See also *Bethel School District No. 403 v. Fraser*; Free Speech and Expression Rights of Students; *Hazelwood School District v. Kuhlmeier Tinker v. Des Moines Independent Community School District*

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Drugs, Dog Searches for

For decades, school systems engaged in efforts to stem drug use and violence in schools. As a means to deter this behavior and to confiscate drugs and other contraband that pose a risk to the safety of both students and staff, school boards have increasingly come to rely on certified drug-sniffing dogs to respond to such threats. As the sample of rulings discussed in this entry suggest,

mass suspicionless dog searches are generally accepted from a legal standpoint unless officials administer searches of persons. If canine searches are used on students' bodies, then the expectation is that reasonable individualized suspicion is sufficient to permit a search. Otherwise, such intrusive searches are likely to violate the Fourth Amendment.

Foundation Cases

U.S. Supreme Court rulings in *New Jersey v. T. L. O.* (1985), *Vernonia School District 47J v. Acton* (1995), and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) largely provide the legal basis for permitting forms of even-handed, mass suspicionless searches such as those involving drug-sniffing dogs.

In the landmark Fourth Amendment ruling of *T. L. O.,* the Supreme Court ruled that school officials are generally exempt from having to secure warrants or obtain probable cause to administer searches of students. Instead, the Court was of the opinion that school officials had to meet a less rigid standard of reasonable suspicion to initiate a search. In order for searches to be reasonable, the Court explained that they must be justified at their inception and reasonable in scope in light of the sex, age, and maturity of students.

Vernonia v. Acton and *Board of Education v. Earls* were equally pivotal, because they upheld random drug examinations of students participating in athletics and extracurricular activities respectively. In both cases, the Court upheld random student drug testing, analyzing three primary factors: the decreased expectation of privacy afforded to students engaging in non-curricular activities, the relative unobtrusiveness of the drug-testing procedure, and the severity of the governmental need and efficacy of the approach. While the three cases appear to thread together a sufficient legal defense for dog searches, implementation issues relating to locker, vehicle, and person searches have emerged in lower court cases.

Dog-Related Rulings

Canine locker searches are a common staple in American public schools. It is generally believed that students are afforded a lesser expectation of privacy in government-owned storage such as lockers. This, in turn, gives school officials greater leverage to administer suspicionless searches in the interest of campus security and safety. While a considerable portion of case law, some predating *T. L. O.,* supports the use of dog searches of lockers, courts customarily have ruled against purposive, incidental, or arbitrary dog searches of students' persons or bodies.

Personal Searches

For instance, in *Jones v. Latexo ISD* (1980), a school board approved the use of drug dogs after signs of a possible schoolwide drug problem. At the initial search, the security company representative and handler, along with the dog, entered classrooms and walked along aisles of students sitting at their desks. After three students were identified as persons of suspicion, two were asked to remove the contents of their pockets; one pocket contained a hairclip appearing to be burnt and a bottle of Sinex; another pocket contained a cigarette lighter. Subsequent vehicle searches did confirm the possession of illegal contraband (i.e., marijuana cigarettes).

While school officials argued that they were executing a service, the court decided that dog sniffing of students without individualized suspicion undermines the provision that school officials must put together a necessary reasonable cause to administer a search. The Fifth Circuit, in *Horton v. Goose Creek ISD* (1982), reached a similar outcome but was distinct in that it ruled that dog searches of persons, absent individualized suspicion, constitute unlawful searches. The use of drug dogs to comb lockers and vehicles is not considered a true search as such under the purview of the Fourth Amendment.

Similarly, in *B. C. v. Plumas Unified School District* (1998), a drug-sniffing canine happened to alert authorities to a student walking in a campus hallway. After a search of the student's person and belongings, no contraband was found. The Ninth Circuit maintained that the search violated the student's Fourth Amendment rights, as the dog arbitrarily detected the student's odors and because no prior notice of a search was communicated to the campus student body.

Car Searches

In addition to canine searches of lockers, courts have grappled with the expectation of privacy in student vehicles that are parked on campus grounds. In *Jennings v. Joshua ISD* (1989), a drug-sniffing dog alerted school officials to a vehicle belonging to a daughter of a federal law enforcement officer who, on learning of the dog-sniffing program, instructed his child not to consent to a search based on such information. When the student and her father refused consent, school officials contacted police. After a warrant was obtained, police searched the vehicle and nothing illegal was ever discovered. Although the plaintiffs argued that the search violated the Fourth Amendment and that school officials and law enforcement officers should be held monetarily responsible for damages, the Fifth Circuit ruled that no factual basis was present to claim that school officials and police orchestrated or conducted the search in a manner depriving the student of Fourth Amendment protection.

In *Marner v. Eufaula City School Board* (2002), a drug-sniffing dog search team led by law enforcement officers and school officials identified a high school student's vehicle in a campus parking lot as possibly harboring narcotics. While a more extensive search of the student's vehicle yielded no illegal drugs, two articles in violation of school policy were discovered: an exacto knife and a pocketknife of considerable size. Although school officials acknowledged the student had no intention of causing harm to others, the student was subsequently suspended and placed in an alternative educational placement for a 45-day period. A federal trial court in Alabama found the dog search permissible based on the credibility of suspicion coming from the dog's alert.

Mario S. Torres Jr.

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drug Testing of Students; Locker Searches; *New Jersey v. T. L. O.; Vernonia School District 47J v. Acton*

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Horton v. Goose Creek Independent School District, 693 F.2d 524 (1982).

Jennings v. Joshua Independent School District, 877 F.2d 313 (5th Cir. 1989).

Jones v. Latexo ISD, 449 F. Supp. 223 (E.D. Tex. 1980).

Marner v. Eufaula City School Board, 204 F. Supp. 2d 1318 (M.D. Ala. 2002).

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Vernonia School District 47J v. Acton, 515 U.S. 64 (1995).

Drug Testing of Students

Drug testing of students most often arises in two circumstances: tests conducted when a school official reasonably believes that a student is under the influence of a controlled substance not permitted by law or school policy, and tests conducted pursuant to a policy permitting random, suspicionless drug tests. Usually, the drugs targeted are those that are considered serious and dangerous, such as marijuana and alcohol, but not nicotine. Likely the most popular test implemented is urinalysis. Other drug tests include searches with breathalyzers and analysis of hair samples. With some limitations in policy and practice, student drug testing is lawful in both suspicion-based and random circumstances.

Suspicion-Based Searches

Suspicion-based searches of students are governed, largely, by the Supreme Court decision in *New Jersey v. T. L. O.* In *T. L. O.,* a high school teacher discovered two students smoking in a bathroom, in contravention of school policy. The two girls were questioned by the assistant principal. One girl admitted the violation. The other one denied it, and the assistant principal searched her purse and found cigarettes, rolling papers, marijuana, and other contraband that implicated her in drug dealing. The student filed a motion to suppress the evidence, claiming the search violated her Fourth Amendment rights to be free from unreasonable search and seizure.

The Supreme Court upheld the search, rejecting the application of the warrant and probable cause requirement and adopting a two-part "reasonable suspicion" test, also applicable today in suspicion-based drug tests. First, the search must be justified at its inception, meaning that there must be reliable physical or eyewitness evidence that the search will reveal a violation of a school rule or law. Second, the search must be reasonable in scope such that it must be related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the contraband and the infraction.

The possession or use of drugs on school property is against school policy as well as in violation of law. So the first step is typically met as long as the information brought to the school administrator leading the search is reliable. The second step is trickier and must be handled with careful watch on privacy rights. For example, school officials should allow the student to produce a desired urine sample in a closed stall. Suspicion-based drug tests may be conducted on any student reasonably suspected of violating drug-related law or school policy (*Gutin v. Washington Township Board of Education,* 2006).

Suspicionless Tests

Random, suspicionless drug tests are usually reserved for students who participate in interscholastic athletics or other extracurricular activities. The most typical form of drug test is urinalysis; breathalyzers and tests of hair samples are viable, as well. Subject to important policy implications, random, suspicionless drug tests are lawful and do not violate the Fourth Amendment. The Supreme Court heard this basic legal challenge to urinalysis drug tests of students and held in favor of the school in both cases.

In 1995, in *Vernonia School District 47J v. Acton,* the Court upheld a test applied to athletes in grades 7 through 12. In 2002, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls,* the Court upheld a similar policy and practice applied to all high school students involved in competitive extracurricular activities. The *Earls* Court reaffirmed a useful three-part test to scrutinize random, suspicionless student drug testing.

First, courts look at the nature of the privacy interest. In both *Vernonia* and *Earls,* the Court held that the expectation of privacy in the students subject to the policy was limited by the fact that they voluntarily joined extracurricular activities, which already have additional rules. Further, the Court explained that the custodial and tutelary responsibilities of the school outweigh students' rights when health, safety, and education are of primary concern.

Second, the character of the intrusion was minimal. Each student subject to the policy typically submits to a test at the beginning of the season or activity and then is subject to random tests throughout. The procedures used in these two landmark cases, especially *Earls,* were respectful of students' privacy: The urine sample was produced in a closed stall, with a monitor listening for "the normal sounds of urination," and the results were kept confidential and were subject to further testing for confirmation. In *Earls,* positive results were not turned over to law enforcement. Students violating the policy were subject only to lost privileges in extracurricular activities, and that deprivation was longer than 14 days only after the third positive test. No other discipline was imposed.

Third is the nature and immediacy of the governmental concern. While evidence of actual drug use among the population of students subject to the policy would appear to be important to justify a random drug testing policy, courts have not typically required it, in light of the seriousness of drug use among young people. According to the Court in *Earls,*

> The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school drug-testing policy. Indeed, it would make little sense to require a school district to wait for the substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use. (p. 836)

The board of education in *Earls* successfully expanded its drug testing policy to include students in all competitive extracurricular activities, not just athletics. How wide open this door has become, though, is still a matter of some debate. School officials should be careful to exclude from coverage those

students who earn academic credit, such as participants in a marching band. Conditioning academic credit on the submission to random drug testing is questionable legally.

With mixed success, other school officials have attempted to expand random drug testing to students who drive to school. In *Theodore v. Delaware Valley School District,* the Supreme Court of Pennsylvania struck down a policy requiring random tests for those in extracurricular activities and those who wished to obtain a parking permit. Yet, in *Joye v. Hunterdon Regional High School Board of Education,* the Supreme Court of New Jersey upheld a similar policy.

It is important to reiterate the aspects of the policy in *Earls* that made it strong enough to combat the drug use problem in the schools, yet protective enough of the privacy rights of students. Policymakers are encouraged to check their policies for similar safeguards.

Patrick D. Pauken

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Locker Searches; *New Jersey v. T. L. O.;* Privacy Rights of Students; Strip Searches; *Vernonia School District 47J v. Acton*

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Joye v. Hunterdon Regional High School Board of Education, 826 A.2d 624 (N.J. 2003).

New Jersey v. T. L. O., 469 U.S. 325 (1985).

Theodore v. Delaware Valley School District, 836 A.2d 76 (Pa. 2003).

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

Drug Testing of Teachers

Drug testing of teachers involves the law regarding search and seizure, and it must consider both the general nature of a workplace with the expectation that privacy exists there and the specific nature of a school setting with the special considerations necessary there. As a general rule of thumb, drug testing of teachers is lawful under two circumstances: tests conducted when a school official reasonably believes that a teacher is under the influence of a controlled substance not permitted by law or school policy, and tests conducted pursuant to a policy permitting random, suspicionless drug tests. As with student drug testing, the drugs targeted are usually those with serious and dangerous consequences for use (e.g., marijuana and alcohol, but not nicotine). The most popular test implemented is urinalysis. Other drug tests include searches with breathalyzers and analysis of hair samples.

Privacy Issues

Public schoolteachers, generally, do not have an expectation of privacy in their workplace, including those places under the control of the school itself, such as classrooms, cafeterias, hallways, offices, desks, and file cabinets (*O'Connor v. Ortega,* 1987). Even so, educators have an expectation of privacy in their personal items such as luggage, purses, and briefcases. Suspicion-based drug tests of teachers are governed largely by the two-part "reasonable suspicion" test adopted by the Supreme Court in *New Jersey v. T. L. O.* (1985).

First, the search must be justified at its inception (i.e., there must be reliable physical or eyewitness evidence that the search will reveal a violation of a school rule or the law). Second, the search must be reasonable in scope (i.e., it must be related to the objectives of the search and not excessively intrusive in light of the sex of the teacher and the nature of the contraband and the infraction). Suspicion-based searches of teachers are justified on the argument that school boards should maintain a safe, efficient workplace, but the evidence used to justify a search must be reasonable. In *Warren v. Board of Education of*

St. Louis (2001), for example, a school principal who ordered a teacher to undergo a urinalysis drug test noted the teacher's aggressive and erratic behavior at a meeting, but could not articulate a reasonable suspicion of drug use.

Random Testing

For students, random and suspicionless drug testing is supported by the Supreme Court cases of *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) and *Vernonia School District 47J v. Acton* (1995). *Earls* set out a three-factor inquiry for the legality of such searches: (1) The nature of the privacy interest is lessened in extracurricular activities; (2) the character of the intrusion is minimal; and (3) the nature and the immediacy of the school's interest in fighting drug use among young people are strong. While there is likely some sentiment in support of the same sort of inquiry regarding random, suspicionless drug testing of teachers, particularly under a school policy that safeguards privacy, like the one upheld in *Earls,* the fact that teachers are school employees adds some complexity to the legal question.

Three landmark Supreme Court cases address the issue of random, suspicionless drug testing of employees (*Chandler v. Miller,* 1997; *National Treasury Employees Union v. Von Raab,* 1989; *Skinner v. Railway Labor Executives Association,* 1989). In these cases, the Court held that while urinalysis drug testing does intrude on a public employee's expectation of privacy, that expectation can be trumped by the articulation of a compelling governmental interest—the need for a safe and drug-free workplace, particularly for those employees in "safety sensitive" positions.

Applying these precedents, courts have regarded random and suspicionless drug testing of teachers with mixed views. In 1998, the Fifth Circuit struck down a Louisiana school board's urinalysis drug testing policy for teachers on the argument that the "special needs" of the education workplace are different from those of the railway workers in *Skinner,* who were required to undergo testing after railroad accidents (*United Teachers of New Orleans v. Orleans Parish School Board,* 1998). According to the court, there were no such special needs. On the other hand, the Sixth Circuit, also in 1998, used the same precedent and upheld a similar policy; according to that court, teachers occupy "safety-sensitive" positions, and the lack of a demonstrated drug problem among the teaching staff was not relevant (*Knox County Education Association v. Knox County Board of Education,* 1998; see also *Crager v. Board of Education of Knott County,* 2004). The court also cited the in loco parentis doctrine and argued that the public interest in drug testing outweighed the teachers' privacy interests in what was already a heavily regulated profession.

While drug testing of teachers is lawful, school boards wishing to adopt drug testing policies for their employees are encouraged to read the case law related to both suspicion-based and suspicionless drug tests (*Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District,* 1987).

Patrick D. Pauken

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drugs, Dog Searches for; Locker Searches; *O'Connor v. Ortega;* Privacy Rights of Teachers; Strip Searches; *Vernonia School District 47J v. Acton*

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Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).
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Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

Dual and Unitary Systems

Based on precedent from the U.S. Supreme Court, dual systems of public education were those that operated separate and distinct schools for students who were White and children who were African American or other minorities such as Mexican American. Conversely, unitary systems were those that achieved the status of being desegregated, meaning that students were no longer placed in racially separate schools. Following the landmark *Brown v. Board of Education of Topeka* ruling in 1954, dual systems were declared unconstitutional. As a result of lawsuits brought by parents and students, school districts across the country were placed under the supervision of federal courts while they worked to desegregate their schools. Once federal courts decided that school boards no longer operated dual systems, they released districts from direct judicial oversight and monitoring with regard to the implementation of school desegregation plans. This entry provides a brief overview of that process and current developments.

Achieving Unitary Status

The Supreme Court announced the most comprehensive list of items that lower courts had to examine in evaluating whether districts achieved unitary status in *Green v. County School Board of New Kent County* (1968). These six factors address the composition of a student body, faculty, staff, transportation, extracurricular activities, and facilities. School boards that seek unitary status must prove that officials implemented their desegregation orders in good faith, that their plans were effective in eliminating all vestiges of school segregation to the extent practicable under the *Green* factors, and that they have not violated the U.S. Constitution subsequent to the original judicial decrees.

In discussing desegregation and unitary status, David Armor, a well-known researcher on school desegregation, identifies the second criterion, the removal of vestiges, as the most complex. Among the vestiges that federal courts are likely to consider in formerly segregated schools systems are the maintenance of one-race schools from the period prior to the issuance of desegregation decrees through the implementation of an approved plan, a school faculty racial composition that deviates greatly from the overall district percentage, and inadequate programs to help minorities in predominantly minority schools.

Even though the Court later decided that districts could achieve unitary status incrementally in *Freeman v. Pitts* (1992), and that desegregation orders are not meant to operate in perpetuity in *Dowell v. Board of Education of Oklahoma City Public Schools* (1991), lower courts continue to apply the principles established in *Green.*

Pursuant to a large body of case law, school boards that failed to achieve unitary status had to receive judicial approval for any changes that they wished to make to their desegregation plans. Among the changes needing court approval today are such important items as school attendance areas or zones, the construction of new buildings or closing of old schools, and changes in teacher or student transfer policies. The burden of proof for making changes rests on defendant school boards.

Current Issues

In districts that have achieved unitary status, school officials have the same constitutional rights to act as in districts that have never operated under court orders. To succeed in a lawsuit protesting a school policy or action, plaintiffs must prove that the school board intended to discriminate and that its activity had the outcome of segregation. Thus, in unitary districts, the burden of proof to show discrimination shifts back to the plaintiffs, those charging that a school board operated a racially segregated system.

Armor has pointed out three reasons why school boards in unitary systems may have preferred to

remain under court orders rather than be declared unitary. First, the court order provides a measure of judicial protection from political pressures to alter the content of their plans. Second, court orders help protect staffing plans that spread minority staff throughout school districts. An increasingly significant third reason in this regard is that remaining under judicial orders allows boards to maintain the funding that the courts provide from state and/or federal sources.

If a system that was at one point racially balanced has since become segregated again, courts typically consider the extent to which school board actions or demographics were the cause. In recent litigation, for example, plaintiffs have called for the elimination of disparities in student achievement, disciplinary action, and representation in special education and in programs for the gifted. In addition, while plaintiffs have cited such differences as vestiges of discrimination, the judiciary has yet to rule definitively or favorably on such motions, insofar as the Supreme Court has noted that that a Black-White achievement gap by itself is not a barrier to a district's achieving unitary status.

Gary Orfield and Susan Eaton, working with the Harvard Project on School Desegregation, argue that recent Supreme Court cases defining unitary status have led to the erosion of judicial support for school desegregation. According to these authors, by 1990, unitary status no longer meant achieving a truly integrated school system. They argue that the Court no longer supported lasting desegregation and had abandoned the notion of the parts of a desegregation plan as an inseparable package to move a school district from a dual to a single district. The shifting burden of proof, they said, made it difficult to prove segregative intent in an era when officials knew that providing racially tinged reasons for their actions would have led them to litigation. In other words, Orfield and Eaton posited that moving from dual to unitary status meant that acts that were illegal in the former stage may well be legal in the latter stage.

Paul Green

See also *Dowell v. Board of Education of Oklahoma City Public Schools; Freeman v. Pitts; Green v. County School Board of New Kent County*

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Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Due Process

The U.S. Constitution guarantees every person within the jurisdiction of the United States protection against arbitrary government action through the Due Process Clause. The Due Process Clause that protects against arbitrary action by the federal government can be found in the Fifth Amendment; it states in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law." The Due Process Clause applicable to states and state agencies, including school boards, is in the Fourteenth Amendment, which provides in pertinent part: "No State shall . . . deprive any person of life, liberty or property, without due process of law."

There are two aspects to the Due Process Clause: *substantive due process* and *procedural due process.* The Substantive Due Process Clause provides protection for persons within the jurisdiction of the United States against arbitrary deprivation by the federal or state government (including school boards) of any of the following three interests: "life, liberty or property." The Procedural Due Process

Clause is the portion of the amendment that states "without due process of law"; in other words, this clause requires public officials to take certain procedures before persons can be deprived of life, liberty, or property. This entry describes each in more detail, with examples from education.

Substantive Due Process

The approach courts use to evaluate whether the Substantive Due Process Clause is violated depends on whether an alleged violation is a result of a legislative act or an executive action, such as a specific action of a government official. When a legislative act is alleged to be in violation of substantive due process rights, courts first determine if a life, liberty, or property interest is involved under the Substantive Due Process Clause. Substantive due process analysis then requires courts to determine if the life, liberty, or property interest in question is a fundamental right. The U.S. Supreme Court has recognized certain rights as fundamental; the test for determining if a right is fundamental is whether the right is explicitly or implicitly guaranteed by the federal Constitution. Examples of fundamental rights include the right to free speech, the right to privacy, the right to vote, the right to procreate, and the right to interstate travel; the right to education is not a fundamental right. Once the court determines that a fundamental right is involved, it reviews the legislative act using the *strict scrutiny* standard of review, described below. If a fundamental right is not involved, then a court reviews a legislative act using the *rational basis* standard of review, also described below.

When an executive action or a specific act of a government official is alleged to be in violation of substantive due process rights, courts first determine if a life, liberty, or property interest is involved under the Substantive Due Process Clause. If so, substantive due process analysis then requires courts to determine if the executive action "shocks the conscience."

According to the Supreme Court, liberty interests include not only freedom from bodily restraint but also the right to contract and to enjoy the privileges traditionally recognized as important to the orderly pursuit of happiness. Property interest is defined as a right created by contract or statute. By way of illustration, when a state statutorily grants the right to vote for local school boards to its residents, a property interest is statutorily created. Likewise, when a school district contracts with a teacher for employment, the school district has created in such a teacher a property right to the job for the term of the contract, unless the terms of the contract state otherwise.

The strict scrutiny standard of review is applied only when government action "interferes with a fundamental right or discriminates against a suspect class" (*Kadrmas v. Dickinson Public Schools,* 1988, p. 457). In order to withstand judicial scrutiny under the strict scrutiny standard of review, the burden is on the government to show that the legislative act is narrowly tailored to achieve a compelling interest; this is a very difficult burden for the government. Thus strict scrutiny has often been referred to as strict in theory and fatal in fact.

Suspect classes to which the Supreme Court has held strict scrutiny applicable include race, ethnicity, and national origin; as noted above, fundamental rights include the right to vote and right to interstate travel but not the right to education. Suspect classification is not applicable in determining whether strict scrutiny applies to the review of a Substantive Due Process Clause case; suspect classification is only a factor in determining if strict scrutiny applies to a case under the Equal Protection Clause.

The rational basis standard of review is a very lenient standard of review used by courts for substantive due process analysis. Under this standard of review, the Substantive Due Process Clause is violated only if the legislative act is not rationally related to a legitimate state interest. As noted above, rational basis review applies only when the life, liberty, or property interest a legislative act is alleged to violate is not a fundamental right; the legislative act will be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the [legislative act]" (*FCC v. Beach Communications, Inc.,* 1993, p. 313). A legislative act will withstand rational basis review even if it is "based on rational speculation unsupported by evidence or empirical data. . . . Those attacking the rationality of the legislative [act] have the burden to negative every conceivable basis which might support

it" (*FCC v. Beach Communications, Inc.,* 1993, p. 315) (internal quotes omitted).

Procedural Due Process

The Procedural Due Process Clause requirement of "due process of law" has been interpreted by the U.S. Supreme Court as a requirement that notice and an opportunity for a hearing must be provided before the government (including school boards) deprives citizens of life, liberty, or property. If life, liberty, or property interests are not involved in a governmental deprivation, procedural process is not due to the citizen. The opportunity for a hearing provides citizens the chance to defend themselves. A hearing does not have to amount to the formalities of a trial; courts have upheld some informal hearings as adequate procedural due process.

In evaluating what procedures are required in a hearing under the Procedural Due Process Clause, courts consider three factors: (1) the importance of the life, liberty, or property interest impacted by the government action; (2) the likelihood that the procedure in question will reduce the risk of an erroneous deprivation; and (3) the importance of the government interest in the deprivation. These factors are also considered when courts are asked to decide whether a citizen is entitled to a hearing before the deprivation or whether a postdeprivation hearing would suffice. In certain exigent circumstances, such as those involving risk to life or safety, courts might uphold government deprivation of liberty or property before a hearing occurs; clearly, life cannot be deprived before a hearing.

In addition, procedural due process requires that governments and school boards ensure that hearings and decision makers in the hearings are fair and unbiased; even one decision maker with bias could constitute a deprivation of due process. The notice given must state the charges and grounds for the government action taken against the citizen.

When dealing with teachers and students, school boards should always keep in mind that whenever life, liberty, or property interests are implicated, substantive due process as well as procedural due process might be due in order to avoid constitutional violations. As such, if a teacher has a one-year employment contract with a school system, the board has created a property right: The teacher has a property right to employment by the district for the year. If the board chooses to terminate the teacher's employment during the year provided for in the contract, it must provide the teacher with notice of the termination and reasons for the termination, and it must also provide an opportunity for the teacher to refute the district's reasons for the termination. To terminate tenured teachers, notice and a hearing must be afforded the teacher, because tenure is a property right. Similarly, when school officials seek to expel students, they must afford the student procedural due process, because education is a property right.

Joseph Oluwole

See also Bill of Rights; *Board of Regents v. Roth;* Contracts; Due Process Hearing; Due Process Rights: Teacher Dismissal

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Mathews v. Eldridge, 424 U.S. 319 (1976).

Due Process Hearing

The Individuals with Disabilities Education Act (IDEA) gives parents of a student with disabilities the right to request a due process hearing on any matter concerning the delivery of a free appropriate public education (FAPE), such as the identification, evaluation, and placement of the child. School personnel may ask for hearings when parents refuse to consent to an evaluation or reject a proposed individualized education program (IEP). The party requesting a due process hearing must forward to the state education agency copies of the complaint containing the child's name, address, and school attended. In addition, a complaint must include a description of the problem giving rise to the complaint.

States may establish either a one-tiered or a two-tiered due process system. In one-tier arrangements, hearings are conducted at the state level. Two-tiered programs allow for local hearings with appeals of adjudications to state-level entities, generally review boards. Aggrieved parties must ask for hearings within two years of the events that precipitated the requests. However, in the event that state laws create different limitation periods, those laws prevail. This entry summarizes court decisions related to due process hearings.

Hearing Officers

Hearing officers must be impartial, meaning that they cannot be employees of the state or school board involved in the education of the children whose cases appear before them or have personal or professional interests in these students. Persons who otherwise qualify as hearing officers are not considered employees of their states or local school boards just because they were paid to serve as hearing officers.

The fact that hearing officers may be employed by another school board does not automatically make them biased. For example, in one challenge to the impartiality of a hearing officer, the Tenth Circuit held that a hearing officer's employment by another school district did not violate the IDEA prohibition against working for the district involved in a hearing (*L. B. and J. B. ex rel. K. B. v. Nebo School District,* 2004).

The task of hearing officers is to sort out what took place and apply the law to the facts in a manner similar to that of trial court judges. Hearing officers are empowered to issue orders and grant equitable relief regarding the provision of a FAPE to students with disabilities. There are some limitations on the power of hearing officers. For example, hearing officers generally do not have the authority to provide remedies when broad policies or procedures that affect a large number of students are challenged or to address matters of law, because they lack the ability to consider a statute's constitutionality. For the most part, the power of hearing officers is limited to the facts of the disputes at hand. The IDEA provides that the awarding of attorneys fees to prevailing parents in special education disputes is solely within the discretion of federal courts.

Interestingly, the IDEA does not contain specific language regarding the qualifications of hearing officers. Thus, it is up to individual states to establish their own criteria for the qualifications and training of hearing officers. In one of the few cases to address this issue, the federal trial court in Connecticut ruled that a state's failure to train hearing officers was not a violation of the IDEA (*Canton Board of Education v. N. B. and R. B.,* 2004).

Legal Requirements

The IDEA does not specifically assign the burden of proof in a due process hearing. In 2005, the U.S. Supreme Court resolved a controversy that had existed over which party had the burden of proof in *Schaffer v. Weast* (2005). Recognizing that arguments could be made on both sides of the issue, the Court saw no reason to depart from the usual rule that the party seeking relief bears the burden of proof. In IDEA cases, this is usually the parents. The assignment of the burden of proof is important, as it can well determine the final outcome in close cases.

The IDEA requires parties to exhaust administrative remedies before filing suits, unless it clearly is futile to do so. In other words, parties may not file suit until all due process hearings and appeals have been pursued. If administrative remedies are not exhausted, courts generally refuse to address issues that were not subject to complete exhaustion (*T. S. v. Ridgefield Board of Education,* 1993).

All parties involved in due process hearings have the right to be accompanied and advised by counsel with special knowledge concerning the education of students with disabilities. Inasmuch as it is a quasi-judicial proceeding, the parties at a hearing may present evidence, compel the attendance of witnesses, and cross-examine witnesses. The parties may prohibit the introduction of evidence that is not disclosed at least five business days prior to hearings. The parties have the right to obtain a written or an electronic verbatim record of the hearing as well as of findings of fact and decisions.

The IDEA requires hearing officers to render final decisions within 45 days of the request for hearings. However, hearing officers can grant requests from

either party for extensions or continuances of this time period. The decisions of hearing officers are final, unless they are appealed. In states with a two-tiered due process hearing system, when appeals are taken, final decision must be reached within 30 days of the requests for review. Once administrative review is complete, aggrieved parties may file appeals in either the federal or state courts. Aggrieved parties are generally considered to be the losing parties or those who did not obtain the relief sought.

Allan G. Osborne, Jr.

See also Disabled Persons, Rights of; Hearing Officer

Further Readings

Russo, C. J., & Osborne, A. G. (2006). The Supreme Court clarifies the burden of proof in special education due process hearings: *Schaffer ex rel. Schaffer v. Weast. Education Law Reporter, 208,* 705–717.

Legal Citations

Canton Board of Education v. N. B. and R. B., 343 F. Supp. 2d 123 (D. Conn. 2004).

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

L. B. and J. B. ex rel. K. B. v. Nebo School District, 379 F.3d 966 (10th Cir. 2004).

Schaffer v. Weast, 546 U.S. 49 (2005).

T. S. v. Ridgefield Board of Education, 10 F.3d 87 (2nd Cir. 1993).

Due Process Rights: Teacher Dismissal

Basic procedural due process in disputes over the dismissal of teachers usually includes notice of intended actions, the right to some explanation for proposed adverse employment actions, and the dismissed individuals' rights to respond to the planned action. *Teacher dismissals* refers to the termination of employment contracts either during academic years for just cause or, for teachers with tenure, at the end of a given school year. Such employment actions are considered dismissals at the end of academic years, because *tenure,* sometimes referred to as *continuing contract status,* entitles teachers to an expectation of continuing employment from year to year. This entry discusses the evolution and application of due process in teacher terminations.

Reduction-in-force (RIF) is the term used when the basis for teacher dismissals deals with organizational factors and not with any personal fault on the part of individuals who may have property rights in their jobs. In the RIF process, for example, tenured teachers could be excellent and have done nothing wrong, but their employment contracts are terminated without cause due to such factors as declining enrollment or the discontinuation of programs. Depending on state law and board policy, tenured and nontenured teachers are placed on call-back lists, meaning, typically, that if their jobs become available again, they must be given the opportunity to be returned to their jobs before others can fill the vacant positions.

When school boards elect not to renew the expiring contracts of teachers who have yet to achieve tenure, this is not a termination, because the employment relationship has run its course. Accordingly, these teachers have no right to procedural due process, unless it is conferred by state law or collective bargaining contracts. For instance, Ohio provides basic due process rights to teachers whose contracts are not renewed.

Legal Background

There was a time when most teachers were at-will employees without much of a right to due process. This situation changed in light of judicial interpretation of the due process rights of employees under the U.S. Constitution's Fourteenth Amendment, which includes the clause "nor shall any state deprive any person of life, liberty, or property, without due process of law." Courts and legislatures agree that teacher dismissal involves a property interest, because salaries are property.

Another argument can be made that liberty interests involving the good reputations of teachers can sometimes be relevant, particularly when actions infringe on the ability of individuals to procure future employment. At the same time, these arguments have

not changed the responsibility of school officials to evaluate and dismiss incompetent teachers truthfully and fairly. In light of the wide acceptance of these ideas, school boards must provide procedural due process in teacher evaluations, especially if an individual's teaching ability is at issue.

In most states, due process laws require that teachers who are being dismissed must have been informed about their deficiencies and urged to improve. While school boards may use rationales other than job performance in dismissals, such as when teachers or other employees commit immoral acts with students, regardless of whether in or out of school, these individuals are still entitled to the basic due process rights described above.

In addition to notice of intended actions and their rationales, employees have the right to present their side of the issues. The Supreme Court specified the right of teachers to some form of a pretermination hearing in *Cleveland Board of Education v. Loudermill* (1985). In *Loudermill,* the Court clearly distinguished between the procedure for dismissal and the reasons supporting such a decision. Subsequently, other courts have strongly protected procedural due process while being hesitant to interfere in the substantive decisions of school boards. State laws typically provide that while courts may intervene on procedural issues, school boards have "sole discretion" over the decision itself, free from judicial review.

State Laws

Most, if not all, states have enacted detailed legislation that provides basic due process rights even for first year or nontenured teachers, the minimum due process rights to which all educators are accorded. For example, in Ohio, the law not only mandates strict time lines but also identifies who must conduct classroom observations as part of the evaluation process. Specifically, the law requires that there must be observations of not less than 30 minutes carried out by administrators as part of formative evaluations that must be completed prior to sharing written summative evaluations with individual teachers no later than January 25 of each school year. The law adds that the results of another set of two 30-minute observations must be shared with teachers prior to April 10. Under this law, officials must give teachers the required criteria prior to conducting observations, and if their contracts are to be terminated or not renewed, they must be apprised of the criteria that were used in making such decisions. The law adds that school boards must offer assistance plans to help teachers correct the inadequacies revealed in their evaluations. Teachers who are tenured may have even greater rights, and administrators may need to provide more documentation if their employment is to be terminated due to poor performance.

If, following evaluations, school boards are considering the dismissal of tenured teachers, officials must follow both their own policies and state law. These procedures sometimes include more specific requirements and time lines for documenting the rationales that boards use in terminating or not renewing teacher contracts. For these situations, some boards have developed policies or contractual agreements that require administrators to meet with teachers to discuss instructional objectives prior to observations and to agree on scheduling of observations. While these additional requirements may not be applicable everywhere, in effect, teachers cannot be dismissed unless their school boards follow these due process procedures. If, for example, teachers are not able to relate with students who are thus not learning, classroom observations must document this or any other deficiencies that may eventually lead to the teachers' dismissals. If boards follow their own procedures (and, of course, state law) to the letter of the law, then the courts ordinarily uphold their actions.

Returning, once again, to Ohio as the source of an illustration, if administrators choose not to renew the contracts of teachers, then they need to follow all district policies and contractual agreements. In addition, at a minimum, school officials have to document that they informed teachers about the criteria used to evaluate their work. Then, officials must schedule two 30-minute observations to gather evidence supporting proposed dismissals along with providing teachers with copies of detailed written plans for improvement. While it is not explicitly clear exactly how long the periods would have to be, teachers must be given sufficient time to improve

their deficiencies. If teachers fail to measure up to the minimum standards set in the specified performance criteria in their improvement plans, then their school boards are free to terminate their employment contracts.

A. William Place

See also *Cleveland Board of Education v. Loudermill;* Contracts; Fourteenth Amendment; Reduction in Force; Tenure

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E

Early Childhood Education

Through most of American history, all early childhood education was provided at home since school systems did not assume any responsibility to educate children prior to first grade. The situation began to change during the second half of the 19th century, as a variety of kindergarten programs emerged to prepare preschool-aged children for socialization and the beginning of elementary school learning and as federal legislation addressed the needs of children with disabilities. This entry describes the scope of legislative and agency efforts in these areas.

Until recent years, most states did not require kindergarten programs. However, some states have enacted laws that require children to attend kindergarten prior to entering standard elementary education. At the same time, legislative efforts have been initiated at both the federal and state levels to require some form of early childhood education. Some states are even seeking to make full-day kindergarten a requirement. Insofar as sociologists and psychologists have been able to demonstrate that a structured learning environment better prepares children for education, there have been attempts to force states to require not only kindergarten programs but also structured preschool programs of varying length and duration.

Federally, the Education for All Handicapped Children Act of 1975 (sometimes still referred to as Public Law 94–142, indicating that it was the 142nd piece of litigation introduced during the 94th Congress, its designation before being enacted), now the Individuals with Disabilities Act (IDEA), provides two specific entitlements under Part H for infants and toddlers: One is access to appropriate early intervention programs, while the other is to provide least restrictive programs and placement. To put the IDEA's mandates into effect, the federal government requires states to create a statewide system of early intervention services that are appropriate for children. Part B of the IDEA also identifies appropriate special education services that states, though local school boards, must provide for children with disabilities.

As reflected since the U.S. Court's first-ever case interpreting the statutory rights of students with disabilities at any age, *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), state and local educational agencies must provide services that result in some educational benefit for eligible children with disabilities. Advocates have interpreted *Rowley,* consistent with the provisions of the IDEA, as meaning that there must be a process and a professionally defensible individualized family service plan that provides a wide range of services that give opportunity for educational benefits for eligible students.

There are still no clear requirements for early childhood education other than those for some special education students. In recent years, a variety of educational groups encompassing a wide array of perspectives have begun to advocate for more organized

education prior to the regular public school systems. The National Parent Teacher Association, for example, has advocated for good-quality early childhood programs that could be made available to children in all socioeconomic classes. At the same time, the U.S. Department of Education has conducted a series of cognitive-development summits, which have welcomed presentations by academicians and other experts on early childhood learning.

The phrase "Good Start, Grow Smart" is the name of the current early childhood initiative that is attempting to strengthen Head Start and partner with states to improve early childhood education and provide better information to teachers, caregivers, and parents across the country. The Department of Health and Human Services is also working to strengthen Head Start and Early Head Start in an attempt to serve children from birth to age 5, pregnant women, and their families. These child-focused programs are designed with the goal of increasing readiness for school among the low-income families. Another initiative, Even Start, is a program that supports projects providing educational services to low-income families. Some of Even Start's efforts have supported programs for women and children in prison, American Indian tribes and tribal organizations, migrant education, homeless education, and formula grants to states, especially in the area of special education for 3- to 5-year-old children.

The fact that there is a growing call for movement in this regard notwithstanding, the effort to provide comprehensive early childhood education, whether based on state or federal initiatives, has a long way to go to achieve universal implementation for all children.

James P. Wilson

See also *Board of Education of the Hendrick Hudson Central School District v. Rowley;* Disabled Persons, Rights of

Legal Citations

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Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Educational Malpractice

Beginning in the 1970s, parents sought to render school boards, teachers, and other educational staff members liable for the inability of their children to perform well in school, charging a variety of school officials with educational malpractice in disputes over pedagogical methods and student outcomes. Plaintiffs have tried unsuccessfully to rely on the concept of *malpractice,* a term used to refer to negligence by professionals, such as doctors and lawyers who fail to meet their duties to clients and cause them harm.

To date, all efforts to establish educational malpractice as a tort in regular educational settings have been fruitless insofar as it is "a tort theory beloved of commentators, but not of courts" (*Ross v. Creighton University,* 1990, p. 1327). Among the reasons why the purported tort of educational malpractice has failed in disputes arising in the context of regular educational settings is that teachers, unlike professionals who ordinarily face changes of malpractice, do not typically work in one-to-one relationships with students, have virtually no discretion in selecting which students they teach and serve, and have little ability to set their own rules of professional conduct.

Moreover, plaintiffs in regular education have been unable to establish that school officials committed malpractice because almost as a matter of public policy, when applying the rules of negligence, practical issues arise, such as the duty that students and parents share to ensure that learning occurs, coupled with questions of apportioning liability for the alleged failings of educators. If, for example, secondary school students in regular education classes are unable to read at grade level, it is unclear how much they, their parents, and teachers at a variety of grade levels should share the fault.

At the same time, since students have explicit statutory rights under the Individuals with Disabilities Education Act, some courts (*M. C. on Behalf of J. C. v. Central Regional School District,* 1996a, 1996b), but not all (*Suriano v. Hyde Park Central School District,* 1994), have permitted claims filed on their behalf to proceed, even though jurists refused to identify such cases as educational malpractice. Rather,

when dealing with disputes that arise in the context of special education, courts are apparently more willing to grant plaintiffs some relief because they are safeguarding well-established statutory rights. In disagreements over special education, courts have granted prevailing plaintiffs relief in the form of compensatory services, such as extended day- or year-long programming to compensate for the denial of services and attorney fees to cover the costs associated with filing suit to protect their rights.

In perhaps the best-known early case involving educational malpractice, parents in California unsuccessfully claimed that school officials improperly allowed their son, who could read only at the eighth-grade level, to graduate from high school (*Peter W. v. San Francisco Unified School District,* 1976). The plaintiffs sought relief because even though the student graduated after attending school for 12 years, he was qualified to work only at jobs requiring little or no ability to read or write. An appellate court, in rejecting the suit, engaged in a lengthy review of the duty-of-care concept in the law of negligence. The court reasoned that the legal claim could not proceed since there was no workable rule of care against which to measure the alleged misconduct of school officials, no injury within the meaning of the law of negligence, and no perceptible connection between the conduct of teachers and other staff in relation to the injuries that the student alleged had incurred. In other words, the court found that insofar as the student's claims were too amorphous, they could not proceed under a theory of negligence. The court also dismissed a charge of intentional misrepresentation because even though the student and his parents had the opportunity to do so, they were unable to provide facts demonstrating that they had relied on the alleged misrepresentations that the educators made.

Along with the reasons cited above, other courts have recognized the difficulties of measuring damages, as well as the public policy considerations: Acceptance of such cases would, in effect, have put them in the position of being responsible for supervising the day-to-day educational management activities in public schools, a task for which they recognize that they are ill-suited (*Hunter v. Board of Education of Montgomery County,* 1982; *Simon v. Celebration Co.,* 2004). In so ruling, courts agree that since aggrieved parents can seek redress through the administrative procedures made available by local school boards and state-level educational agencies, they are not left without recourse when they disagree with the decisions that school officials make that impact on the education of their children. Of course, as witnessed by the voluminous litigation on torts, especially negligence, if the specific acts of school employees directly or intentionally cause injuries to students, they as well as their school boards may face liability for educational malpractice. Even so, it remains to be seen whether claims for educational malpractice will, or should, be permitted to proceed to litigation on their merits.

Charles J. Russo

See also Negligence

Legal Citations

Hunter v. Board of Education of Montgomery County, 439 A.2d 582 (Md. 1982).

M. C. on Behalf of J. C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996), *cert. denied,* 519 U.S. 866 (1996).

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Education Law Association

The Education Law Association (ELA), founded in 1954 as the National Organization on Legal Problems of Education (NOLPE), provides an unbiased forum for the dissemination of information on current issues in education law. Originally located in Topeka, Kansas, NOLPE changed its name to the Education Law Association and moved to the campus of the University of Dayton, in Ohio, in 1997.

Membership, which is open to anyone interested in education law, currently numbers 1,200 members, with approximately 40 members from non-U.S. countries. According to the mission statement on its Web site, the ELA, as a nonprofit, nonadvocacy organization, "brings together educational and legal scholars and practitioners to inform and advance educational policy and practice through knowledge of the law." Together with its professional community, ELA "anticipates trends in educational law and supports scholarly research through the highest value print and electronic publications, conferences, and professional forums."

Encompassing attorneys, administrators, and educators, ELA's inclusive membership policy allows for a broad range of perspective in all areas of education law. It provides an opportunity for people who have a stake in education law to connect with people in different careers who share the same interest.

In February 1954, several individuals, with Ed Bolmeier serving as leader, met to discuss school law at a roundtable discussion at the American Educational Research Association annual banquet. Their discussion report stated the following:

> Intense interest appears to be offsetting former resistance to recognition of school law. This trend would be facilitated if channels of communication were strengthened between school law specialists and their colleagues. To this end, a unified or cooperative plan may be feasible; a national conference on school law might become a continuous project, eventually attaining organizational status.

It is no coincidence that 1954 saw the landmark case of *Brown v. Board of Education of Topeka* bringing education law issues to the forefront of the nation's consciousness. It was clear that education law was a field in and of itself.

In June 1954, Bolmeier convinced the Council of Professors of Educational Administration (CPEA) and Duke University to jointly sponsor a school law conference. Of those attending, several met to discuss their interest in forming a school law organization that stood alone, neither seeking nor accepting connections with any other organization, educational or legal. Each member of this original group, 57 people in total, contributed $1 each to cover organizational expenses. These individuals came from Alabama, Delaware, Georgia, Massachusetts, Maryland, Missouri, Nebraska, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Virginia, West Virginia, and the District of Columbia. NOLPE was born.

An official constitution was adopted in September 1954, and in January 1955, the following officers were installed: Madaline Kinter Remmlein, president; Lee O. Garber, secretary-treasurer; E. C. Bolmeier, executive committee member to represent schools of education and teacher training institutions; Robert R. Hamilton, executive committee member to represent law school faculties; Nolan D. Pulliam, executive committee member to represent professional staffs of elementary or secondary school systems; and Edgar Fuller, executive committee member to represent those otherwise engaged in educational activities of an official or advisory nature. The four executive committee members were to represent categories of the membership: faculty members of schools of education and teacher training institutions, law school faculty members, professional staffs of elementary and secondary school systems, and those otherwise engaged in educational activities of an official or advisory nature.

Today, ELA's board of directors consists of an equal number of attorneys, school administrators, and professors. ELA is governed by nine directors, an additional executive committee consisting of four members (president, president-elect, vice president, and immediate past president), and an executive director. Elections are held at the business meeting during ELA's annual conference. Each year, one-third of the board (three directors and one executive committee member) is elected to fill retiring positions. Regular directors serve 3-year terms, and executive committee members serve 4-year terms, having already served in a regular director capacity prior to being eligible for executive committee service. The executive director is appointed by the board.

ELA keeps its members abreast of the most current education law information via several avenues. *ELA Notes* is a quarterly publication that provides case notes and commentaries on legal issues and informs members about ELA's activities, new publications, and upcoming seminars and conferences.

School Law Reporter, published monthly, offers citations and case digests for new education-related decisions from state and federal courts and analyzes selected cases.

Each year, the ELA publishes three to four books, including *The Yearbook of Education Law,* which provides a summary of education-related state appellate and federal court decisions; it includes a detailed subject index, table of cases, and a listing of cases by jurisdiction.

ELA also hosts an annual conference, where experts in education law—whether they are attorneys, professors, or practitioners—discuss current education law issues. Group sessions for professionals in different roles are also included. The site moves each year so that all ELA members have an opportunity to attend.

ELA's Web site (http://www.educationlaw.org) allows members to access education law information, *School Law Reporter, ELA Notes,* ELA books and other publications, constituency group listservs, and more. Links to other education law sites give ELA members the opportunity to receive information and services from other education law organizations as well.

Mandy Schrank

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Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).

Edwards v. Aguillard

At issue in *Edwards v. Aguillard* (1987) was whether a Louisiana statute titled "Balanced Treatment Creation-Science and Evolution-Science in Public School Institutions Act" was unconstitutional under the Establishment Clause of the First Amendment of the U.S. Constitution, which prohibits states from making laws respecting an establishment of religion. This "Creationism Act," as it was called, was a mandate forbidding the teaching of the theory of evolution in public schools unless accompanied by the teaching of creation science.

The legislative purpose of Louisiana's Creationism Act was to focus attention on certain areas of science instruction related to the creation of mankind. The U.S. Supreme Court examined whether this statute advanced academic freedom, provided teachers with new authority, promoted fairness, or maximized the comprehensiveness and effectiveness of science instruction. The Court found the act did not grant teachers the flexibility they already had, in that scientific concepts based on established fact already could be taught. Further, the Court found that the Creationism Act incorporated the development of curricular guidelines and research for creation science to the exclusion of evolution. Therefore, the Court noted that if the legislature was attempting to maximize the comprehensiveness and effectiveness of science instruction, it would have included the teaching of all scientific theories about the origins of mankind.

The Court held that the state legislature had a preeminent religious purpose in enacting this statute. The Court thought that the state legislature was attempting to advance the religious viewpoint that a supernatural being created man. The Court determined that the statute violated the Establishment Clause because it sought to employ the symbolic and financial support of government to achieve a religious purpose. The Court thus held that the state statute was unconstitutional because it lacked a secular purpose.

The Supreme Court compared *Aguillard* to other cases where state legislation was struck down as unconstitutional if the legislature's preeminent purpose was to further religion. Comparing *Aguillard* to *Epperson v. State of Arkansas* (1968), another one if its judgments involving a state statute regulating the teaching of evolution as a scientific theory, the Court decided that so long as there was no doubt that the motivation for the statute was to suppress the teaching of a theory thought to deny the Divine Creation of man, the legislature unlawfully used its position to protect a particular religious view from scientific views that were distasteful to it.

One case resolved by the Supreme Court that has guided many of the decisions related to the application of the First Amendment's Establishment Clause is *Lemon v. Kurtzman* (1971). In *Lemon,* the Court formulated a three-part test to be used in determining

the constitutionality of state statutes that involved the use of state funding or state resources for education. The three prongs of the *Lemon* test are whether a statute has a secular legislature purpose, whether the statute has a primary effect of either advancing or inhibiting religion, and whether the statute and its administration creates an excessive government entanglement with religion. In *Aguillard,* the Court was of the opinion that the state statute failed the *Lemon* test insofar as its primary purpose was that of advancing religion in violation of the First Amendment of the U.S. Constitution.

Aguillard has relevance for school leaders today in guiding a school's approach related to exclusion or inclusion of science curriculum having to do with the origin of mankind. Today, consistent with *Aguillard,* science curriculum related to the creation of mankind is often presented as theory rather than fact, and consonant with *Aguillard,* it should avoid having as its purpose the presentation of a particular religious viewpoint. *Aguillard* is consistent with other Supreme Court cases, such as *Epperson v. State of Arkansas,* wherein the justices noted that the First Amendment precluded states from barring public school instruction, such as teaching about evolution, simply because the instruction conflicts with certain religious views.

Aguillard furthered this notion by determining that if a state statute requiring that instruction in the biblical account of creation must be taught whenever the theory of evolution was introduced, it was unconstitutional because it advanced religion. As a result of *Aguillard,* science curricula and instruction in public schools related to the origins of mankind often include the biblical explanation as well as other theories, such as evolution, while avoiding the incorporation of or fostering of any particular religious point of view.

Vivian Hopp Gordon

See also Creationism, Evolution, and Intelligent Design, Teaching of; *Epperson v. State of Arkansas;* First Amendment; *Lemon v. Kurtzman*

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Abington Township School District v. Schempp and Murray v. Curlett, 374 U.S. 203 (1963).
Edwards v. Aguillard, 482 U.S. 578 (1987).
Epperson v. State of Arkansas, 393 U.S. 97 (1968).
Lemon v. Kurtzman, 403 U.S. 601 (1971).
Stone v. Graham, 449 U.S. 39 (1980).

Eighth Amendment

The Eighth Amendment, enacted in 1791 as part of the Bill of Rights, provides that "excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted" (U.S. Const., Amend. VIII). The three tenets of the Eighth Amendment aim to protect the property and liberty rights of those accused of crimes under the "presumption of innocence" principle, coupled with the notion that consequences imposed on conviction should bear some relationship to the gravity of the offense and neither be uncivilized nor imposed arbitrarily. This entry briefly reviews the general contours of the Eighth Amendment as well as the principles and parameters that regulate government actions in these regards. While the Eighth Amendment is an important source of constitutional principles with respect to criminal suspects and those convicted of a crime, it has limited, if any, potential applicability in the traditional public school context.

Excessive Bail

The Excessive Bail Clause of the Eighth Amendment can be traced to the traditional English law principle prohibiting the incarceration of an accused party prior to the establishment of guilt. Much debate has ensued in America regarding the interpretation of the precise meaning of "excessive bail" and whether it guaranteed all criminals the opportunity for bail or simply limited the amount of bail for individuals whose release before trial did not contravene some important governmental interest. The governmental interest that must be satisfied, at least historically, has been to ensure that a defendant appears for trial. If the amount of bail exceeds what is necessary to ensure that end, it could be deemed excessive.

In more recent times, Congress enacted the Bail Reform Act (1984), which denies bail altogether for those accused of certain serious federal crimes if

a court concludes that the accused is a flight risk or a threat to the safety of others. In *United States v. Salerno* (1988), such "preventative detention" of a defendant awaiting trial was found to be constitutional. Reflecting the continuing historic tension regarding the meaning of the "excessive bail" provision, the Bail Reform Act, which introduced preventive detention, also sought to ensure that bail amounts would be proportional to the offense committed by the defendant.

Excessive Fines

The second clause of the Eighth Amendment has been interpreted to bar "excessive fines" that are imposed by and payable to the government. This clause went largely undefined until relatively recently, when the Supreme Court decided *Austin v. United States* (1993). While the provision was initially associated with fines in criminal proceedings, the Court declared in *Austin* that the bar against excessive fines also applies in civil actions brought by the government seeking forfeiture of property, since the forfeiture constitutes a form of punishment. In *Austin* and a subsequent case, *United States v. Bajakajian* (1998), the Court also imposed a proportionality principle, requiring a measured relationship between the punitive forfeiture and the gravity of the offense, including its harmful effects, to ensure that the punishment is not excessive.

Cruel and Unusual Punishment

The Cruel and Unusual Punishment Clause is the most dynamic and debated tenet of the Eighth Amendment. At the center of the Court's interpretation of this standard is the fact that overlying moral views of the country are constantly changing. This presents a significant problem when attempting to define what constitutes "cruel" or "unusual" punishment, since according to the Court's language in *Trop v. Dulles* (1958), "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society" (p. 101).

This has been most problematic in relation to capital punishment. In 1972, the Court in *Furman v. Georgia* found that the death penalty was not unconstitutional per se, although in that and a series of subsequent cases, the Court has found constitutional defects in how the decision to put someone to death is prescribed in state statutes. As Justice Douglas noted in his concurring opinion in *Furman,*

> The high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. (p. 526)

In scrutinizing the work of legislatures after *Furman,* the Supreme Court ruled unconstitutional those state capital punishment statutes that fail to (a) narrowly define the offenses for which the death penalty may be invoked; (b) identify expressly aggravating circumstances that the jury may consider in imposing the death penalty; or (c) permit individual defendants to determine and present evidence as to what they believe constitutes mitigating circumstances, as well as ones that fail to exempt the mentally retarded or juveniles for crimes committed before the age of 18.

Lesser forms of punishment have, of course, also been argued to be cruel and unusual. One case of particular interest to those in the field of education is the administration of corporal punishment in public elementary and secondary schools. In *Ingraham v. Wright* (1977), two junior high students challenged their receipt of some 20 swats with a wooden paddle. The Supreme Court, citing the historical purpose of the Eighth Amendment, concluded that it was intended to protect prisoners from physical abuse, not school children from corporal punishment. In finding the Eighth Amendment inapplicable, the Court reasoned that schools, unlike prisons, are open institutions and subject to greater public scrutiny and that children, unlike prisoners, are free to return home every evening, thereby further reducing the possibility that children will be exposed to arbitrary or abusive punishment at the hands of state officials without outside intervention. Further, in *Ingraham,* the Court observed that corporal punishment was both authorized and limited by state law, affording a remedy if it was administered in an excessive manner or with unreasonable force.

However, even though the Eighth Amendment is not applicable to the schools and consequently does not bar the use of corporal punishment by school officials, the principle of proportionality, discussed in conjunction with the Eighth Amendment, may be enforced in school settings via the substantive "due process" provision of the Fourteenth Amendment, at least where the school punishment is so grossly excessive as to be "shocking to the community's conscience."

Based on prior Supreme Court interpretations, then, it appears that the Eighth Amendment protections are intended for those who have been accused of criminal activity or convicted and incarcerated. Its applicability to traditional public schools and public school students, therefore appears to be exceedingly limited, at least in any direct sense.

Charles B. Vergon and David Mullane

See also Corporal Punishment; *Ingraham v. Wright*

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Electronic Communication

The growth of the personal computer industry and the Internet has ushered in an "information age," characterized by individual empowerment and the flattening of geographical and temporal barriers to communication and collaboration. The same technological revolutions that have transformed global society also have impacted how schools and districts operate. While the digitization of school communications has enabled a number of new possibilities for educators, it also has raised a number of legal and policy concerns, which are discussed in this entry.

Monitoring Communications

Electronic school communication can take many forms. School e-mail and instant-messaging systems, local area networks, Web sites, course management systems, and parent portals are just a few examples of the many types of school-sponsored systems that facilitate educators' communication with internal or external audiences. Teachers and administrators may also utilize outside, non-school-sponsored services, such as search engines, blogs, wikis, online video sites, and online office software suites, to access or share information and to communicate with students, parents, or other educators.

A number of school systems allow Web site visitors to download text, graphic, audio, video, or other types of files, including policy documents, instructions for outside vendors, parent newsletters, and examples of student work. Digital communications also occur between school-owned mobile devices, such as wireless radios, cell phones, and Global Positioning Systems (GPS).

One issue raised by this explosion of communication options is the ability of school officials to engage in effectively monitoring the vast array of mechanisms that educators have to communicate with each other and with institutional stakeholders. To this end, school officials have at least some obligation to monitor employee and student use of technology tools when those tools are used for professional or instructional purposes.

School organizations that disregard their supervisory responsibilities may face the legal and public relations ramifications of ignoring potential employee or student abuse of digital technologies. No school system wants to be sued or highlighted in the global

news because it wasn't effectively safeguarding its electronic communication channels or online environments from sexual harassment, cyberbullying, or exposure to age-inappropriate content. However, preventing or regulating employee usage of electronic communication tools is extremely difficult.

Keeping Records

A second concern that accompanies use of electronic communications is whether they fall under the legal definition of *educational records.* Federal and state laws, as well as school and board policies, typically define what types of information are considered to be formal educational records for purposes of the law. Those definitions typically are based on the document content rather than the form. This means that an individual e-mail, wiki page, or word processing document, for example, may or may not be an educational record for legal compliance purposes, depending on its content.

Files that are determined to be educational records must comply with all document retention and legal discovery rules. Recent changes in the federal rules of civil procedure emphasize that institutions must have clear polices regarding data storage, data access, and timelines for data deletion. School-related electronic communications fall under these requirements.

Further, electronic communications that are considered to be educational records must comply with federal and state data confidentiality requirements and state laws regarding openness of public records. Balancing confidentiality against openness can be extremely difficult when it comes to digital records, particularly given the relative ease with which digital files can be further distributed. For instance, an employee who receives a "confidential" instant message from another can easily forward all or part of that message on to another employee or to the world at large.

Privacy and Validity

Other legal issues associated with electronic communications relate to trustworthiness, privacy, and accessibility. Insofar as digital records can be easily manipulated or modified, educators who receive electronic documents may have no easy way of validating whether they were originals or were altered in some way. In addition, educators may have no viable mechanism for verifying the identity of purported senders. To the extent that school organizations have the ability to monitor usage of their own technology systems through mechanisms such as network usage histories and keylogging, the privacy of electronic communications may become an issue if employees or students feel that organizational monitoring becomes too intrusive.

Finally, at least some electronic communications may fall under the accessibility provisions of the Individuals with Disabilities Education Act or the Americans with Disabilities Act, meaning that such communications must be reasonably accessible to individuals with disabilities.

Just as school boards have policies regarding educational records on paper, they must also have policies for electronic communications. School officials have an affirmative obligation to comply with all federal and state statutory and regulatory requirements despite the difficulties associated with monitoring and storing electronic communications, safeguarding against inappropriate release of confidential information, and ensuring accessibility for persons with disabilities. Verifying the accuracy and validity of electronic documents will increasingly be of concern to educators as "spoofing," "phishing," "spamming," and other identity-masking techniques continue to evolve and intrude into school workplaces. The balance between institutional obligations to monitor electronic communications with employees' or students' expectations of privacy will be an ongoing discussion for decades to come.

Scott McLeod

See also Acceptable Use Policies; Children's Internet Protection Act; Electronic Document Retention; Global Positioning System (GPS) Tracking; Internet Content Filtering; Open Records Laws; Personnel Records; Privacy Rights of Students; Privacy Rights of Teachers; Technology and the Law; *United States v. American Library Association;* Web Sites, Use by School Districts and Boards

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LexisNexis. (2007). *Applied discovery law library.* Retrieved June 30, 2007, from http://www.lexisnexis.com/applieddiscovery

Electronic Document Retention

The infusion of technology into schooling presents an emerging issue for educational officials at all levels. Electronic documents, or e-documents, encompass the entire range of digitized or electronically generated information. In the absence of current federal litigation specifically related to e-documents in education, the proper protection and retention of e-documents is necessary should parties file suits against school boards and/or individual educators requiring evidence that may include e-documents. As the move toward a paperless society continues, educational officials must establish systematic policies and procedures to handle e-documents.

If school boards lack policies or procedures governing protection and retention of e-documents, then current or historical methods used for handling documents generally apply to e-documents. This standard applies in considering whether school officials are proceeding consistently regarding protection and retention of documents in general and e-documents specifically. A determination of reasonableness would be employed to identify whether boards or individual educators arbitrarily disposed of pertinent e-documents. Educators at all levels must be aware of the need to protect and retain e-documents, ranging from daily e-mails, electronic forms, annual budgets, and 5-year forecasts.

Properly designed policies should enable employees to manage e-documents and maintain critical information. Educators formulating e-document policies need to consider general handling of interoffice e-mails, external e-mails, original documents created electronically, and sensitive electronic information. They must also consider how to manage backup and storage of computer information, as well as timelines associated with archiving and destruction of e-documents. Sensible guidelines must be imposed in the absence of legal requirements.

Archiving large quantities of e-documents may prove to be too costly and a storage capability issue for school systems. A sound e-document policy will incorporate retention requirements for different types of information; destruction of archived documents in a timely manner; handling and disposition of sensitive information; periodic review of e-document timelines; and training of personnel in the use, storage, retention, and destruction of e-documents. Current federal legislation regarding electronic documents is contained in the Sarbanes-Oxley Act.

Congress passed and President George W. Bush signed the Sarbanes-Oxley Act into law in 2002. The act directly affects public companies as well as their accounting and auditing with regard to financial records. Clearly, school boards utilize public funds to operate and provide educational opportunities to the surrounding communities. As such, the funding of public schools is often a political battle within communities as boards ask for increased amounts of funding while taxpayers demand accountability and proof of success for the money they provide. Although, as stated earlier, no current litigation is tied to the Sarbanes-Oxley Act and education, it does not appear to be outside the realm of possibility, given the stipulations in the act. This emerging issue of e-documents and accountability along with the creation of federal crimes and penalties tied to e-documents may find its way into the education profession through legal action taken by concerned citizens.

Accountability and records are key requirements of the Sarbanes-Oxley Act. If litigation results from citizen complaints or suspicion of wrongdoing, e-documents may become legal evidence. Proper care of e-documents includes archiving, storage, and destruction. Although the costs associated with the maintenance and physical space of e-documents are relatively minimal, retention beyond reasonable time frames may prove to be ill-advised. Public access to records through freedom-of-information legislation requires timely response to legal requests. In addition,

historical documents need to be purged; otherwise, providing requested documents may become unwieldy due to the vast number of e-documents archived. To this end, sound e-document disposition policies should provide schools and districts a legal recourse when litigation arises that requires furnishing e-documents.

Electronic document management is necessary in technology-driven education. Legal requirements may dictate e-document disposition. In the absence of legal requirements, school systems that are well prepared will establish sound policies addressing the handling of the multitude of e-documents that educators generate on a daily basis. Moreover, training school personnel; conducting internal audits; and implementing reasonable requirements for retention, destruction, and archiving will provide a basis for responding to requests for information through freedom-of-information acts or litigation.

Michael J. Jernigan

See also Electronic Communication; Open Records Laws; Personnel Records; School Board Policy

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Eleventh Amendment

According to the Eleventh Amendment, "The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." In the past, many scholars and the Court itself have used the term *Eleventh Amendment immunity* to describe this immunity, yet *sovereign immunity* is the more accurate term. As the Supreme Court recently observed,

> The sovereign immunity of the States neither derives from nor is limited by the terms of the Eleventh Amendment. Rather, as the Constitution's structure, and its history, and the authoritative interpretations by this Court make clear, the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today. (*Alden v. Maine,* 1999, p. 713)

Sovereign immunity has enormous significance for education lawyers and their clients. Essentially, "sovereign immunity of the States" means that private individuals or corporations cannot sue the states, state agencies, or state institutions. Therefore, if state universities or school boards are considered "arms of the State," then both the entity and its administrators, when sued in their official capacities, generally are immune from suits. Yet, contrary to popular belief, sovereign immunity does not mean that the states may violate federal law, that federal law is inapplicable to the states, or that the federal government could not enforce federal law. Rather, sovereign immunity simply prevents private parties from enforcing certain federal claims.

Early History

In the founding years of the United States, there was widespread acceptance of the proposition that states had immunity from private suits. In 1793, the Supreme Court held in *Chisholm v. Georgia* that private citizens from one state could sue another state. In reaction and almost immediately, Congress passed and the states subsequently ratified the Eleventh Amendment, which effectively overturns *Chisholm.*

While the text of the Eleventh Amendment is limited to the concerns raised in those ratification debates, the Eleventh Amendment confirms a much broader proposition: The states are immune from suit. Sovereign immunity does not exist solely in order to prevent federal court judgments from being paid out of a state's treasury. It allows the states to avoid being

subjected to "the indignity of . . . the coercive process of judicial tribunals at the instance of private parties" (*Puerto Rico Aqueduct & Sewer Authority v. Metcalfe & Eddy, Inc.,* 1993, p. 146).

Thus, the immunity confirmed by the Eleventh Amendment bars suits against the states by American Indian tribes, foreign nations, and corporations created by the national government. Moreover, it applies to proceedings in state court, federal administrative proceedings, admiralty, and situations in which the state's treasury is not implicated.

Changing Standards

Despite this long history, there was a period when the Supreme Court created so many exceptions that it effectively nullified sovereign immunity. In 1976, the Court reasoned that Congress could abolish the state sovereign immunity by exercising its powers to enforce the Fourteenth Amendment, which allows the federal government to intervene if states abridge the rights of U.S. citizens. In 1989, the Court extended that holding and declared that Congress could use any of its powers to limit state sovereign immunity, thereby giving it virtually unlimited power to strip the states of their sovereign immunity. Not surprisingly, Congress took advantage of these rulings and proceeded to cancel the state sovereign immunity for most federal statutes.

All of this changed in 1996, in *Seminole Tribe of Florida v. Florida,* when the Court reversed itself and ruled that the power of Congress to abrogate sovereign immunity was limited to its efforts to enforce the Fourteenth Amendment. Although this case was constitutionally significant in that it technically limited congressional power to nullify sovereign immunity, it had little practical effect because at the time, the powers of Congress to enforce the Fourteenth Amendment were almost unlimited. Thus, Congress could still abrogate sovereign immunity for most federal statutes.

A year later, in *City of Boerne v. Flores* (1997), the Court imposed significant limitations on the power of Congress to enforce the Fourteenth Amendment. *Flores* declares that Congress can enforce only the actual substantive guarantees of the Fourteenth Amendment, which include equal protection of the laws, the privileges or immunities of national citizenship, and due process.

When *Flores* and *Seminole Tribe* are combined, congressional abrogation of sovereign immunity becomes extremely difficult. To have a valid abrogation, Congress must first make a specific finding that the states are violating the substantive guarantees of the Constitution. Once there are such findings, Congress must then demonstrate that abrogation of sovereign immunity for a particular class of claims is a proportionate response to the violations.

Recent Application

Recent Supreme Court decisions illustrate this point. For example, in *Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank* (1999), the Court held that Congress could not abrogate sovereign immunity for intellectual property claims. In *Kimel v. Florida Board of Regents* (2000), the Court noted that Congress could not abrogate sovereign immunity for Age Discrimination in Employment Act claims. In 2001, in *Board of Trustees of University of Alabama v. Garrett,* the Court found that Congress could not abrogate sovereign immunity for employment claims under the Americans with Disabilities Act. In 2002, in *Federal Maritime Commission v. South Carolina State Ports Authority,* the Court held that sovereign immunity extended not only to judicial proceedings but also to federal administrative proceedings.

In the final years of the Rehnquist Court, the Court suddenly became reluctant to expand sovereign immunity. In 2003, in *Nevada Department of Human Resources v. Hibbs,* the Court observed that sovereign immunity was abrogated for family care provisions of the Family and Medical Leave Act. In 2004, in *Tennessee Student Assistance Corporation v. Hood,* the Court pointed out that sovereign immunity did not bar an action to discharge a student loan. That same year, in *Tennessee v. Lane,* the Court decided that sovereign immunity had been abrogated for claims under Title II of the Americans with Disabilities Act that involved the fundamental constitutional right of access to the Courts. This reluctance continued during the first term of the Roberts Court. In *United States v. Georgia*

(2006), the Court unanimously determined that Congress could abrogate sovereign immunity for a claim under Title I of the Americans with Disabilities Act that was also a constitutional claim. Finally, in *Central Virginia Community College v. Katz* (2006), the Court was of the opinion that by ratifying the Constitution, the states had surrendered their sovereign immunity "in proceedings necessary to effectuate the in rem jurisdiction of the bankruptcy courts."

William E. Thro

See also Fourteenth Amendment; Intellectual Property

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Elk Grove Unified School District v. Newdow

In *Elk Grove Unified School District v. Newdow* (2004), the Supreme Court faced two issues. The first issue was whether Michael Newdow had standing or the legal right to challenge as unconstitutional a public school board's policy that required teachers to lead willing students in reciting the Pledge of Allegiance. The second issue was whether the pledge, which includes the phrase "under God," violated the Establishment Clause of the U.S. Constitution. The Court decided that Newdow, as noncustodial father, had no right to sue, and thus it avoided having to rule on the constitutional issue.

Facts of the Case

The Pledge of Allegiance reads, "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and Justice for all." It was enacted on June 22, 1942, and the phrase "under God" was added by a congressional amendment in 1954.

The Elk Grove Unified School Board in California required all of its elementary school students to recite the Pledge of Allegiance each day. Newdow, the atheist noncustodial father of a young girl enrolled in kindergarten in the district, filed suit, arguing that because the pledge contained the phrase "under God," his daughter was being indoctrinated in violation of both the Establishment Clause and the Free Exercise Clause. Newdow, who had never lived with his daughter, filed suit as "next friend" on her behalf in a federal trial court in California.

Finding that the disputed words were constitutional, the court dismissed the complaint. This

volatile issue immediately became a case of great public interest and was watched as it was appealed to the Ninth Circuit. On further review, the Ninth Circuit, which reversed in favor of the father, maintained that he had a right to direct his daughter's religious education and that the board policy violated the Establishment Clause.

This case was not only controversial, but directly impacted schools throughout the entire Ninth Circuit, putting many public schools in this area on hold and, in general, confusing some schoolchildren. To further complicate the proceedings, the mother, the sole legal guardian of the child, did not object to her daughter's recitation of the Pledge of Allegiance. She unsuccessfully filed a motion to dismiss the case, pointing out that it was not in her daughter's best interest to become involved in the litigation. Eventually the Ninth Circuit again affirmed in favor of Newdow, asserting that he retained the right to expose his child to his own religious views.

The Court's Ruling

In 2004, the Supreme Court agreed to hear an appeal in *Newdow* under the watchful eyes of a nation, divided in sentiments between church and state. As is often the case when another means of review is available, the Court avoided the question of the constitutionality of the school board's policy. Instead, the majority decided that since Newdow, as noncustodial father, did not have legal standing to file suit, his case had to be dismissed and the earlier judgments vacated. Dissatisfied with the outcome, in 2005 Newdow filed a new version of the suit along with parents who shared his perspective. Insofar as a federal trial court in California granted the plaintiffs' request to prohibit students from reciting the words "under God" in the pledge on the basis that doing so violated the Establishment Clause, it appears that this litigation over the constitutionality of these words is far from over.

Deborah E. Stine

See also Pledge of Allegiance; Prayer in Public Schools; Religious Activities in Public Schools; State Aid and the Establishment Clause

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Employment Division Department of Human Resources of Oregon v. Smith

In *Employment Division Department of Human Resources of Oregon v. Smith* (1990), the Supreme Court ruled that their religious beliefs do not necessarily exempt people from compliance with neutral, generally applicable laws. The ruling has had a significant effect on the interpretation of the Free Exercise of Religion Clause of the First Amendment. Although *Employment Division* was not an education case, it has had a broad and profound effect on disputes involving persons alleging that government entities have limited or intruded upon the exercise of their religion, both in and out of educational contexts.

The Ruling

At issue in *Employment Division* was the status of two former employees of the Oregon Department of Human Resources who were discharged for violating the state's illegal drug act by using a prohibited substance, peyote. When the employees were denied unemployment compensation benefits, they filed suit under section 1983 of the Civil Rights Act of 1964, alleging that use of the peyote had been pursuant to a Native American religious ceremony. They also

claimed unsuccessfully that the state's denial of benefits infringed upon the exercise of their religion under the U.S. Constitution.

In an extraordinary decision, the Supreme Court, in an opinion authored by Justice Antonin Scalia, upheld the employees' discharge and their denial of unemployment compensation benefits. The Court observed that it had "never held that an individual's religious beliefs excuse[s] him from compliance with . . . valid and neutral law[s] of general applicability" (*Employment Division,* p. 879).

In support of its rationale, the Court relied heavily on *United States v. Lee* (1982), wherein it had rejected an Amish employer's free exercise claim that his faith prohibited participation in governmental support programs and thus he should be exempt from the collection and payment of Social Security taxes for his Amish employees. In *Employment Division,* the Court reasoned that the only time it had held

> that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press. (p. 881)

Further, the Court looked for an example to its own precedent in *Wisconsin v. Yoder* (1972) decided almost two decades earlier. In *Yoder,* the Court upheld the objections of Amish parents to complying with the state of Wisconsin's compulsory attendance law. Even so, *Yoder* involved parental claims under not only the Free Exercise Clause but also the right of parents to direct the education of their children under the Liberty Clause of the Fourteenth Amendment. In *Employment Division,* the Court found that there was no such hybrid claim at issue since there was no contention that the drug laws were an attempt "to regulate religious beliefs" (p. 882). The Court thus concluded that the laws satisfied neutrality and generally applicable criteria.

Impact of the Decision

Employment Division had an immediate and profound effect on claims grounded in the Free Exercise Clause. Following *Employment Division,* the Supreme Court recognized another exception to its neutral, generally applicable criterion, in addition to hybrid claims, namely, those grounded in animosity toward religion.

In *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), the Court struck down a city ordinance that while purporting to prevent the killing of animals contained so many exceptions that its real and sole purpose appeared to be prohibiting the Santeria religion's use of animals for sacrifices. The *Lukumi* Court noted that the ordinance, which was neither neutral nor generally applicable, targeted the Santeria religion. Where a government action fails the *Employment Division* neutral, generally applicable criterion, the Court explained that officials must produce evidence that their conduct is "justified by a compelling governmental interest [that is] narrowly tailored to advance that interest" (*Lukumi,* pp. 531–32). Insofar as the ordinance failed this test, the Court decided that its purposes were "animosity to Santeria adherents [and] the suppression of [their] religion" (p. 542).

Animosity claims have generally been unsuccessful, although courts have more recently obviated the need to produce evidence of such animosity in disputes involving free speech claims where government action is framed not by claims of animosity, but of viewpoint discrimination. Thus, it is probably more than coincidental that Supreme Court decisions such as *Lamb's Chapel v. Center Moriches Union Free School District* (1993), *Rosenberger v. Rector and Visitors of University of Virginia* (1995), and *Good News Club v. Milford Central School* (2001), in which the justices uncovered viewpoint discrimination, have also gratuitously declared in dictum that hostility toward religion is likewise prohibited by the Free Speech Clause (*Lamb's Chapel,* p. 390, Note 4; *Milford,* p. 118; *Rosenberger,* pp. 845–846).

Ralph D. Mawdsley

See also *Good News Club v. Milford Central School; Lamb's Chapel v. Center Moriches Union Free School District; Wisconsin v. Yoder*

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Engel v. Vitale

The U.S. Supreme Court's landmark judgment in *Engel v. Vitale* (1962), its first ever case on prayer in public schools, is popularly known as the "Regents Prayer" decision. In *Engel,* the Court ruled that the New York State Board of Regents, the body that supervises the New York State public schools, violated the Establishment Clause of the First Amendment in composing and recommending the recitation of a prayer for daily use in the state's public schools. *Engel* stands out because it paved the way for a long line of Supreme Court cases involving prayer and religious activities in public schools.

Facts of the Case

Acting on the recommendation of the New York State Board of Regents, the school board in New Hyde Park, a Long Island suburb of New York City, adopted the "Regents Prayer." The prayer read as follows: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (*Engel,* p. 422). Officials directed the principals in the school system to have the prayer recited aloud at the beginning of each school day in all classes and in the presence of a teacher.

The parents of 10 pupils in New Hyde Park filed suit in a state court, challenging the recitation of the "Regents Prayer" in the schools their children attended. The plaintiffs questioned the constitutionality both of the state law permitting school officials to authorize school prayer as well as the board's decision to adopt the "Regents Prayer," on the grounds that both actions violated the First Amendment, which applies to the states through the Fourteenth Amendment, prohibiting any law respecting the "establishment" of religion.

After a trial court entered a judgment in favor of the board, the state's high court affirmed. The court found that Board of Regents had the power to authorize the use of the "Regents Prayer" in public schools as long as no students were compelled to join in it over the objections of their parents. The Supreme Court then granted the parents request for further review.

The Court's Ruling

In a 6-to-1 decision, the Supreme Court reversed and struck down the practice of reciting the "Regents Prayer" at the beginning of every school day. The Court, in an opinion authored by Justice Hugo Black, decided that state-mandated prayer in school was "wholly inconsistent with the Establishment Clause" (*Engel,* p. 424). The Court agreed with the arguments made on behalf of the parents that the prayer was unconstitutional because it was composed by government officials as part of a government program to further religious beliefs. The Court noted that the prohibition against an establishment of religion means at least that the government has no business composing official prayers for any group of people to recite as part of a religious program.

The Supreme Court also dismissed the school board's arguments that the prayer did not violate the Establishment Clause because it was nondenominational and students were not required to participate in its recitation. According to the Court, the fact that the prayer was "denominationally neutral" and that student participation was voluntary did not excuse the Establishment Clause violation. The Court pointed out that an Establishment Clause violation does not require any showing of compulsion by the government. Instead, the Court was of the view that such a violation takes place on the enactment of any law establishing an official religion, regardless of whether it coerces individuals who choose not to observe the religious practice.

In dissent, Justice Potter Stewart reviewed religious references found throughout the government,

including the invocation of God at the beginning of every Supreme Court session, the National Anthem, the Pledge of Allegiance, and the inclusion of "In God We Trust" on the nation's coins. He concluded that the practice of reciting the "Regents Prayer" was not the establishment of an official religion, but an instance of the spiritual traditions of the United States.

James F. Pearn, Jr.

See also *Abington Township School District v. Schempp* and *Murray v. Curlett; Lee v. Weisman;* Religious Activities in Public Schools; *Santa Fe Independent School District v. Doe; Wallace v. Jaffree*

Legal Citations

Abington Township School District v. Schempp and *Murray v. Curlett,* 374 U.S. 203 (1963).
Engel v. Vitale, 370 U.S. 421 (1962).
Lee v. Weisman, 505 U.S. 577 (1992).
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).
Wallace v. Jaffree, 472 U.S. 38 (1985).

Engel v. Vitale (Excerpts)

In Engel v. Vitale, *its first case on point, the Supreme Court struck down state or school-sponsored prayer as unconstitutional because it violates the Establishment Clause.*

Supreme Court of the United States

ENGEL

v.

VITALE

370 U.S. 421

Argued April 3, 1962.

Decided June 25, 1962.

Mr. Justice BLACK delivered the opinion of the Court.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: 'Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country.'

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their 'Statement on Moral and Spiritual Training in the Schools,' saying: 'We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program.'

Shortly after the practice of reciting the Regents' prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that 'Congress shall make no law respecting an establishment of religion'—a command which was 'made applicable to the State of New York by the Fourteenth Amendment of the said Constitution.' The New York Court of Appeals … sustained an order of the lower state courts which had upheld the power of New York to use the Regents' prayer as a part of the daily procedures of its public schools so long as the schools did not compel any pupil to join in the prayer over his or his parents' objection. We granted certiorari to review this important decision involving rights protected by the First and Fourteenth Amendments.

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal

of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found: 'The religious nature of prayer was recognized by Jefferson and has been concurred in by theological writers, the United States Supreme Court and state courts and administrative officials, including New York's Commissioner of Education. A committee of the New York Legislature has agreed. . . .

The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America. The Book of Common Prayer, which was created under governmental direction and which was approved by Acts of Parliament in 1548 and 1549, set out in minute detail the accepted form and content of prayer and other religious ceremonies to be used in the established, tax-supported Church of England. The controversies over the Book and what should be its content repeatedly threatened to disrupt the peace of that country as the accepted forms of prayer in the established church changed with the views of the particular ruler that happened to be in control at the time. Powerful groups representing some of the varying religious views of the people struggled among themselves to impress their particular views upon the Government and obtain amendments of the Book more suitable to their respective notions of how religious services should be conducted in order that the official religious establishment would advance their particular religious beliefs. Other groups, lacking the necessary political power to influence the Government on the matter, decided to leave England and its established church and seek freedom in America from England's governmentally ordained and supported religion.

It is an unfortunate fact of history that when some of the very groups which had most strenuously opposed the established Church of England found themselves sufficiently in control of colonial governments in this country to write their own prayers into law, they passed laws making their own religion the official religion of their respective colonies. Indeed, as late as the time of the Revolutionary War, there were established churches in at least eight of the thirteen former colonies and established religions in at least four of the other five. But the successful Revolution against English political domination was shortly followed by intense opposition to the practice of establishing religion by law. This opposition crystallized rapidly into an effective political force in Virginia where the minority religious groups such as Presbyterians, Lutherans, Quakers and Baptists had gained such strength that the adherents to the established Episcopal Church were actually a minority themselves. In 1785–1786, those opposed to the established Church, led by James Madison and Thomas Jefferson, who, though themselves not members of any of these dissenting religious groups, opposed all religious establishments by law on grounds of principle, obtained the enactment of the famous 'Virginia Bill for Religious Liberty' by which all religious groups were placed on an equal footing so far as the State was concerned. Similar though less far-reaching legislation was being considered and passed in other States.

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The Constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Out Founders were no more willing to let the content of their prayers and their privilege of praying whenever they

pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say—that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is 'nondenominational' and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever government had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support for government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand. The Founders knew that only a few years after the Book of Common Prayer became the only accepted form of religious services in the established Church of England, an Act of Uniformity was passed to compel all Englishmen to attend those services and to make it a criminal offense to conduct or attend religious gatherings of any other kind—a law which was consistently flouted by dissenting religious groups in England and which contributed to widespread persecutions of people like John Bunyan who persisted in holding 'unlawful (religious) meetings . . . to the great disturbance and distraction of the good subjects of this kingdom. . . .' And they knew that similar persecutions had received the sanction of law in several of the colonies in this country soon after the establishment of official religions in those colonies. It was in large part to get completely away from this sort of systematic religious persecution that the Founders brought into being our Nation, our Constitution, and our Bill of Rights with its prohibition against any governmental establishment of religion. The New York laws officially prescribing the Regents' prayer are inconsistent both with the purposes of the Establishment Clause and with the Establishment Clause itself.

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, or course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of

that history many people have devoutly believed that 'More things are wrought by prayer than this world dreams of.' It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment: '(I)t is proper to take alarm at the first experiment on our liberties. . . . Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?'

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

Citation: *Engel v. Vitale,* 370 U.S. 421 (1962).

English as a Second Language

Over the past four decades, numerous federal policy initiatives and judicial decisions have emerged to address the education of students with limited English language skills. Throughout this time period, students with limited English language skills have been referred to as English as Second Language (ESL) learners, English speakers of other languages (ESOL), English language learners (ELL), or limited-English-proficient learners (LEP). LEP is frequently used in schools because of the federal reference to students who are LEP in Title III of the No Child Left Behind Act (NCLB) of 2002. For clarity purposes, this entry refers to students with limited English language skills as *English language learners* (ELLs), because ELL is preferred by advocacy groups, has less judgmental implications than LEP, and is a more accurate description of students than identifying them as ESLs.

Although non-English-speaking students are often referred to as ESLs, "English as a Second Language" is actually an instructional program for ELLs. In response to federal initiatives and to the increasing number of students whose native language is not English, public school systems have adopted various programs and services to address the needs of ELL students. One such program, ESL, focuses on providing specialized, and often intensive, instruction in English. ESL differs significantly from bilingual education programs because in ESL programs, instruction is focused on English comprehension. Bilingual education, on the other hand, is a program that provides dual-language instruction in major content areas.

Federal Law

Despite the instructional differences, both ESL and bilingual education programs emerged as methods to promote the educational and future success of ELLs. The Bilingual Education Act in 1968 initially addressed the rights of ELLs in public schools, mandating funding for bilingual education programs. However, this act did not provide clear guidelines to school systems. In 1970, the Office of Civil Rights (OCR) issued a memorandum concerning the rights of ELLs in public school systems.

As a regulatory body within the U.S. Department of Education, the OCR is charged with enforcement of Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin in programs and activities that receive federal financial assistance. During the late 1960s, the OCR became concerned about the lack of public school services being provided to students with insufficient English language skills. Prompted by these concerns, the OCR issued a memorandum, "Identification of Discrimination and Denial of Services on the Basis of National Origin," to explain the requirements of Title VI of the Civil Rights Act of 1964 to school officials.

According to this memorandum, national origin minority group children who do not speak or understand the English language are denied an opportunity to effectively participate in schools' educational programs. The memorandum requires school board officials to take positive steps to correct each child's language deficiencies in order to provide access to the instructional programs. Pursuant to the memorandum, school board officials were alerted that they would have violated Title VI if students were (a) excluded from educational programs as a result of their limited English language skills, (b) identified inappropriately as mentally retarded based upon their limited English language skills, (c) placed in dead-end programs or in programs that fail to promote the development of English language skills, (d) or disadvantaged when school notices and other information are not provided to their parents in a language that the limited-English-speaking parent can understand. Although the memorandum did not identify specific steps that educators should take, several school systems responded by adopting ESL or bilingual education programs.

Court Cases

Non-English-speaking students and their parents have voiced their concerns over the adequacy and effectiveness of programs and services in federal courts. For example, in *Lau v. Nichols* (1974), non-English-speaking Chinese students sought to compel the San Francisco Unified School District to provide all non-English-speaking Chinese students with bilingual compensatory education in the English language. The U.S. Supreme Court held that the San Francisco School System was denying the non-English-speaking students' rights to an equal education as required by the Civil Rights Act of 1964 § 601. Nonetheless, the Court failed to identify specific remedies to redress the school district's discriminatory practices. As a result, there was no clear mandate to the San Francisco Unified School District or to other school systems regarding the provision of specific programs or services that would satisfy the obligation to educate non-English-speaking students in a nondiscriminatory fashion pursuant to of the Civil Rights Act of 1964 §601.

In *Castaneda v. Pickard* (1981), the Fifth Circuit reasoned that the provision of bilingual education by the Raymondville, Texas, Independent School District (RISD) did not violate Title VI of the Civil Rights Act of 1964. In so ruling, the court established a three-part test to guide the efforts of school officials to take "appropriate action" as required by the Equal Educational Opportunity Act of 1974 (EEOA) in seeking to meet the educational needs of ELLs. According to the test, school programs are to be judged using the following three guiding questions: Is the educational theory on which the program is based sound? Is the program being implemented effectively? Is the program achieving results in overcoming language barriers confronting ELLs? As evidenced by these standards of analysis, neither bilingual education nor ESL programs were specifically designated as preferred instructional methods to promote the educational rights of ELLs.

Immersion and English-only programs have gained favor in state and federal political arenas, as evidenced

by state initiatives such as Proposition 227 in California and Proposition 203 in Arizona. In both states, voters supported these propositions, initiating a change in educational programming for non-English-speaking students. Thus, English-only and immersion programs replaced bilingual education and ESL programs in many school districts throughout California and Arizona. When adopting ESL or bilingual education programs, schools are also guided by Title VI of the Civil Rights Act of 1964, by *Lau* and *Castaneda,* and by the Bilingual Education Act, which has been reauthorized as Title III of the NCLB and is now referred to as the "English Language Acquisition Act."

Susan C. Bon

See also Bilingual Education; *Brown v. Board of Education of Topeka;* Civil Rights Act of 1964; *Lau v. Nichols;* Limited English Proficiency

Legal Citations

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).
No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Epperson v. State of Arkansas

In *Epperson v. State of Arkansas* (1968), the U.S. Supreme Court invalidated a state law that barred the teaching of Darwin's theory of evolution because although the statute obviously did not coerce anyone to support religion or participate in any religious practice, the law was enacted for a singularly religious purpose. *Epperson* is most often cited for its importance with regard to the body of law surrounding the teaching of religious doctrine in public schools.

Facts of the Case

At issue in *Epperson* was a 1928 Arkansas statute, enacted in the wake of the so-called Scopes Monkey Trial, that made it illegal for teachers in state-supported schools or universities to teach the theory or doctrine that mankind ascended or descended from a lower order of animals or to adopt or use a textbook that teaches this theory of mankind's evolution. Violation of the statute was a misdemeanor and subjected violators to dismissal from their positions.

Until 1965, the science textbooks used in the Little Rock, Arkansas, school system did not contain a section on evolution. However, for the 1965–1966 academic year, the school administration adopted a textbook that contained a chapter on evolution. Susan Epperson was a biology teacher in the Little Rock school system who was confronted with the task of teaching from the new textbook that included the prohibited material. Specifically, if Epperson taught from the new textbook, she feared being dismissed. As such, Epperson sought a declaration that the Arkansas statute was void. She also unsuccessfully sought to enjoin the state and the school officials of the Little Rock school system from dismissing her for violating the statute's provisions.

The Court's Ruling

On further review of a ruling of the Supreme Court of Arkansas, the U.S. Supreme Court reversed in favor of Epperson. In its analysis, the Court reasoned that it was clear that the statute sought to prevent its teachers from discussing the theory of evolution because it was contrary to the belief of many of its citizens, who thought that the Bible's book of Genesis had to be the exclusive source of information as to the origins of humankind. Thus, despite the fact that there was support for the statute among those who believed that teaching evolution was offensive to their religious views, the Court still ruled that since it was not an act of religious neutrality, it violated the Establishment Clause.

More specifically, the Court explained that the law was unconstitutional because the government, regardless of whether it is at the state or national level, must adopt an approach of neutrality in matters of religious theory, doctrine, and practice. At the same time, the Court was of the opinion that the government cannot be hostile to any religion or to the advocacy of "no religion" and that it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite.

Epperson was the first in a series of legal setbacks to creationists and, more recently, supporters of intelligent

design, who have attempted to promote religion through America's public schools. *Epperson* may have settled the constitutionality of outlawing the teaching of evolutionary theory in the classroom, but it did not end the quest of fundamentalists to alter school curriculum to conform to a literal reading of the Bible. The battle between proponents of a literal reading of the Bible's creation stories and the supporters of evolutionary theory over which viewpoint should be taught in schools is still being fought. Even so, *Epperson,* like any number of cases that followed it, prevents states and local school officials from using particular religious beliefs as the basis for education or curricula.

Malila N. Robinson

See also *Edwards v. Aguillard;* First Amendment; Fourteenth Amendment; Prayer in Public Schools; Religious Activities in Public Schools; Scopes Monkey Trial; State Aid and the Establishment Clause

Legal Citations

McLean v. Arkansas, 529 F. Supp. 1255 (E.D. Ark. 1982).
Edwards v. Aguillard, 482 U.S. 578 (1987).
Epperson v. State of Arkansas, 393 U.S. 97 (1968).
Freiler v. Tangipahoa Parish Board of Education, 530 U.S. 1251 (1997).
Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

Epperson v. State of Arkansas (Excerpts)

In Epperson v. State of Arkansas, *the Supreme Court invalidated a law that forbade the teaching of evolution on the basis that it essentially promoted a religious point of view about the origins of humankind.*

Supreme Court of the United States

Susan EPPERSON et al., Appellants,

v.

ARKANSAS.

393 U.S. 97

Argued Oct. 16, 1968.

Decided Nov. 12, 1968.

I

Mr. Justice FORTAS delivered the opinion of the Court.

This appeal challenges the constitutionality of the 'anti-evolution' statute which the State of Arkansas adopted in 1928 to prohibit the teaching in its public schools and universities of the theory that man evolved from other species of life. The statute was a product of the upsurge of 'fundamentalist' religious fervor of the twenties. The Arkansas statute was an adaption of the famous Tennessee 'monkey law' which that State adopted in 1925. The constitutionality of the Tennessee law was upheld by the Tennessee Supreme Court in the celebrated *Scopes* case in 1927.

The Arkansas law makes it unlawful for a teacher in any state-supported school or university 'to teach the theory or doctrine that mankind ascended or descended from a lower order of animals,' or 'to adopt or use in any such institution a textbook that teaches' this theory. Violation is a misdemeanor and subjects the violator to dismissal from his position.

The present case concerns the teaching of biology in a high school in Little Rock. According to the testimony, until the events here in litigation, the official textbook furnished for the high school biology course did not have a section on the Darwinian Theory. Then, for the academic year 1965–1966, the school administration, on recommendation of the teachers of biology in the school system, adopted and prescribed a textbook which contained a chapter setting forth 'the theory about the origin . . . of man from a lower form of animal.'

Susan Epperson, a young woman who graduated from Arkansas' school system and then obtained her master's degree in zoology at the University of Illinois, was employed by the Little Rock school system in the fall of 1964 to teach 10th grade biology at Central High School. At the start of the next academic year, 1965, she was confronted by the new textbook (which one surmises from the record was not unwelcome to her). She faced at least a literal dilemma because she was supposed to use the new textbook for classroom instruction and presumably to teach the statutorily condemned chapter; but to do so would be a criminal offense and subject her to dismissal.

She instituted the present action in the Chancery Court of the State, seeking a declaration that the Arkansas statute is void and enjoining the State and the defendant officials of the Little Rock school system from dismissing her for violation of the statute's provisions. H. H. Blanchard, a parent of children attending the public schools, intervened in support of the action.

The Chancery Court, in an opinion by Chancellor Murray O. Reed, held that the statute violated the Fourteenth Amendment to the United States Constitution. . . .

On appeal, the Supreme Court of Arkansas reversed. Its two-sentence opinion is set forth in the margin. It sustained the statute as an exercise of the State's power to specify the curriculum in public schools. It did not address itself to the competing constitutional considerations.

Appeal was duly prosecuted to this Court. . . . Only Arkansas and Mississippi have such 'anti-evolution' or 'monkey' laws on their books. There is no record of any prosecutions in Arkansas under its statute. It is possible that the statute is presently more of a curiosity than a vital fact of life in these States. Nevertheless, the present case was brought, the appeal as of right is properly here, and it is our duty to decide the issues presented.

II

At the outset, it is urged upon us that the challenged statute is vague and uncertain and therefore within the condemnation of the Due Process Clause of the Fourteenth Amendment. The contention that the Act is vague and uncertain is supported by language in the brief opinion of Arkansas' Supreme Court. That court, perhaps reflecting the discomfort which the statute's quixotic prohibition necessarily engenders in the modern mind, stated that it 'expressed no opinion' as to whether the Act prohibits 'explanation' of the theory of evolution or merely forbids 'teaching that the theory is true.' Regardless of this uncertainty, the court held that the statute is constitutional.

On the other hand, counsel for the State, in oral argument in this Court, candidly stated that, despite the State Supreme Court's equivocation, Arkansas would interpret the statute 'to mean that to make a student aware of the theory . . . just to teach that there was such a theory' would be grounds for dismissal and for prosecution under the statute; and he said 'that the Supreme Court of Arkansas' opinion should be interpreted in that manner.' He said: 'If Mrs. Epperson would tell her students that 'Here is Darwin's theory, that man ascended or descended from a lower form of being,' then I think she would be under this statute liable for prosecution.'

In any event, we do not rest our decision upon the asserted vagueness of the statute. On either interpretation of its language, Arkansas' statute cannot stand. It is of no moment whether the law is deemed to prohibit mention of Darwin's theory, or to forbid any or all of the infinite varieties of communication embraced within the term 'teaching.' Under either interpretation, the law must be stricken because of its conflict with the constitutional prohibition of state laws respecting an establishment of religion or prohibiting the free exercise thereof. The overriding fact is that Arkansas' law selects from the body of knowledge a particular segment which it proscribes for the sole reason that it is deemed to conflict with a particular religious doctrine; that is, with a particular interpretation of the Book of Genesis by a particular religious group.

III

The antecedents of today's decision are many and unmistakable. They are rooted in the foundation soil of our Nation. They are fundamental to freedom.

Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

As early as 1872, this Court said: 'The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect.' This has been the interpretation of the great First Amendment which this Court has applied in the many and subtle problems which the ferment of our national life has presented for decision within the Amendment's broad command.

Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do

not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values. On the other hand, '(t)he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' As this Court said in *Keyishian v. Board of Regents,* the First Amendment 'does not tolerate laws that cast a pall of orthodoxy over the classroom.'

The earliest cases in this Court on the subject of the impact of constitutional guarantees upon the classroom were decided before the Court expressly applied the specific prohibitions of the First Amendment to the States. But as early as 1923, the Court did not hesitate to condemn under the Due Process Clause 'arbitrary' restrictions upon the freedom of teachers to teach and of students to learn. In that year, the Court, in an opinion by Justice McReynolds, held unconstitutional an Act of the State of Nebraska making it a crime to teach any subject in any language other than English to pupils who had not passed the eighth grade. The State's purpose in enacting the law was to promote civic cohesiveness by encouraging the learning of English and to combat the 'baneful effect' of permitting foreigners to rear and educate their children in the language of the parents' native land. The Court recognized these purposes, and it acknowledged the State's power to prescribe the school curriculum, but it held that these were not adequate to support the restriction upon the liberty of teacher and pupil. The challenged statute it held, unconstitutionally interfered with the right of the individual, guaranteed by the Due Process Clause, to engage in any of the common occupations of life and to acquire useful knowledge.

. . . .

There is and can be no doubt that the First Amendment does not permit the State to require that teaching and learning must be tailored to the principles or prohibitions of any religious sect or dogma. In *Everson v. Board of Education of Ewing Township,* this Court, in upholding a state law to provide free bus service to school children, including those attending parochial schools, said: 'Neither (a State nor the Federal Government) can pass laws which aid one religion, aid all religions, or prefer one religion over another.'

At the following Term of Court, in *People of State of Ill. ex rel. McCollum v. Board of Education,* the Court held that Illinois could not release pupils from class to attend classes of instruction in the school buildings in the religion of their choice. This, it said, would involve the State in using tax-supported property for religious purposes, thereby breaching the 'wall of separation' which, according to Jefferson, the First Amendment was intended to erect between church and state. While the study of religions and of the Bible from a literary and historic viewpoint, presented objectively as part of a secular program of education, need not collide with the First Amendment's prohibition, the State may not adopt programs or practices in its public schools or colleges which 'aid or oppose' any religion. This prohibition is absolute. It forbids alike the preference of a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma. As Mr. Justice Clark stated in *Joseph Burstyn, Inc. v. Wilson,* 'the state has no legitimate interest in protecting any or all religions from views distasteful to them. . . .' The test was stated as follows in *Abington School District v. Schempp:* '(W)hat are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution.'

These precedents inevitably determine the result in the present case. The State's undoubted right to prescribe the curriculum for its public schools does not carry with it the right to prohibit, on pain of criminal penalty, the teaching of a scientific theory or doctrine where that prohibition is based upon reasons that violate the First Amendment. It is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees.

In the present case, there can be no doubt that Arkansas has sought to prevent its teachers from discussing the theory of evolution because it is contrary to the belief of some that the Book of Genesis must be the exclusive source of doctrine as to the origin of man. No suggestion has been made that Arkansas' law may be justified by considerations of state policy other than the religious views of some of its citizens. It is clear that fundamentalist sectarian conviction was and is the law's reason for existence. Its antecedent, Tennessee's 'monkey law,' candidly stated its purpose: to make it unlawful 'to teach any theory that denies the story of the Divine Creation of man as taught in the Bible, and to teach instead that man has descended from a lower order of animals.' Perhaps the sensational publicity attendant upon the Scopes trial induced Arkansas to adopt less explicit language. It eliminated Tennessee's reference to 'the story of the Divine Creation of man' as taught in the

Bible, but there is no doubt that the motivation for the law was the same: to suppress the teaching of a theory which, it was thought, 'denied' the divine creation of man.

Arkansas' law cannot be defended as an act of religious neutrality. Arkansas did not seek to excise from the curricula of its schools and universities all discussion of the origin of man. The law's effort was confined to an attempt to blot out a particular theory because of its supposed conflict with the Biblical account, literally read. Plainly, the law is contrary to the mandate of the First, and in violation of the Fourteenth, Amendment to the Constitution.

The judgment of the Supreme Court of Arkansas is reversed.

Reversed.

Citation: *Epperson v. State of Arkansas,* 393 U.S. 97 (1968).

Equal Access Act

According to the Equal Access Act (EAA), secondary schools receiving federal funds must allow noninstructional-related groups equal access to their facilities for meetings before and after school or during noninstructional periods of the day. The EAA was intended to open school facilities to religiously oriented groups, which had previously been barred from using facilities under constitutional prohibitions on the involvement of government in religion. It has also been used by other groups, especially gay and lesbian organizations, which had previously been barred from school grounds. Schools that do not receive federal funds or that bar all noncurriculum-related meetings remain unaffected by the act. This entry discusses the EAA's background and implications.

Legal Background

Congress enacted the EAA in 1984, with broad bipartisan support. Enforcement of the EAA was immediately challenged under the Establishment Clause, and in *Board of Education of Westside Community Schools v. Mergens* (1990), the Supreme Court upheld its constitutionality.

In enacting the EAA, Congress limited its application to secondary schools receiving federal financial assistance and prohibited those schools that created a "limited open forum" from denying student access to school premises for the purpose of engaging in "religious, political, philosophical, or other speech content" (sec. 4071(a)). The definition of a *secondary school* is left up to state law, although if case law is any indication, the term appears limited to high schools (see *Prince v. Jacoby,* 2002). Congress deliberately selected the term *limited open forum* so as not to confuse this right granted under the EAA with the free speech limited-public-forum right that had been extended to public education 3 years prior to passage of the EAA in *Widmar v. Vincent* (1981).

Pursuant to the EAA, a limited open forum exists whenever one or more noncurriculum-related student groups meet on school premises during noninstructional time. While the EAA does not define what constitutes "noncurriculum-related student groups," the Supreme Court in *Mergens* determined that "any student group that does not *directly* relate to the body of courses offered by the school" would be considered to be noncurriculum related (*Mergens,* p. 239, emphasis in original; 20 U.S.C. § 4072(3)). The EAA defines *noninstructional time* as that which is "set aside by the school before actual classroom instruction begins or after actual classroom instruction ends" (sec. 4072(4)). Subsequent case law suggested that noninstructional time can extend to activity periods during the school day as long as noncurriculum-related student groups are permitted to meet during that time (*Prince v. Jacoby*).

To ensure that students have a fair opportunity to conduct meetings under a school's limited open forum, meetings must be voluntary and student initiated; cannot be government sponsored; can be attended by government employees only in a nonparticipatory capacity; cannot materially or substantially interfere with the educational activities of the school; and cannot be

directed, conducted, or regularly attended by nonschool persons (sec. 4071(c)). In clarifying the statute's prohibition on government-sponsored meetings, the EAA defines *sponsorship* as "promoting, leading, or participating in a meeting" but expressly excludes from sponsorship "the assignment of a teacher, administrator, or other school employee to a meeting for custodial purposes" (sec. 4072(2)).

In enacting the EAA, Congress provided assurance to public schools that the statute was not intended to "limit the authority of the school, its agents or employees, to maintain order and discipline on school premises, to protect the well-being of students and faculty, and to ensure that attendance of students at meetings is voluntary" (sec. 4071(f)). The EAA reflects the language of *Tinker v. Des Moines Independent Community School District* (1969) by ensuring protection of the EAA to a student group only so long as its "meeting does not materially and substantially interfere with the orderly conduct of educational activities within the school" (sec. 4071(c)(4)).

To ensure the neutrality of schools' control over student groups, Congress placed broad limitations on every level of government and its subdivisions, including school districts, to prohibit them from influencing the content of prayer or religious activities, requiring that any person participate in prayer or religious activities, expending more than incidental funds to provide space for student meetings, compelling school agents or employees to attend meetings in which the content of speech at a meeting would be contrary to a person's beliefs, sanctioning meetings otherwise unlawful, limiting the rights of groups not of a specified size, and abridging the constitutional rights of any person (sec. 4071(d)).

Implications for Schools

While it has not generated any litigation to date on this point, a cursory review of the EAA suggests an interesting anomaly for school administrators. Administrators can assign teachers to attend student meetings to function in a supervisory capacity without violating the EAA's nonparticipation requirement. Yet administrators cannot compel teachers to attend such meetings if attendance would violate the teachers' beliefs.

The EAA implicitly allows for private enforcement of the statute (sec. 4071(e)). Courts have granted injunctions to student groups that were denied access to school meeting space on the same terms as other groups, in effect finding that denial of such access amounts to irreparable harm (*Student Coalition for Peace v. Lower Merion School District Board of School Directors,* 1985). However, the EAA expressly prohibits the federal government from denying or withholding federal financial assistance to any school (sec. 4071(e)). In effect, Congress provided just the opposite enforcement process for the EAA as it had for the Family Educational Rights and Privacy Act (FERPA), enacted in 1974. In FERPA, Congress expressly allowed for withholding of funds, and the Supreme Court later interpreted FERPA as not permitting private enforcement (20 U.S.C. 1232g(f); *Gonzaga University v. Doe,* 2002).

The language and purpose of the EAA was influenced by the Supreme Court's decision in *Widmar v. Vincent,* wherein it held that a public university could not deny the use of its facilities to student religious groups after officials opened the facilities to a wide range of other groups. According to the Court, in opening the facilities, the university created a limited public forum under the Free Speech Clause, which prohibited it from making facility use decisions based on the content of student meetings.

In enacting EAA, Congress was also influenced by two cases from federal circuit courts, *Brandon v. Board of Education of Guilderland Central School District* (1980) and *Lubbock Civil Liberties Union v. Lubbock Independent School District* (1982). In *Brandon,* the Second Circuit upheld the refusal of a school board in New York to permit a student religious club to meet on school premises during the instructional day although other student groups were permitted to do so. The court reasoned that the refusal did not violate the students' rights of free exercise of religion, freedom of speech, or equal protection because the district had a compelling interest in removing any indication under the Establishment Clause that it sponsored religious activity in public schools. In *Lubbock,* the Fifth Circuit held that a school board policy in Texas allowing students to gather at school for voluntary religious meetings close

to the beginning and end of the school day violated the Establishment Clause because it implied recognition of religious activities.

The EAA affects cases such as *Brandon* and *Lubbock* only to the extent that public schools that receive federal financial assistance permit other noncurriculum-related student groups to meet on school premises during noninstructional time. Public schools can avoid the impact of the EAA by not accepting federal assistance or by closing their limited open forums and permitting only student groups that are curriculum related, such as allowing biology clubs to meet, provided that schools have biology courses. While identity between the names of student groups and school courses is preferable, courts have not always required identity, such as treating the National Honor Society as curriculum related (*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District,* 1998).

The EEA was enacted to ensure that public school personnel do not discriminate against religious student groups because of their religious messages. Two major effects of the EAA and *Mergens* have been the protection of student expression under the Free Speech Clause and the use of the EAA by other kinds of student groups. Once *Mergens* eliminated the Establishment Clause as an excuse for schools treating religious groups differently than nonreligious ones, the emphasis shifted, beginning with *Lamb's Chapel v. Center Moriches Union Free School District* (1993), to providing constitutional protection for religious expression.

Although initially applied solely to religious clubs, the fluidity and flexibility of federal legislation has been reflected in the EAA's application more recently to a wider range of student groups, especially gay/straight clubs, attempting to gain access to meeting space on public school premises (*Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County,* 2003).

Ralph D. Mawdsley

See also *Board of Education of the Westside Community Schools v. Mergens;* Family Educational Rights and Privacy Act; Prayer in Public Schools; Religious Activities in Public Schools; *Widmar v. Vincent*

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Widmar v. Vincent, 454 U.S. 283 (1981).

Equal Educational Opportunity Act

The Equal Educational Opportunity Act of 1974 (EEOA) was an amendment to the Elementary and Secondary Education Act. The EEOA came into effect when school boards in the United States were involved in court-required busing of students to desegregate schools and soon after the Supreme Court decided *Keyes v. School District No. 1, Denver, Colorado* (1973), and *Lau v. Nichols* (1974). The EEOA is a statute of contradictions. The rights that Congress appeared to grant in its expansive language of equal educational opportunity were undermined by the restricted definition of segregation, the elimination of

busing as a corrective remedy, and the ambiguous phrase "appropriate action." This entry reviews the law and its impact.

On Racial Segregation

The EEOA essentially codified the holdings in *Brown v. Board of Education of Topeka* (1954) and *Lau* (1974) by specifically prohibiting the denial of equal educational opportunity by a state educational agency based on race, color, sex, or national origin due to deliberate segregation, failure to take affirmative steps to end the vestiges of formerly deliberate segregation, or the failure to take appropriate action to overcome language barriers that impede equal participation by its students. The EEOA also prohibited discrimination against the faculty and staff of school agencies.

At the same time, the EEOA codified the holding in *Keyes,* which limited desegregation actions to de jure segregration; it also reflected congressional opposition to busing by restricting the remedies available for desegregating school districts. Under the EEOA, if individuals believe that they have been denied equal education opportunities, they, or the attorney general of the United States on their behalf, may file civil suits against offending school agencies.

Pursuant to the EEOA, Congress limited both the scope of actionable segregation and the remedies available to rectify discrimination based on school segregation. Section 1714 codified the Supreme Court's 1973 ruling in *Keyes,* which limited desegregation actions to de jure segregation, not de facto segregation. *De jure segregation* derives from the direct actions of government officials or institutions, usually in the form of explicit legislation or policies, such as creating separate schools for children of different races. *De facto segregation* results from private decisions, such as where one buys a house or locates a business.

Under the EEOA's provisions, Congress permitted courts and educational agencies to remedy vestiges of dual systems that were created by direct government action, but it barred actions if subsequent population shifts resulted in de facto segregation. By eliminating actions against de facto segregation, the EEOA severely restricted the ability of minority students to sue for more integrated schools.

Section 1714 also effectively eliminated busing as a remedy. This section mandated that students could be transported only to their neighborhood schools or the next-closest school to the student's place of residence. Segregated areas often include clusters of adjoining neighborhoods with many segregated schools, so desegregation through busing was possible only when students could be transported to schools that were much further away than the one next-closest to a student's residence. In addition, Congress also prohibited the required transportation of any student, even to the next-closest school, where that transportation posed a risk to the student's health or significantly impinged on the student's educational process. In sum, Section 1714 eliminated the possibility of busing student volunteers and provided resisting students simple objections to being bused. The passage of the EEOA left minority students with few legal options to combat school segregation.

On Language Barriers

The rights that the EEOA provided to limited-English-proficient students were also eventually made ineffective, though this occurred in a more indirect manner. Under Section 1703(f), Congress outlawed discrimination by a state that resulted from "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." This codified the Supreme Court's opinion in *Lau,* handed down earlier that year (1974). In *Lau,* the Court maintained that public schools must provide additional language support to limited-English-proficient students so they can have a meaningful educational experience.

In *Lau,* the Supreme Court left it to state educational agencies to decide what methods they would use to provide this language support. In the EEOA, Congress did not define the term *appropriate action,* thereby leaving the interpretation initially to state educational agencies and eventually to judicial review. The final result is a definition of *appropriate action* that is highly deferential to school boards, leaving students who are of limited English proficiency with almost no legal ability to contest a school's English language support program.

In 1981, the Fifth Circuit in *Castenada v. Pickard* established a three-part test for determining whether a school district's language support plan was "appropriate action" as required by section 1703(f). The test required that a school board's plan should be based on a sound educational theory that is supported by some qualified experts; should provide sufficient resources and personnel to be implemented effectively; and should ensure that after a trial period, students must actually be learning English and to some extent, subject matter content. Subsequently, "sound educational theory" and "some qualified experts" required interpretation.

Later judicial opinions resulted in two primary rules for interpreting these phrases and applying the *Castenada* test. First, the courts agreed that it was the burden of the student to demonstrate that the school district's language plan violated the EEOA. This created the presumption that the school district's existing language plan was appropriate. Second, to meet that burden, the student must show that no expert supports the education theory underlying a school board's education plan. For students to win their suits under Section 703(f), they must demonstrate that a school district's language support program could not, under any circumstance, be interpreted as "appropriate action." This is a nearly impossible burden of proof, for a school board can successfully defend its language program if it presents one expert who will testify that the program is based on sound educational theory, even when experts hired by school boards are challenged by other experts and contradicted by the vast majority of research studies. Under this interpretation, California, Arizona, and Massachusetts have enacted English-only statutes that appear to contradict the intent of *Lau* and the EEOA. These statutes require English immersion programs and outlaw bilingual education, in direct disagreement with the current best-practices research in second-language acquisition and the views of the vast majority of experts in the field.

Eric M. Haas

See also Bilingual Education; *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Act of 1964; English as a Second Language; Limited English Proficiency; Segregation, De Facto; Segregation, De Jure

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Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).

Equal Employment Opportunity Commission

The Equal Employment Opportunity Commission (EEOC) is a federal agency charged with enforcement of a variety of laws designed to prevent discrimination in the workplace. The EEOC has made a major difference for many people, inside and outside of education, and it will continue to do so as workers seek its assistance so that their employers do not discriminate against persons on account of sex, race, creed, national origin, or physical disability.

The forerunner of the EEOC was the President's Committee on Equal Employment Opportunity, created under Executive Order 10925 and signed into law on March 6, 1961, by President John F. Kennedy, who was aware of the need to protect the rights of a wide array of employees. The EEOC was created by Congress some time later to protect equal employment opportunities under federal law. In fact, the EEOC was created largely to serve as a mechanism to enforce the far-reaching provisions of the Civil Rights Act of 1964. The Civil Rights Act's 10 titles deal with important areas such as voter registration, discrimination in public accommodations, desegregation of public

schools, authorized withdrawal of federal funds from discriminatory programs, commission on civil rights, nondiscrimination in federal programs, equal employment opportunity, voting and registration statistics, procedures for appealing a federal court order, and creation of a community relations office.

As to its actual operations, the president appoints the five commissioners to staggered 5-year terms on the EEOC. All commissioners must be approved by the Senate. In addition, the president has the authority to select the chairman and vice-chairman. The chairman is the EEOC's chief executive officer. In carrying out its duties, the EEOC may establish equal employment policy and approve litigation after completing its investigations. In following up on the commission's recommendations for disputes to proceed to litigation, the EEOC selects a general counsel, who holds office for 4 years.

The EEOC has the specific authority to enforce the Equal Pay Act of 1963 (EPA); Age Discrimination in Employment Act of 1967 (ADEA); Title I and Title V of the Americans with Disabilities Act of 1990 (ADA); Section 501, Section 504, and Section 505 of the Rehabilitation Act of 1973 (Section 504); Title VII of the Civil Rights Act of 1964 (Title VII); and the Civil Rights Act of 1991. The EEOC is also charged with the responsibility of overseeing and coordinating equal employment opportunity regulations, practices, and polices pursuant to federal law. Further, the EEOC carries out its enforcement responsibilities through 50 offices throughout the nation.

Federal workplace discrimination laws are enforced by different federal agencies, including the EEOC. In its lead capacity, officials at the EEOC coordinate the federal government's employment nondiscrimination efforts. To ensure consistency in the federal government's effort to fight workplace discrimination, the EEOC is compelled to review regulations and other EEOC policy-related documents before they are promulgated for enforcement. The EEOC has the power to file suits on behalf of alleged victims of discrimination against private employers. It can also adjudicate discrimination claims filed against federal agencies. When first enacted, the EEOC did not have the ability to intervene in disputes involving public school employment. However, Congress eliminated this exemption in 1972 and conferred authority on the EEOC to act in the important arena of public education.

The EEOC is significant in education law because each year it reviews numerous disputes alleging violations of Title VII, the ADEA, the EPA, and Section 504, as well as other claims that eventually make their way to court.

Robert J. Safransky

See also Age Discrimination in Employment Act; Americans with Disabilities Act; Equal Pay Act; Title VII

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Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Equal Pay Act

The Equal Pay Act of 1963 amended the Fair Labor Standards Act, making it illegal to pay different wages to employees of different genders for equal work or jobs requiring equal skill, effort, or responsibility and performed under similar working conditions. The act is essentially a prohibition of discrimination by employers on the basis of sex. Moreover, the act forbids employers from paying workers of one sex at a rate less than that paid to workers of the opposite sex for substantially equal work. This entry describes the law, what it requires, and what exceptions may be acceptable.

The Equal Pay Act applies to employers in industries engaged in commerce or in the production of goods for commerce. The act specifically includes

elementary or secondary schools and institutions of higher education, regardless of whether they are public or private or are operated for profit or not for profit. Essentially, the act covers the same employees as the rest of the Fair Labor Standards Act but also covers executives, administrators, and other professional employees who are ordinarily exempted from the Fair Labor Standards Act. At the same time, the act covers most state and local government employees unless they are specifically exempted. Although most cases involve claims by females, the act protects men as well. When different pay is provided for the same work, violations occur each time an employer pays its employees.

Basis for Claims

The Equal Pay Act provides as follows:

> No employer having employees subject to any provision of [the act] shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he paid wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions. (29 U.S.C. § 206(d)(1))

A basic theme underpinning the act is the concept of "equal pay for equal work" performed by employees of either sex. To recover under the act, plaintiffs must prove that an employer is paying different wages to employees of the opposite sex for equal work. The act defines *equal work* by noting that the performance of jobs must require "equal skill, effort and responsibility and which are performed under similar working conditions" (29 U.S.C. § 206(d)(1), 2007). The courts have interpreted the term *equal* as "substantially equal," which means that the jobs being compared must be "either closely related" or "very much alike."

An appropriate comparison of two jobs must be made in light of all the circumstances. The evaluation of whether jobs are substantially equal focuses on the overall job content. Courts ordinarily look beyond job classifications, job titles, and job descriptions to the basic substance of the job being performed. Wage differentials are justified when they compensate individuals for appreciable variations in skills, efforts, responsibilities, or working conditions between otherwise comparable work activities. When claimants establish common core of tasks between two jobs, courts must evaluate whether any additional tasks make the jobs "substantially different."

In evaluating whether work is equal, skill, effort, and responsibility are factors to be evaluated separately. Each of the factors must be satisfied in order for the equal pay requirement to apply. "Skill" is based on job performance requirements for the positions involved and considers experience, training, education, and ability. "Effort" is based on the physical and/or mental exertion required for a position. "Responsibility" is evaluated in the context of the importance of the job's duties and degree of accountability involved, such as the responsibility to supervise and direct other employees. "Working conditions" refers to physical working conditions, including surroundings and hazards.

Acceptable Policies

The equal pay standard adopted by Congress under the Equal Pay Act differs from the standard involving a claim that employees performing "comparable" work or work of "comparable worth" or "comparable value" to the employer. Congress expressly rejected a standard of "comparable worth" or "comparable value." The Equal Pay Act applies only to jobs that are substantially identical or equal and not jobs that are of "comparable value" to the employer.

The Equal Pay Act permits employers to pay different wages for equal work if salaries are made pursuant to seniority systems, merit systems, systems that measure earnings by quantity or quality of production, or pay differentials based on any other factor than sex. Salary differentials based on length of time that employees have worked for employers are permissible, even when there is no formal seniority system in effect and the result may be generally higher salaries for men.

The merit system defense must be grounded in a bona fide merit system. Job descriptions that differentiate between positions but provide no means for advancement or reward based on merit do not constitute a bona fide merit system. Generally, courts require employers to demonstrate objective, written standards.

Employers must validate that they have bona fide incentive systems based on either the amount of work or the quality of work that individuals produce if they seek to rely on a defense based on the quantity or quality of worker production. The quantity test refers to compensation rates of equal dollars per unit. Thus, there is no discrimination if two employees receive the same rate of pay for producing the same product but one receives more total compensation because one produces more of a work product. However, employers may not pay lesser rates per unit to females in order to equalize total compensation among men and women when there is no qualitative difference between the jobs that they perform.

The "factors other than sex" defense is a broad exception encompassing the right of the employer to change and revise its job evaluation and pay system. Basing wages on a sex-neutral objective measure is an example of the "factors other than sex" defense. If a differential in pay would have been the same regardless of an employee's sex, there is no violation under the act.

Enforcement

Employees may seek to file charges with the Equal Employment Opportunities Commission (EEOC) or may file suit directly in court to enforce the Equal Pay Act. The EEOC may also file suit against an employer for a violation of the act. Jury trials are permitted under the act.

Employees who prove a violation of the Equal Pay Act may be awarded back wages, a sum equal to the amount of the back wages (liquidated or double damages), attorneys' fees, court costs, and interest. Front pay, back pay extended into the future, may also be awarded to compensate for the continuing loss of employment until job vacancies become available. Courts can award liquidated or double damages at their discretion. Double damages may be disallowed in whole or in part if employers show to the satisfaction of the court that pay differences were made in good faith based on reasonable grounds.

The Equal Pay Act contains a 2-year statute of limitations. However, each time an employer issues a paycheck to a woman for lower pay than a man receives (or vice versa) for performing equal work, a separate act of discrimination occurs and provides a separate basis for liability. The limitations period is increased to 3 years for willful violations. In addition, willful violations may be prosecuted criminally. Conviction can result in fines and for second willful violations, imprisonment.

Jon E. Anderson

See also Equal Employment Opportunity Commission; Title VII

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Equal Protection Analysis

The Fourteenth Amendment to the U.S. Constitution declares that no state may "deny to any person within its jurisdiction the equal protection of the laws." Adopted in 1868, the Fourteenth Amendment was intended to protect African Americans from discrimination by the states in the aftermath of the Civil War. Since its adoption, the Equal Protection Clause

has become one of the most important constitutional provisions for the protection of individual rights. In particular, the Equal Protection Clause has been an important concept in the law of public education.

In that context, the courts have invoked the Equal Protection Clause of the Fourteenth Amendment to prohibit the segregation of school children by race, to bar sex-based discrimination in educational settings, to guarantee access to the public schools by children whose parents are not legal residents, and to protect gay and lesbian students and teachers from discriminatory treatment. This provision has been very important in ensuring equal educational opportunities in the nation's public schools, as discussed in this entry.

What the Law Says

By its own terms, the Fourteenth Amendment applies only to state and local governments. The Constitution contains no Equal Protection Clause that applies to the federal government. However, to the extent that the federal government classifies persons or groups in a way that would have violated the Equal Protection Clause of the Fourteenth Amendment, courts find that they violate the Due Process Clause. The courts rely on the Fifth Amendment when dealing with the federal government, because its application is limited to this context. The Fourteenth Amendment applies to the actions of states. Perhaps the best example of how this distinction plays out occurred in a case that was resolved on the same day that the Supreme Court struck down racial segregation in public schools in *Brown v. Board of Education of Topeka* (1954). In *Bolling v. Sharpe* (1954), the Court applied the Due Process Clause in the Fifth Amendment, rather than the Equal Protection Clause, to invalidate racial segregation in public schools in Washington, D.C, because it is under the control of the federal government.

Over the years, the U.S. Supreme Court has applied three standards when examining challenges to governmental actions based on the denial of equal protection. Laws that discriminate against "suspect" classifications of individuals or that infringe on fundamental rights are presumptively void and are subjected to strict judicial scrutiny. Such laws can pass constitutional muster only if they can be shown to be narrowly tailored to meet a compelling governmental interest. The Court has declared these classifications to be suspect under the Equal Protection Clause, namely, race, ethnicity, and national origin or being a foreigner.

At the same time, the Supreme Court has recognized certain "quasi-suspect" classifications: laws that discriminate based on sex or laws that draw distinctions between legitimate and illegitimate children. Laws that discriminate against these quasi-suspect classes of individuals are subject to an intermediate level of judicial scrutiny. Such laws are upheld only if they are substantially related to important governmental interests.

Finally, laws that discriminate against individuals based on other kinds of classifications are subjected to only a minimal level of judicial scrutiny. The courts uphold these governmental actions against an equal protection challenge if they are shown to be at least rationally related to legitimate governmental interests.

Cases Involving Race

Undoubtedly, the most important case in the field of education law to apply equal protection analysis is *Brown v. Board of Education of Topeka* (1954), in which the Supreme Court struck down segregated school systems in four states. The plaintiffs in *Brown* contended that segregated schools were not "equal" and that African American students were thus deprived of their right to equal protection of the laws. One issue in *Brown* was the continuing validity of the "separate but equal" doctrine that the Court had adopted in 1896 in *Plessy v. Ferguson.* In *Plessy,* the Court upheld the constitutionality of a Louisiana law that required railroad companies to segregate their passengers by race in so-called separate-but-equal railroad coaches.

In *Brown,* the Supreme Court unanimously ruled in favor of the plaintiff schoolchildren and disavowed the "separate but equal" doctrine of *Plessy.* "We conclude," the Court wrote, "that in the field of public education the doctrine of 'separate but equal' has

no place. Separate educational facilities are inherently unequal" (*Brown,* p. 495). Therefore, the Court continued, African American children who had been segregated by race in the schools had been "deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment" (p. 495).

Since *Brown,* the Supreme Court has approved of racial classifications in public education in the context of admitting students to a public law school. In *Grutter v. Bollinger* (2003), the Court ruled that the University of Michigan Law School had a compelling interest in obtaining the educational benefits that come from a racially and ethnically diverse student body and this justified the use of race as one factor among others in the selection of students for admission to the study of law. However, in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), a divided Court, in a plurality opinion, struck down race-based school assignment plans in two public school systems, finding that educators had not established a compelling interest to justify the use of race as a basis for assigning children to public schools. Unlike *Grutter,* in which race was but one factor in a holistic approach to choosing law students, the school systems in *Parents Involved* used race in a nonindividualized and mechanical way as the decisive factor for determining which students gained admittance to schools.

Cases Involving Other Issues

In another landmark opinion, *Plyler v. Doe* (1982), the Supreme Court relied on the Equal Protection Clause to strike down a Texas law that permitted public school boards to bar the children of undocumented immigrants from attending the state's public schools. In *Plyler,* the Court ruled that the Fourteenth Amendment prohibited the state of Texas from excluding the children of undocumented immigrants from the public schools. The Court did not think that the state's categorization of children created a suspect class. Rather, the Court seemed to categorize the excluded children as a "quasi-suspect" class in subjecting the law to heightened scrutiny. To deny "a discrete group of innocent children the free public education that it offers to other children residing within its borders," the Court wrote, the state of Texas was required to justify that denial "by a showing that it furthers some substantial state interest" (*Plyler,* p. 230). In the Court's view, since Texas was unable to show that it had a substantial governmental interest in excluding the children of undocumented immigrants from the public schools, the statute was unconstitutional.

Equal protection analysis has also come into play in disputes about sex-based discrimination in the context of public education. In *Mississippi University for Women v. Hogan* (1982), for example, a male applicant to a university nursing program filed suit after he was denied admission solely on his gender. Applying a heightened standard of judicial scrutiny, the Supreme Court held that the university's female-only admission policy could be upheld only when it was substantially related to an important governmental objective. In a divided opinion, the Court rejected the university's arguments that its single-sex admission policy was justified as a means of compensating for past discrimination against women and ruled that the policy violated the Equal Protection Clause.

In recent years, lower federal courts have utilized the Equal Protection Clause to assist another category of public school students, gay and lesbian students. In a 1996 case, *Nabozny v. Podlesny,* the Seventh Circuit was of the opinion that a school board could not allow a gay student to be repeatedly harassed by peers at the same time that it protected other students from harassment. In reaching its judgment, the court did not designate gay students as a suspect or quasi-suspect class, which would have subjected school officials to heightened judicial scrutiny for their actions or inaction. Instead, under the most minimal level of scrutiny, the court observed that discrimination against a gay student in such a way was simply not rational. In a 2003 opinion, *Flores v. Morgan Hill Unified School District,* the Ninth Circuit reached a similar outcome in a dispute that additionally involved allegations that school officials failed to protect gay and lesbian students from harassment by other students.

Federal courts have also relied on the Equal Protection Clause to protect gay and lesbian teachers from discrimination by their public employers. In *Weaver v. Nebo School District* (1998), for example, a school board chose not to reappoint a female teacher to her position as girls' volleyball coach after she revealed that she was a lesbian. The teacher sued, and a federal court ordered the board to offer her the chance to regain her coaching position. The court noted that the teacher's sexual orientation and the community's negative response to it had provided no rational basis for removing her from the coaching position and that the board had violated her constitutional rights under the Equal Protection Clause.

Richard Fossey

See also *Bolling v. Sharpe; Brown v. Board of Education of Topeka; Grutter v. Bollinger; Parents Involved in Community Schools v. Seattle School District No. 1; Plessy v. Ferguson; Plyler v. Doe*

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Grutter v. Bollinger, 539 U.S. 306 (2003).
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Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Plyler v. Doe, 457 U.S. 202 (1982).
Weaver v. Nebo School District, 29 F. Supp. 2d 1279 (D. Utah 1998).

Establishment Clause

See State Aid and the Establishment Clause

Everson v. Board of Education of Ewing Township

In *Everson v. Board of Education of Ewing Township* (1947), the Supreme Court upheld a statute from New Jersey and a local school board's authorization to reimburse parents for the expense of bus transportation to school on public transportation for students who attended religiously affiliated, nonpublic schools. *Everson* was the first Supreme Court case to address public education and religion within the confines of the First Amendment.

Everson came about after a local school board, pursuant to a New Jersey statute which authorized boards to make their own rules for transporting students to school, enacted a resolution that provided reimbursement to parents for transportation expenses. The plaintiff in *Everson* challenged the board's right to reimburse the parents, contending that the statute and resolution violated both the Federal and State Constitutions. After a trial court decided for the plaintiff, confirming that there was a constitutional violation, New Jersey's Court of Errors and Appeals reversed, holding that there was no constitutional issue with either the statute or resolution.

On further review by the Supreme Court, in a 5-to-4 judgment, Justice Black (joined by Vinson, Reed, Douglas, and Murphy) affirmed the judgment of the New Jersey Court of Appeals. Focusing extensively on the history of government sponsorship of religion, and looking particularly at the history of paying taxes to support religion, Black noted that the establishment of government-sponsored religion and the persecution of any particular religious beliefs were evils the First Amendment was designed "forever to suppress."

Black's opinion used sweeping language that broadly construed the Establishment Clause. He focused on what the government may not do, per the First Amendment: it may not set up a church; aid one, any, or all religions through legislation; levy taxes to support religious activities or institutions; or force citizens to attend one church or prevent them from participating in the services of another.

Justice Black noted the delicate balance struck between the restrictions placed on the government by the First Amendment and other language within the same that provides citizens the opportunity to practice whatever religion they choose. As a result, he was of the opinion that the state cannot exclude one group of people because of their faith (or lack thereof) from receiving the benefits of public welfare legislation. While states are not prevented from busing all children to school, regardless of the school's religious affiliation, Black indicated that it is also crucial to ensure that the benefits of state legislation are provided to all people, without concern for their religious beliefs. As such, Black found no prohibition in the First Amendment against using tax dollars to provide transportation reimbursement to parents, including those who sent their children to religious schools.

Black admitted that this statute helped children to travel to religious schools while acknowledging the possibility that some students might not have been able to reach their religiously affiliated, nonpublic schools if the state had not funded transportation. Yet he also maintained that this result could occur through other means, such as if the state required all students to have busing provided at a low cost, or if municipally owned buses offered transportation to all students. Likening this legislation to the type of aid provided by policemen, firefighters, or any other general government service—it provides for the general welfare of the citizenry without looking first to their religious creeds—Black ruled that there was no overt aid provided to the religious schools.

In his analysis, Black decided that, while the citizens of New Jersey needed protection against state-sponsored churches, it was also crucial to ensure that all the citizens received equal benefit from state laws, regardless of their religious beliefs. He added that states are not required to be adversaries to organized religion, but they must remain neutral to all religions.

Black looked to the Supreme Court's precedent in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), which allowed students to attend religious schools as long as the schools meet the state's secular education requirements. To this end, he reasoned that there were no constitutional problems with nonpublic schools so long as taxpayer-funded legislation neither supported them nor gave money them money directly. Black thus concluded that the statute and resolution did not violate the First Amendment.

Justice Jackson, joined by Justice Frankfurter in his dissent, argued that Justice Black's view of the Establishment Clause necessarily led to the invalidation of the New Jersey statute and school board resolution. He believed that the character of the school determined the eligibility of parents to reimbursement, since the act authorized reimbursement to public or religious schools but not private schools operated for profit.

Jackson also disagreed with the majority opinion on the basis that the legislation authorized use of local funds to transport students to any school, while the authorization passed by the board approved reimbursement for students who attended only public or religious schools.

Justice Rutledge, along with Justices Frankfurter, Jackson, and Burton, stated in a separate dissent that the First Amendment's purpose was not only to prevent establishment of one religion by the government, but it was also to separate the government completely and wholly from any and all religious activity. Within this separation, he argued, falls the prohibition of any sort of public aid or support for any reason. Looking at transportation as a crucial, if not the most important, facet of education, Rutledge could not view funding transportation of students as anything other than aid to religious schools, and therefore religion in general.

Megan L. Rehberg

See also Child Benefit Test; Parental Rights; State Aid and the Establishment Clause; Transportation, Students' Rights to

Legal Citations

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

Everson v. Board of Education of Ewing Township (Excerpts)

Everson v. Board of Education of Ewing Township *was the Supreme Court's first ever case involving a dispute on the merits of the Establishment Clause and public education. The Justices upheld a statute that permitted local school boards to reimburse parents for the cost of transporting their children to religiously affiliated non-public schools, thereby enunciating what is often referred to as the child benefit test.*

Supreme Court of the United States

EVERSON

v.

BOARD OF EDUCATION OF EWING TOWNSHIP.

330 U.S. 1

Argued Nov. 20, 1946.

Decided Feb. 10, 1947.

Rehearing Denied March 10, 1947.
See 330 U.S. 855

Mr. Justice BLACK delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation of children to and from schools. The appellee, a township board of education, acting pursuant to this statute authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions. That court held that the legislature was without power to authorize such payment under the State constitution. The New Jersey Court of Errors and Appeals reversed, holding that neither the statute nor the resolution passed pursuant to it was in conflict with the State constitution or the provisions of the Federal Constitution in issue. The case is here on appeal. . . .

Since there has been no attack on the statute on the ground that a part of its language excludes children attending private schools operated for profit from enjoying state payment for their transportation, we need not consider this exclusionary language; it has no relevancy to any constitutional question here presented. Furthermore, if the exclusion clause had been properly challenged, we do not know whether New Jersey's highest court would construe its statutes as precluding payment of the school transportation of any group of pupils, even those of a private school run for profit. Consequently, we put to one side the question as to the validity of the statute against the claim that it does not authorize payment for the transportation generally of school children in New Jersey.

The only contention here is that the State statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution in these two respects, which to some extent, overlap. First. They authorize the State to take by taxation the private property of some and bestow it upon others, to be used for their own private purposes. This, it is alleged violates the due process clause of the Fourteenth Amendment. Second. The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states.

First. The due process argument that the State law taxes some people to help others carry out their private purposes is framed in two phases. The first phase is that a state cannot tax A to reimburse B for the cost of transporting his children to church schools. This is said to violate the due process clause because the children are sent to these church schools to satisfy the personal desires of their parents, rather than the public's interest in the general education of all children. This argument, if valid, would apply equally to prohibit state payment for the transportation of children to any non-public school, whether operated by a church, or any other non-government individual or group. But, the New Jersey legislature has decided that a public purpose will be served by using tax-raised funds to pay the bus fares of all school children, including those who attend parochial schools. The New Jersey Court of Errors and Appeals

has reached the same conclusion. The fact that a state law, passed to satisfy a public need, coincides with the personal desires of the individuals most directly affected is certainly an inadequate reason for us to say that a legislature has erroneously appraised the public need.

It is true that this Court has, in rare instances, struck down state statutes on the ground that the purpose for which tax-raised funds were to be expended was not a public one. But the Court has also pointed out that this far-reaching authority must be exercised with the most extreme caution. Otherwise, a state's power to legislate for the public welfare might be seriously curtailed, a power which is a primary reason for the existence of states. Changing local conditions create new local problems which may lead a state's people and its local authorities to believe that laws authorizing new types of public services are necessary to promote the general well-being of the people. The Fourteenth Amendment did not strip the states of their power to meet problems previously left for individual solution.

It is much too late to argue that legislation intended to facilitate the opportunity of children to get a secular education serves no public purpose. The same thing is no less true of legislation to reimburse needy parents, or all parents, for payment of the fares of their children so that they can ride in public busses to and from schools rather than run the risk of traffic and other hazards incident to walking or 'hitchhiking.' Nor does it follow that a law has a private rather than a public purpose because it provides that tax-raised funds will be paid to reimburse individuals on account of money spent by them in a way which furthers a public program. Subsidies and loans to individuals such as farmers and home owners, and to privately owned transportation systems, as well as many other kinds of businesses, have been commonplace practices in our state and national history.

Insofar as the second phase of the due process argument may differ from the first, it is by suggesting that taxation for transportation of children to church schools constitutes support of a religion by the State. But if the law is invalid for this reason, it is because it violates the First Amendment's prohibition against the establishment of religion by law. This is the exact question raised by appellant's second contention, to consideration of which we now turn.

Second. The New Jersey statute is challenged as a 'law respecting an establishment of religion.' The First Amendment, as made applicable to the states by the Fourteenth, *Murdock v. Commonwealth of Pennsylvania*, commands that a state 'shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.' These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity. Doubtless their goal has not been entirely reached; but so far has the Nation moved toward it that the expression 'law respecting an establishment of religion,' probably does not so vividly remind present-day Americans of the evils, fears, and political problems that caused that expression to be written into our Bill of Rights. Whether this New Jersey law is one respecting the 'establishment of religion' requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

. . . .

. . . . Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom

rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause. . . .

The 'establishment of religion' clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.'

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the state's constitutional power even though it approaches the verge of that power. New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church. On the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any other faith, because of their faith, or lack of it, from receiving the benefits of public welfare legislation. While we do not mean to intimate that a state could not provide transportation only to children attending public schools, we must be careful, in protecting the citizens of New Jersey against state-established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general State law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State. The same possibility exists where the state requires a local transit company to provide reduced fares to school children including those attending parochial schools, or where a municipally owned transportation system undertakes to carry all school children free of charge. Moreover, state-paid policemen, detailed to protect children going to and from church schools from the very real hazards of traffic, would serve much the same purpose and accomplish much the same result as state provisions intended to guarantee free transportation of a kind which the state deems to be best for the school children's welfare. And parents might refuse to risk their children to the serious danger of traffic accidents going to and from parochial schools, the approaches to which were not protected by policemen. Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions, than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose. It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

Citation: *Everson v. Board of Education of Ewing Township,* 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).

Evolution, Teaching of

See Creationism, Evolution, and Intelligent Design, Teaching of

Extended School Year Services

The Individuals with Disabilities Education Act (IDEA) and its regulations do not unequivocally require school boards to provide students with disabilities with special education and related services during traditional school vacations. However, when students with disabilities need extended school year (ESY) programming in order to receive a free appropriate public education, school boards must deliver such programs. Even though most students with disabilities do not require services during school vacations, those with severe disabilities sometimes require programming of this sort. The IDEA and its regulations are silent as to the situations in which school boards must provide ESY programming, but the courts have offered some direction, as summarized in this entry.

Required Option

Courts in three federal jurisdictions quickly established the principle that programming beyond the traditional school year must be an available option. In the first of these cases, a federal trial court in Georgia, later affirmed by the Eleventh Circuit, held that state practices that effectively limited educational programming to 180 days per year violated the IDEA (*Georgia Association of Retarded Citizens v. McDaniel,* 1981, 1983, 1984). Noting that the IDEA requires the full consideration of the unique needs of each child, the court asserted that any policy that prohibited or inhibited such full consideration violated the statute.

Around the same time, the Fifth Circuit, in a case that originated in Mississippi, stressed that the IDEA did not tolerate policies or practices that imposed a rigid pattern on the education of students with disabilities, but instead favored the development of individualized education programs (IEPs) based on an individual evaluation (*Crawford v. Pittman,* 1983). The court emphasized that categorical limitations on the length of special education programs were not consistent with the IDEA. Likewise, a federal trial court in Missouri, in an opinion later affirmed by the Eighth Circuit, acknowledged that any policy that refused to consider ESY programming violated the IDEA (*Yaris v. Special School District, St. Louis County,* 1983, 1984). Subsequent courts recognized the notion that ESY programming is required when it is needed to prevent substantial regression, if the time required for students to recoup lost skills will substantially impede their progress toward meeting the objectives contained in their IEPs. This principle first surfaced in a suit from Pennsylvania in which a federal trial court reasoned that some students with severe disabilities suffered substantial regression during vacation periods and that the time required to recover lost skills was significant (*Armstrong v. Kline,* 1979, 1980, 1981). The court was convinced that these students would not be given a free appropriate public education unless they received services beyond the traditional 180-day school year.

Defining the Regression Standard

Later opinions refined the regression/recoupment standard. The Fifth Circuit postulated that an ESY program is required when the benefits accrued during the school year may be significantly jeopardized in the absence of a summer program (*Alamo Heights Independent School District v. State Board of Education,* 1986). The Sixth Circuit observed that regression in the past does not need to be shown to justify the need for ESY programs (*Cordrey v. Euckert,* 1990). That court acknowledged that the need for ESY programming can be established by expert opinion based on a professional individual evaluation of the student's needs. Naturally, past regression would help demonstrate the need for an ESY.

Although the regression/recoupment criterion has received almost unanimous acceptance in ESY cases, some courts have looked at additional factors in determining whether students should be given services beyond a traditional school year. In that regard, the Tenth Circuit indicated that the following factors must be considered: degree of impairment, amount of regression, recoupment time, rate of progress, availability of other resources, and the student's skill level (*Johnson v. Independent School District No. 4 of Bixby,* 1990).

The regression/recoupment standard does not require school personnel to provide an ESY program in every instance in which a student with disabilities might experience regression. Courts know that regression during the summer vacation is normal for all students. Thus, the courts require school officials to provide ESY programs only when the rate of regression and/or the recoupment time is excessive. For example, a federal trial court in Wisconsin declined to order a school board to provide a summer school program when a student's regression during the summer months was no greater than that of a child without disabilities (*Anderson v. Thompson,* 1980, 1981). The court found that the student would not have suffered an irreparable loss of progress without summer school. Similarly, the Sixth Circuit determined that when a child benefits meaningfully from an IEP for a traditional school year, an ESY program would not be obligatory unless those benefits would be significantly jeopardized without summer programming *(Cordrey).*

The Fourth Circuit pointed out that ESY services are necessary only when the benefits that students with disabilities gain during the school year are significantly jeopardized if they are not provided with educational programming during the summer months (*MM v. School District of Greenville County,* 2002). It must also be kept in mind that an ESY program is required only to prevent regression, not to advance skills that students have not yet mastered (*McQueen v. Colorado Springs School District No. 11,* 2006).

Decisions regarding the duration of ESY programs must be made on an individualized basis and may not be made on the basis of length of existing programs (*Reusch v. Fountain,* 1994). Therefore, the ESY services that school boards provide must be sufficient to realize the objective of preventing regression so that students may continue to make progress during the next school year (*J. P. ex rel. Popson v. West Clark Community Schools,* 2002).

Allan G. Osborne, Jr.

See also Disabled Persons, Rights of; Free Appropriate Public Education; Individualized Education Program (IEP); Related Services

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Reusch v. Fountain, 872 F. Supp. 1421 (D. Md. 1994).
Yaris v. Special School District, St. Louis County, 558 F. Supp. 545 (E.D. Mo. 1983), *aff'd,* 728 F.2d 1055 (8th Cir. 1984).

Extracurricular Activities, Law and Policy

Extracurricular activities fall outside of a school's academic curriculum. Participation by students is voluntary. Extracurricular activities are not a student right, but a privilege. Students interested in participating in extracurricular activities are subjected to minimum standards for qualification. Extracurricular activities range from the commonly known sports teams, such as football, basketball, track and field, field hockey, and soccer, to academic clubs, such as chess club, mathematics club, and pep club. Most sports teams are single gender, whereas academic clubs may be coeducational. This entry discusses related policy and litigation.

Board Policies

Whatever the extracurricular activity, school boards are allowed to establish policies regarding student behavior, academic standing, physical examinations, drug testing, and other requirements needed to ensure the safety and health of each participating student. Of course, board policies must be consistent with those of their state athletic associations, particularly with regard to eligibility based on age and academic standing, topics that have generated considerable controversy.

Educators must be aware of current board policies governing student participation in extracurricular activities within their districts. Noncompliance with board policies can render students ineligible to participate in extracurricular activities. Noncompliance/violations can be in the form of not consenting to drug testing, substandard grades or grade point average, other disciplinary issues not necessarily related to extracurricular activities, and other infractions of school board policies. Notice of the noncompliance/violations must be given to students so that they have the opportunity to present information identifying or clarifying the context and circumstances of their alleged actions. *Palmer v. Merluzzi* (1989) affirmed that students are due "some process" but require only oral or written notice of charges and an opportunity to present their side of the story.

Court Rulings

In recent years, litigation associated with the rights of students to participate in extracurricular activities focused on the issue of drug testing for participation and due process, since doing so imposes a condition on participants that does not apply to other students. A summary discussion of some of the litigation follows.

The Supreme Court held that the suspicionless drug testing of student athletes in *Vernonia School District 47J v. Acton* (1995) was constitutional and did not violate a student's Fourth or Fourteenth Amendment. In *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), the Court largely applied the same test as in *Acton* in holding that a board's policy for urinalysis testing for drugs in order to participate in any extracurricular activity is a reasonable means of preventing and deterring drug use among its students. The Court considered the difference between nonathletic and athletic extracurricular activities and determined the distinction unessential in using *Acton* to render its decision. The primary reason for the constitutionality of the school's drug policy rests with the school's custodial responsibility and authority.

In *Board of Education v. Earls,* the Court applied a three-part test to determine the constitutionality of the extracurricular policy of drug testing. The first part considers the right to privacy of student athletes. The Court has consistently ruled that due to the requirements of participation in sporting activities, given the communal dress and physical exams, the student athlete should have a lesser expectation of privacy. The second part evaluates the collection of the urinalysis sample. Again, the Court found the collection to be minimally intrusive, while providing safeguards that the sample is genuine. The final part considers the need for drug testing whether a specific drug problem has been identified. The Court reasoned that due to the responsibilities of school toward educating young people about the hazards of drug and alcohol use, an actual or perceived drug or alcohol problem is not necessarily needed to allow testing of student athletes.

The Court acknowledged that school officials need not wait for actual drug or alcohol problems to educate and prevent abuse. Part of the education of the public includes awareness of consequences when faced with decisions that may become life threatening. By conducting drug and alcohol urinalysis testing, school officials may reduce the probability of drug and alcohol abuse among what many consider the peer leaders in schools. Further, the Court has extended this to include nonathletic extracurricular activities, due to the prominence within the school of the student participants. The Court maintained that it is a reasonable means of preventing and deterring drug use among schoolchildren. The Court has consistently rendered decisions supporting the school district/school board policies for drug and alcohol prevention by students participating in extracurricular activities.

Although students do not lose their constitutional rights when entering schools, the courts

have determined that students who wish to engage in the privilege of participating in extracurricular activities can be subjected to a greater amount of control than their peers or adults in the general public. Insofar as students who choose to participate in extracurricular activities do so voluntarily, they must subject themselves to intrusions on their privacy as a condition of participation in privileged activities.

Michael J. Jernigan

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Fourteenth Amendment; Privacy Rights of Students; *Vernonia School District 47J v. Acton*

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Fair Use

According to Section 107 of the federal Copyright Act, fair use of a copyrighted work, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." Fair use balances the rights of the owners and creators of copyrighted works with the needs of those who use such works (e.g., teachers and students). If the use of a copyrighted work is fair, then a user need not obtain advance consent of the copyright holder. In addition, fair use is an affirmative defense for alleged copyright infringers. In such cases, defendants generally have the burden of proof to show that their use was fair.

Evaluating whether a use is fair requires the application and balance of four factors, articulated explicitly in the act and discussed in this entry:

1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes
2. The nature of the copyrighted work
3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole
4. The effect of the use upon the potential market for or value of the copyrighted work

Purpose of Use

When examining the purpose and character of use, courts look at whether it is commercial or noncommercial, and whether the use is public or private. Although the determination is not automatic, noncommercial uses tend to be viewed as fair, while commercial uses are typically seen as unfair. Further, private uses are more often deemed fair uses than public ones. Positive for educators, educational purposes generally lean toward a finding of fair use.

The express language of Section 107 makes the distinction between nonprofit and for-profit educational uses. In order to make the distinction, a plaintiff (copyright holder) must present evidence of present or future harm to the market for the copyrighted work. Consequently, the fact that students are the ultimate users of the copyrighted works does not automatically dictate a finding of fair use. One of the biggest controversies arises in cases of course packet copies of multiple works for students to purchase. Largely, the courts agree that commercial copying services must obtain the copyright holders' permission before including copies of protected works in compiled course packets.

Nature of the Work

On the second fair use factor, the nature of the copyrighted work, courts generally look at whether a copyrighted work is published or unpublished and whether it is fiction or fantasy versus nonfiction or factual or

scientific material. If the copyrighted work used is fantasy or fiction (generally considered high on creativity and originality), then a court will weigh the second factor against a finding of fair use.

The use of copyrighted informational works, on the other hand, leans toward a finding of fair use, but the determination is not so easy when courts must consider the always controversial line between ideas (not protected) and the expression of them (protected). In nonfiction writing, scientific writing, and even in history and biography, multiple authors may interpret the same sets of facts and will often engage similar treatment of them. This does not dictate that a later work is an infringement of all those that came before.

There are exceptions, however. If a copyrighted work is unpublished, courts will weigh this factor against a finding of fair use. According to the Supreme Court in *Harper & Row Publishers, Inc. v. Nation Enterprises* (1985), an author has the right of first publication. For example, if a teacher provides her students with an unpublished writing produced by that teacher, future publication rights still belong with the teacher.

Amount of Material and Market

In the determination for the third fair use factor, the more material taken from the copyrighted work, the more likely a court will be to determine that the use is unfair. However, the measure of the material taken is made both quantitatively and qualitatively. For example, the same number of words taken from a novel as from a short poem could certainly give way to different fair use determinations.

On the quantitative end of the principle, if the quantity used is high, the fourth fair use factor—effect on the market—may play a role and dictate a finding of unfair use. On the qualitative end of the principle, the key determinant is whether the "heart" of the original work was taken. Quoting only the facts from a copyrighted source may not amount to an unfair use, but when the part taken is the essence of the original work, or the portion with the most popular appeal, the use will likely be unfair.

For the final fair use factor, the effect of the allegedly infringing use on the market for the original work, the copyright holder must show, with reasonable probability, a causal connection between the infringement and loss of revenue, not only for the current market, but also for the future one. In response, the alleged infringer must show that the damage would have occurred even without this use. Important to the inquiry is the effect not only on the market for the original work, but also on the markets for derivative works.

With respect to academic activities, fair use will generally be recognized so long as the use does not adversely affect the copyright holder's market. For example, the use of brief quotes and passages from earlier works in a biography of the author of those works is considered a fair use, because the use does not affect the market for the biography subject's pre-existing writings. On the other hand, when suitable copies of works are available from the copyright holders for purchase or license, then wholesale copying will not be considered fair, as in cases involving the copying and archiving of research articles, sheet music, or textbooks and the recording and copying of audiovisual works when suitable copies are available for sale.

While fair use determinations are made on a case-by-case basis, there are few legal disputes over fair use in educational settings, as the purposes are most often educational and noncommercial, regardless of whether the copyrighted works used are hard copy or electronic. Teachers may make copies of materials for lesson preparation and for classroom use, usually without incident. Section 110(1) of the act permits the performance and display of a copyrighted work by teachers and students "in the course of face-to-face teaching activities." Further, section 110(2) permits these same activities in online or distance education formats as long as they are under the direct supervision of a teacher, an integral part of the class session, directly related to the classroom content, and made available only to those officially enrolled in a class.

Patrick D. Pauken

See also Copyright; Digital Millennium Copyright Act; Intellectual Property

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Sony Corporation of America v. Universal Studios, 464 U.S. 417 (1984).

False Imprisonment

False imprisonment, sometimes called false arrest, is a tort that protects an individual's freedom from improper restraint and includes more than simple incarceration. An individual can be wrongfully confined when in an open street, traveling in an automobile, or even confined in an entire city. Generally, there can be no tort of false imprisonment unless a defendant intends to cause a plaintiff's confinement. This entry briefly describes the law and provides examples of education-related cases.

According to the *Restatement (Second) of Torts,* an action for false imprisonment requires that a plaintiff be aware of the wrongful confinement at the time it occurs. Damages can include compensation for loss of a plaintiff's time, physical discomfort, mental distress, and humiliation. The wrongful restraint may be caused by the placement of physical barriers, by a threat of force, or by the defendant's conduct or words, which would cause a person to reasonably submit to wrongful restraint due to a fear of force, even though no force is used or explicitly threatened.

A Westlaw search conducted in early 2007 produced slightly less than 200 cases that involved schools and contained the term "false imprisonment." About three quarters of these cases were filed since 1990. Further, claims of false imprisonment were often included as one of many allegations of tortuous wrongdoing by plaintiffs. In other words, few cases involving schools were focused solely on the tort of false imprisonment.

Cases in which school boards or their employees were sued for false imprisonment illustrate the elements that are necessary for a plaintiff to maintain a cause of action. For example, in *Ette v. Linn-Mar Community School District* (2002), an Iowa school board was sued under a variety of theories, including false imprisonment, after school authorities sent a ninth grade student home alone by bus during an out-of-state band trip to San Antonio, Texas. After the student was discovered in possession of cigarettes in violation of school rules, a trip director put him on a Greyhound bus in San Antonio for a 30-hour trip home to Iowa. The Supreme Court of Iowa upheld dismissal of the student's false imprisonment claim, pointing out that he consented to boarding the bus and had not been confined against his will.

Likewise, in *Daniels v. Lutz* (2005), a federal court in Arkansas rejected a student's false imprisonment claim against a teacher who allegedly hit him and grabbed him to prevent him from leaving a classroom. The court allowed the student's battery claim to proceed but dismissed the false imprisonment claim on a motion for summary judgment. The court noted that although the teacher attempted to hold the student to get him to stay in the classroom, the student broke free. The student then boarded a school bus and arrived home as usual. Insofar as it was undisputed that the student was not detained, the court dismissed the false imprisonment claim.

In *School Board of Miami-Dade County v. Trujillo* (2005), an appellate court in Florida rejected a false imprisonment claim against a school board and bus driver that arose from a child's overlong confinement on a school bus, ruling that there was no evidence that school employees intended to confine the student against his will. On the first day of school, a bus driver employed by the school board picked up the plaintiffs' 4-year-old son, a special needs student, about an hour later than his scheduled pick-up time. While

attempting to pick up other students, the bus driver was delayed, and the child arrived at school about four hours late. The plaintiffs alleged that the child arrived at school dehydrated and that he subsequently had nightmares and developed a fear of school buses.

Prior to trial, the trial judge granted the board's motion for summary judgment on the parents' false imprisonment claim but allowed their negligence count to be heard by a jury. On further review, an appellate court upheld the dismissal of the parents' false imprisonment claim and reversed the jury's negligence verdict. There was no evidence, the court ruled, that the board or its employees intended to confine the child, had knowledge that confinement would result, or that he was prevented from leaving the bus or held against his will. Rather, the court maintained that the evidence showed that the bus driver picked the child up at his home and simply managed to get lost. The incident hardly amounted to false imprisonment, the court concluded.

Another case from Florida, *Escambia County School Board v. Bragg* (1996), illustrates the principle that private individuals who cooperate in good faith with police do not thereby expose themselves to the tort of false imprisonment. Here a jury awarded a judgment against a school board for false arrest after school employees incorrectly identified certain equipment in a plaintiff's possession as belonging to the high school. Based on this inaccurate report, the plaintiff was arrested by police and charged with grand theft. On further review, an appellate court reversed a judgment that had been entered on behalf of the plaintiff, reasoning that a private citizen may not be liable in tort for making an honest, good faith mistake in reporting an incident to the police. According to the court, the mere fact that a citizen's communication with a police officer leads to a mistaken arrest does not make the citizen liable for the detention.

Richard Fossey

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School Board of Miami-Dade County v. Trujillo, 906 So. 2d 1109 (Fla. Dist. Ct. App. 2005).

Family and Medical Leave Act

The Family and Medical Leave Act (FMLA), which became law in 1993, applies to public and private employers. Subject to greater protections than they may have under other federal or state laws or collective bargaining contracts, workers at employers covered by the law are entitled to 12 weeks of unpaid leave during any 12 month period as provided for in their employers' FMLA policies. The key protection available under the FMLA is that employees returning from leaves must be restored to their same or similar positions with equivalent pay and benefits. This entry describes what the law requires, including special provisions for schools.

Who Is Included

The FMLA defines private employers as those engaged in commerce or industry with 50 or more eligible employees each working day during 20 or more calendar weeks in the current or preceding calendar year. In addition, the FMLA covers public agencies or employers and their political subdivisions, the most important of which, for this entry, are school boards. The FMLA also specifically applies to private elementary and secondary schools.

The FMLA includes a special rule for schools. According to this rule, any school system "would not be eligible for FMLA leave if the school has fewer than 50 employees and there are no other schools under the jurisdiction of the same employer (usually a school board) within 75 miles" (29 U.S.C. § 825.600(b)). Regardless of size and level of coverage, all schools are subject to the FMLA's record-keeping requirements.

In order to be covered by the FMLA, employees, including both full- and part-time, must have worked for their employers for at least 12 months, providing at least 1,250 hours of service during the year immediately preceding the start of leave.

Rules About Taking Leave

The law specifies 12 weeks of unpaid leave in a 12-month period. When employers create their policies, they may use the calendar year; any 12-month leave period such as a fiscal year; or a 12-month span measured forward, or backward, from the first FMLA leave date. If employers offer *paid* leave for fewer than 12 weeks, the remainder of a leave may be without pay. However, if employees have accrued paid vacation, personal, or family leave, they may elect, or employers may require, these to be substituted for unpaid leave. If leave plans do not allow for substitutions, then they are not permitted. Employers may modify their policies as long as they afford workers 60 days notice.

Employees may request work leave under two broad categories. The first, child care, covers the birth, adoption, or foster care assumption of a child within 12 months of the event. The second, a "serious health condition," pertains to the illnesses of spouses, children, or parents, or one rendering employees unable to perform job functions. The FMLA defines a serious health condition as one requiring treatment from or under the direction of health care providers, such as doctors of medicine and osteopathy, podiatrists, dentists, clinical psychologists, optometrists, and nurse practitioners. The three categories of serious health conditions are those requiring inpatient care; those necessitating absences from work, school, or other daily activities in order to obtain continuing treatment; and those including prenatal care or continuing treatments for chronic or long-term conditions that are incurable or so serious that if left untreated would likely result in incapacities for more than three days. Spouses who work for the same employer must share the 12 week allowance for the birth of a child or to care for sick parents, but each can take 12 weeks of unpaid leave to look after sick children.

Employees may take leave for 12 consecutive weeks or may seek intermittent or reduced leave. Intermittent leave is taken in separate blocks of time for single illnesses or injuries rather than over continuous periods of time. Reduced leave occurs when employees seek changes to part-time or flexible scheduling after childbirth. If this happens, employers may temporarily transfer workers as long as there are no reductions in salary and benefits.

Individuals requesting leave for child care or serious medical conditions must provide 30 days notice or as much as is practicable. Employees seeking leave for foreseeable treatments due to serious medical conditions must make reasonable efforts to schedule them so as not to cause undue disruptions at work. While leave policies may waive notice requirements, if they remain in effect but employees do not comply, employers may deny leave requests for up to 30 days.

Employers may require certification from health care providers before granting leaves. Certification should include the dates when conditions started, their likely duration, and statements of inability to perform job functions. Leaves to care for family members should include estimates of how long it will take to provide care. If employers doubt the validity of certifications, they may, at their own expense, obtain second opinions. If the two opinions conflict, employers may seek a third, at their own expense, from a health care provider that is mutually acceptable to both parties. A third opinion binds both parties.

Employees who are asked to provide certification must be given at least 15 days to comply. Employers may seek recertification at reasonable intervals of not less than 30 days. If employees request extensions or are unable to return to work after 30 days, or if employers doubt the continuing validity of certifications, they need not wait 30 days before seeking recertification. Leave policies should address consequences for employees who fail to provide certification.

Special School Provisions

Special rules apply to school personnel, such as teachers and special education assistants working primarily in instructional capacities. These rules are inapplicable

to instructional aides whose primary jobs do not include teaching and to auxiliary personnel such as counselors, psychologists, or curriculum specialists and cafeteria workers, maintenance staff, and bus drivers. When teachers request intermittent or reduced schedule leaves for foreseeable medical care and will miss more than 20% of the total of working days during leave periods, school systems have two options. Boards may either require teachers to take leaves for periods not to exceed the length of their planned treatments or may temporarily transfer them to other jobs with equivalent pay and benefits.

Three special rules apply for leaves taken near the end of school terms. First, if teachers wish to begin leaves more than five weeks prior to the end of terms, school boards may require them to wait until the end of the term if they will be gone for at least three weeks and they would return to work during the three weeks before the end of term. Second, if leaves are less than five weeks before the end of term, officials may require teachers to wait until the end of term if leaves are to be more than two weeks long and their returns would be during the two weeks prior to the end of term. Third, if requested leaves are less than three weeks before the end of term and greater than five working days, boards may require teachers to wait to take leaves until the end of term.

Rules About Returning

In general, employers are required to provide returning workers with equivalent jobs, pay, and benefits. Even so, if employers have good faith reasons to eliminate the jobs of employees who are on leaves, and do not act out of retaliation, then, subject to proving that they acted with proper motives, positions may be terminated. Employers must continue to provide pre-existing group health plans to employees who are on leave on the same basis as if they worked continuously. Further, employees are entitled to new plans, benefits, or changes in group coverage to the same extent as if they were not on leave along with notification of any opportunities to change plans or benefits.

Where health care plans require employees to contribute, leave policies should include terms on how payments will be made during absences. If employees do not pay premiums, employers have two options: They may either continue making payments to keep policies active and collect from employees when they return to work, or they may discontinue coverage after 30 days. If coverage for health lapses while they are away from work, returning employees are entitled to reinstatement without qualifying periods. If employees fail to return to work due to serious health conditions or situations beyond their control, employers may not recover contributions that they made for health care. Employers may seek reimbursements from employees who do not return to work due to changing jobs.

Employers may require staff to provide certifications of fitness to return to work. Returning employees who are no longer qualified for jobs must be given reasonable chances to meet new standards. The FMLA contains a special section for returning instructional personnel requiring boards to make decisions about restoring teachers to equivalent positions in light of institutional policies, practices, or bargaining agreements.

Along with protecting employees from being fired for claiming their rights, the FMLA requires employers to make, keep, and preserve records demonstrating their compliance. Pursuant to this requirement, the Department of Labor has an annual right to review the FMLA records of employers and may examine them more frequently if necessary to investigate alleged violations.

Employees who believe that their rights have been violated may file suit in federal or state court within two years of alleged violations. Employees who can demonstrate that their employers willfully or intentionally failed to comply with the FMLA have three years within which to file suit. Employers who violate the FMLA may have to reinstate or promote employees whose rights have been violated and may also be liable for up to 12 weeks of wages, benefits, and reasonable attorney fees for these employees.

Charles J. Russo

See also Americans with Disabilities Act; Leaves of Absence

Legal Citations

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*
Family and Medical Leave Act, 29 U.S.C. §§ 2601 *et seq.*

Family Educational Rights and Privacy Act

The Family Educational Rights and Privacy Act of 1974, more commonly referred to as FERPA, is designed to safeguard the confidentiality of student education records. Also known as the Buckley Amendment after its primary sponsor, FERPA applies to all educational institutions that receive federal funds, which includes not only public schools but private schools, colleges, universities, and other institutions of higher learning as well. This entry describes key provisions of the law

Student and Parent Rights

FERPA grants parents rights to access the educational records of their children; these rights are transferred to students when they turn 18 or enter postsecondary institutions, regardless of their age at that time. Under FERPA, parents and students have the right to inspect and review any educational record that the school collects and maintains. Educational records include any type of information or record that is documented and relates directly to a student. Records may be in any medium and thus may include paper records, electronic records, or online data. Further, records include those that are maintained by institutions themselves (such as in a registrar's office) or by individual staff persons (such as teachers). Schools do not have to provide copies of the records to parents or students, unless it is not possible for them to have access to the original records. When copies of educational records are needed, the school may designate a reasonable fee for providing these copies.

If parents or eligible students believe that school records are incorrect or misleading, they may request that the official record be amended. If school officials decline to change the record, then parents or students may request formal hearings. If officials refuse to change the records after hearings, then students or parents may write statements that must be placed with the official records, explaining their side of the story.

FERPA guidelines protect current and former students. The guidelines do not apply to deceased students or those who applied to an institution but never attended. While rights regarding educational records eventually transfer to students as noted earlier, parents may obtain information regarding students who are over 18 if they can prove that the students are still financial dependents. Such financial dependency must be established through proof that the student was claimed as a dependent on the parent's most recent federal tax return. Parents may also receive information through written consent from students.

Protected Information

Information that is protected by FERPA can vary widely. Students' social security and identification number (as designed by local institutions) are considered personally identifiable information that is protected by FERPA. Specific data regarding academic performance also fall under the protection of FERPA; specific examples of these are student grades, grade point averages, academic standing, and test scores.

Not every piece of data and not all information is automatically considered an educational record subject to FERPA guidelines, however. Personal notes about a student written by a faculty or staff member are considered to be sole source documents, meaning that they are not part of a student's official educational record. These personal notes specifically are not kept in a student's permanent file and are not shared with anyone else—they are the teacher's own personal notes and are used solely by the teacher. Insofar as these notes are not shared with other educators and are not kept in student files, they are exempt from disclosure, because they are not considered educational records.

Less protected is so-called directory information, which may include items such as students' names, addresses, telephone numbers, dates of birth, birthplaces, honors, awards, dates of attendance, and height and weight. Information that is not considered to be harmful or an invasion of privacy is typically considered

to be directory information, although each institution develops its own specific definition, within the broader FERPA guidelines, of what data specifically constitute directory information; schools also designate when and to whom directory information may be released. While directory information may be released without consent, it is at the discretion of the institution to actually do so. Thus, schools are not required to release directory information. In order to release directory information, school officials must notify parents and qualified students that it may or will be released. Students and parents may request in writing that directory information regarding the student not be released.

Notification and Consent

In most instances, school officials must secure written consent from parents or eligible students in order to release educational information. FERPA does allow exceptions to this requirement, meaning that in some instances officials may release student information without consent. Information may be released without consent to any school official with legitimate educational interests in the student. Legitimate educational interests are defined as those occurring when educators need to review records in order to fulfill professional duties. For example, educational diagnosticians must evaluate educational records for students who have undergone testing for special services; although diagnosticians do not directly teach students in classrooms, they must have access to students' educational records in order to fulfill their duties.

If students move or transfer to other schools, records may be released without consent, but they or their parents must be so notified. Officials who work for accrediting agencies may also review student records without consent when they are acting in their official capacity, but they may not use personally identifiable information. Likewise, specified persons who conduct evaluations and audits of student services and records may also review such records without consent. Records may be released without consent in order to comply with a judicial order or subpoena, and officials involved with a health or safety emergency may also have access to student records. In accordance with state laws, state and local authorities involved with the juvenile justice system may have access to student records without consent. Finally, persons who are involved with student financial aid services are also permitted access to student records. In addition to these areas of exception, schools may also release, without written consent, information that is referred to as *directory information*, described below.

School officials are required to notify parents and students of their rights under the FERPA each year. The actual format for notice may vary at an institution's discretion or policy; notice may be given in a letter, in a handbook, in a newspaper article, in a brochure, or in any other public medium. Institutional policies regarding the release of information must be made available and given to students or parents on request.

In securing written consent from parents or qualified students, schools must state specifically what records are to be released. Consent must also define the purpose behind the release of the records and must identify the person to whom the records may be released. Written requests may not be granted via e-mail, because e-mail neither allows for the verification of senders' identities nor permits official signatures. The Department of Education is currently reviewing the release of information based on electronic consent and should issue a policy specific to this situation soon.

School officials must keep detailed records of each time requests are made for access to or the release of student records. This record of access must be kept current for however long students are enrolled at the schools and must specifically identify the persons who have requested or received information from files as well as the reasons for requesting access along with whether it was granted or denied. Records of access do not have to include information about the release of directory information.

Parties who are denied access to records under FERPA may file written complaints alleging specific violations with the Federal Department of Education's Family Policy Compliance Office (FPCO) within 180 days of alleged violations. If the FPCO agrees that there were violations, the Department of Education may sanction institutions by withholding payments, ordering them to comply, or declaring them ineligible for federal funding.

The Supreme Court twice reviewed issues arising under FERPA. In *Owasso Independent School District No. 1011 v. Falvo* (2002), the Court permitted a private claim to proceed in deciding that peer grading does not turn papers into educational records covered by FERPA. The Court ruled that a board did not violate FERPA by permitting teachers to use the practice over a mother's objection. In the same term, in *Gonzaga University v. Doe* (2002), the Court rejected a student's challenge to the unauthorized release of his records. The Court, in repudiating its earlier having allowed a private claim to proceed, decided that FERPA does not permit aggrieved parties to file suits against institutions in disputes over impermissible release of their records. The Court maintained the student's only recourse was to have petitioned the Department of Education for redress.

Stacey L. Edmonson

See also *Owasso Independent School District No. 1011 v. Falvo*

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Faragher v. City of Boca Raton

At issue in *Faragher v. City of Boca Raton* (1998) was whether a public employer could be liable for sexual harassment committed by supervisory employees. The Court ruled that an employer could be liable in such circumstances but also outlined affirmative defenses that employers might make to such claims. Although *Faragher* did not take place in a school setting, the Supreme Court's analysis should be useful for educators in the public sector, because it details the duties of those who serve in supervisory capacities in the face of complaints dealing with sexual harassment. *Faragher* underscores the necessity for employers, including universities and school boards, to have suitable sexual harassment policies in place. The failure of school, and other, employers to have such policies would generally deprive them of affirmative defenses to hostile work environment sex harassment claims.

Facts of the Case

As a college student, Beth Ann Faragher worked part-time and during the summers as a lifeguard for the City of Boca Raton, Florida, between 1985 and 1990. During that time frame, about 10% of the approximately 50 lifeguards were women. The two immediate supervisors of the lifeguards were men, who reportedly made offensive sexual remarks and lewd gestures to the women, touched them inappropriately, and asked them for sex. One of the two supervisors reportedly once said to Faragher, "Date me or clean toilets for a year." Two years after resigning, Faragher filed suit under Title VII of the Civil Rights Act of 1964, Section 1983 of the Civil Rights Act of 1871, and Florida civil rights law, alleging that the two supervisors created a sexually hostile work environment and that, as agents for the city, made it liable for nominal damages, costs, and attorney fees.

A federal trial court held that because the conduct of the two supervisors was sufficiently discriminatory to create a hostile working environment, the city was liable for their acts of harassment. The trial court imputed liability on the city on the basis of three justifications: the city had official knowledge or constructive knowledge of the harassment; the supervisors were agents of the city, and traditional agency principles applied; and the immediate supervisor of the lifeguards' supervisors knew of the harassment and had failed to act.

On further review, the Eleventh Circuit reversed in favor of the city. The court explained that employers can be indirectly liable for hostile environment sexual harassment by supervisors only if the harassment took place within the scope of their employment, if employers assigned performances of nondelegable duties to supervisors and employees were injured due to the supervisor's failure to carry out those responsibilities, or if there was an agency relationship present that helped the supervisors' abilities or opportunities to harass subordinates. Insofar as the court viewed the supervisors' behaviors as outside the scope of their employment, it refused to impose liability on the city.

The Court's Ruling

The Supreme Court agreed to hear an appeal in *Faragher* in order to address the legal standard for rendering employers liable for the discriminatory actions of supervisors against employees under Title VII. In an opinion authored by Justice David Souter, the Court acknowledged that there was a conflict between a traditional, mechanical view that harassing behavior by supervisors is always a "frolic" and outside the scope of employment, as compared to a more modern view that all supervisory behavior, including harassing behavior, is generally foreseeable, and that there are good policy reasons to assign the burden of improper supervisory behavior to employers as one of the costs of doing business. If this conflict is decided in favor of assigning vicarious liability to the employer for the misuse of supervisory authority, the Court found that these decisions must, in turn, be balanced by providing a means for employers to raise affirmative defense against liability.

In light of its analysis, the Supreme Court was of the opinion that employers can be subject to vicarious liability when supervisors create actionable hostile work environments. At the same time, the Court pointed out that employers may raise affirmative defenses to liability or damages. The Court observed that such affirmative defenses have two elements: (1) Employers must have exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) victimized employees unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer. The Court added that these affirmative defenses are unavailable when the behavior of supervisors ends in tangible employment actions such as demotions, discharges, or other adverse employment action.

David L. Dagley

See also Civil Rights Act of 1871 (Section 1983); Hostile Work Environment; Sexual Harassment; Title VII

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Federalism and the Tenth Amendment

The term *federalism* refers to the division of power and responsibility between the states and the national government. Implicit in the structure of the Constitution and reaffirmed by the Tenth Amendment, the principles of dual sovereignty—commonly called federalism—limit the powers of the national government in three significant ways. First, as the Eleventh Amendment confirms, the states retain their immunity from suit. Second, dual sovereignty limits Congress's power to enforce the Fourteenth Amendment. Third, federalism limits Congress's ability to regulate interstate commerce. The origins of federalism in the Constitution and early Supreme Court rulings are discussed in this entry, along with the Court-ordered limitations on Congress's power to enforce the Fourteenth Amendment or to regulate interstate commerce.

Background

In *The Federalist No. 51,* James Madison wrote, "In the compound republic of America, the power surrendered by the people is first divided between two distinct governments." By dividing sovereignty between the national government and the states, Madison said, the Constitution ensured that "a double security arises to the rights of the people. The different governments

will control each other, at the same time that each will be controlled by itself." Thus, as the Supreme Court said in *Texas v. White* (1868),

> The preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National Government. The Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.

This division of sovereignty between the states and the national government "is a defining feature of our Nation's constitutional blueprint," according to a more recent ruling in *Federal Maritime Commission v. South Carolina State Ports Authority* (2002). The division of power between *dual sovereigns,* the states and the national government, is reflected throughout the Constitution's text as well as its structure.

> Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front,

the Supreme Court said in *Gregory v. Ashcroft* (1991). In other words, although the Constitution gives vast power to the national government, the national government remains one of enumerated, hence limited, powers. Indeed, "that these limits may not be mistaken, or forgotten, the constitution is written," according the landmark *Marbury v. Madison* (1803) ruling.

Because the federal balance of powers is so important, the Supreme Court has intervened to maintain the sovereign prerogatives of both the states and the national government. In order to preserve the sovereignty of the national government, the Court has prevented the states from imposing term limits on members of Congress and instructing members of Congress as to how to vote on certain issues. Similarly, it has invalidated state laws that infringe on the right to travel, that undermine the nation's foreign policy, and that exempt a state from generally applicable regulations of interstate commerce.

Conversely, recognizing that "the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere" (*Gregory v. Ashcroft,* 1991) and that "the erosion of state sovereignty is likely to occur a step at a time" (*South Carolina v. Baker,* 1988), the Court declared that the national government may not compel the states to pass particular legislation, to require state officials to enforce federal law, to dictate the location of a state's capital, to regulate purely local matters, or to abrogate a state's sovereign immunity.

Development of the Concept

Adopted at the time of the Civil War, the Fourteenth Amendment diminishes the states' sovereign authority while enhancing the power of the national government. First, both the Equal Protection Clause and the Privileges or Immunities Clause impose substantive restrictions on the states. Moreover, although the Bill of Rights originally did not apply to the states, the Due Process Clause incorporated most of the provisions of the Bill of Rights. Second, the Fourteenth Amendment Enforcement Clause gives Congress the authority to enact legislation that enforces the substantive guarantees of the Fourteenth Amendment against the states. Consequently, if the states have engaged in conduct that violates the Fourteenth Amendment, then Congress can take remedial action to correct the violation and to prevent future violations.

However, there are limits on Congress's power to enforce the Fourteenth Amendment. In *City of Boerne v. Flores* (1997), the Supreme Court applied the "congruence and proportionality" test, which involves three questions. First, the Court must identify "the scope of the constitutional right at issue." Second, after identifying the right at issue, the Court must determine whether Congress identified "a history and pattern of unconstitutional . . . discrimination by the States." Third, if there is a pattern of constitutional violations by the states, the Court determines whether the Congress's response is proportionate to the finding of constitutional violations.

The Court has identified three broad categories of activity that Congress may regulate under the Commerce Clause. First, Congress may regulate the

use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though a threat may come only from intrastate activities. Third, Congress may regulate intrastate activities having a substantial relation to interstate commerce. The Court has stated that this last category includes only those activities that are economic in nature.

The test for determining whether an intrastate activity substantially affects interstate commerce varies depending on whether the regulated activity is economic in nature. If the intrastate activity is economic in nature, the impact of all similar activity nationwide is considered. Conversely, if the intrastate activity is not economic in nature, its impact on interstate commerce must be evaluated on an individualized, case-by-case basis. In other words, does the activity have anything to do with "commerce" or any sort of economic enterprise? Is it an essential, or indeed any, part of a larger regulation of economic activity?

While Congress may regulate the states when they engage in general commercial activities, Congress may not regulate the states when they act in their sovereign capacities. As the Court wrote in *Printz v. United States* (1997),

> Even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. . . . The Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce.

William E. Thro

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Federal Role in Education

> According to a time honored but naive notion, educational policies are fashioned by local school boards, operating independently in the thousands of school districts throughout America. This notion is based on the folklore of local control. (Fischer, 1982, p. 56)

From the first federal land ordinances of the 1780s through major judicial decisions like *Brown v. Board of Education of Topeka* (1954) and George W. Bush's 2001 promise to leave no child behind, the federal government has intervened in state and local educational affairs by outlining and implementing policies, programs, and laws that have significantly impacted the landscape of education in America. Moreover, while many have debated the amount of control the federal government should have in the education of the nation's children, its role has unquestionably expanded over time.

This entry provides an overview of the changing federal role in education. It begins with the legislative branch, highlighting key policies as well as strategies used to increase compliance. Next, it examines the work of the judicial branch, noting that while Supreme Court decisions have often resulted in important consequences for America's educational system, the interplay and interdependency between judicial and legislative action has been critical. Subsequently, the

entry examines initiatives of the executive branch that have marked shifts in the control or influence of the federal government in state and local educational policy and practice. Finally, it considers the significance of the growth and varied interest and involvement of the federal government in K–12 education.

Looking at Legislation

The founders of the American republic emphasized the importance of an educated citizenry. With a Kantian bent towards saving the general public from their "crude state of nature," many of America's first leaders believed that education was paramount to the success of the new republic. Leaders such as Thomas Jefferson, Alexander Hamilton, and James Madison espoused what they believed to be a direct correlation between education and the economic development of the country. Madison himself, during the 1787 Constitutional Convention, supported the creation of a national university; however, the remaining delegates were fearful of a central government possessing too much control over the nation's educational offerings. This same concern precluded the mention of education during the framing of the Constitution. The founders settled for a dual federalism in which powers would be divided between the states and federal government, leaving education primarily a state concern. Madison and other similar thinkers were desirous of a clear delineation between federal and state powers. The founders sought a separation that would respect the fact that state and federal agencies were designed for different purposes.

The early avoidance of a strong federal government set the tone for an American educational system that granted states and local education agencies primary control over their educational systems. Even so, public education has never entirely become a state or local matter. Early in the country's history, the federal government asserted its interest in education by enacting a series of policies granting land to territories and states for educational purposes. The Land Ordinance of 1785, for example, helped facilitate the westward movement of settlers by enticing families with the promise that public schools would be provided for every township they encountered. The subsequent Land Ordinance of 1787, known as the Northwest Ordinance, flexed the federal government's might by mandating that any territory wanting to become a state had to have an education provision in its basic law.

Almost a century later, Congress passed the first of the Morrill acts, which like the two land ordinances previously implemented set a supportive tone for education by providing land in an effort to boost educational offerings. The Morrill Act transferred land rights to each state with the promise that colleges would be built to address the country's leaders' desire to accelerate its knowledge within the agriculture and engineering fields.

Societal shifts from the early 1900s through the devastating crash of the stock market significantly changed how the federal government asserted itself in the realm of educational policy. Previously, the federal government supported education with broad distribution of monies. The government then altered its methods of giving general money and land offerings towards a categorical approach addressing targeted needs or desires. These categorical programs addressed the specific interests deemed worthy of federal funding. The Smith Hughes Act of 1917 addressed issues such as vocational education, while the Defense Education Act of 1958 addressed support for math, science, and foreign language instruction. It was during this increased period of categorical aid that the heated debate between big and small government reached a new intensity.

Federal policy typically works on the margins of state and local education, requiring incremental changes to educational programs and practices. It is also constrained by its limited authority and its relatively minor expenditures on education. When addressing public education, the federal government often resorts to policies of compliance or assistance. Compliance involves the use of financial sanctions to influence state and local governments in policy implementation. As a result, the success of compliance strategies tends to be dependent on how high the stakes are that are attached to the policy. Assistance involves the provision of financial or technical expertise in implementing a policy. In recent years, in particular, the federal government has used its fiscal resources to leverage compliance with national directives in multiple policy areas. Both compliance and

assistance strategies, regardless of how well planned, can be undermined by a variety of factors, from shifts in the economy to policy misinterpretations.

The Elementary and Secondary Education Act (ESEA) of 1965 was developed with both compliance and assistance strategies. Although it was not developed specifically to centralize education at the federal level, it was designed to change the role of the federal government in education. President Lyndon B. Johnson and members of the ESEA reform coalition viewed ESEA as a mechanism for funneling support from state and local agencies to target groups of students, particularly those considered educationally or financially disadvantaged. They employed the strategy of federal financial inducements to influence state and local participation. Thus, the federal government asserted its involvement in local schools, but in a way that offered some flexibility as to how Title I programs would be developed. This expansion of federal policy (which involved a long-term strategy for increasing the competence, responsiveness, and flexibility of state and local entities) into state and local governments epitomized President Johnson's optimism that the War on Poverty could be won with strong federal government involvement.

The Influence of Judicial Action

Education programs initiated by the federal government, both those that have been embraced and those that have been repudiated, have stoked the historical wrangling between supporters of an increased federal role in education and those who wish to see local education free from the interference of "big government." The expansion of judicial activity in educational policy issues, interestingly, is derived in large measure from the expansion of federal educational legislation. As the legislative branch sought to alter state and local priorities, the responsibility of the federal courts expanded. According to Louis Fischer, professor emeritus at the University of Massachusetts Amherst, the primary reasons for such involvement include ambiguous language in the Constitution and laws; failure of federal, state, or local officials to obey laws; the evolution of the law and its application due to social change; and the larger role of courts in recent times.

The courts have ruled on issues such as racial desegregation, bilingual education, financial equality, the education of students with disabilities, teacher quality, locker searches, and the use of standardized tests. In many cases, the courts have become involved in interpreting unsettled political and societal debates in education, decisions that earlier might have been considered unfit for adjudication. This section provides a thumbnail sketch of several federal judicial decisions that played a role in increasing the role of the federal government in state and local education.

In the early 1900s, the federal government's role in education was still considered "hands-off." This is illustrated by the 1925 Supreme Court decision in *Pierce v. Society of Sisters,* which determined that a state could not keep a child from attending an adequate private school. Yet, by the beginning of the 1950s, the federal government was becoming more involved in state and local education matters, particularly with regard to issues of race, gender, and the special needs of students with disabilities. All three of these issues dealt with students' constitutional right to education, and all three of these issues, after the judicial and legislative response, completely altered the relationship between the federal government and local and state education agencies.

Race

The early federal court cases involving race, such as *Plessy v. Ferguson* (1896), were considered to be constitutional matters of equal protection. Following numerous challenges to the Jim Crow laws of the South—led by Thurgood Marshall, who was then an attorney for the NAACP—a unanimous Supreme Court in 1954 rejected *Plessy*'s notion of "separate but equal" in *Brown v. Board of Education of Topeka.* According to Fischer, *Brown* outstrips all other judicial decisions in terms of the resulting lawsuits, court intervention, and education policy review and revision.

The South's refusal to acknowledge *Brown* set into motion several unprecedented actions by the federal government. The Court's second *Brown* decision, in 1955, demanded that educational officials seek a "prompt and reasonable start" (p. 300) toward compliance with *Brown I,* mandating that all compliance

efforts proceed "with all deliberate speed" (p. 301). However, many districts, especially those in the South, continued to defy this federal mandate. As a result, President Eisenhower, under intense political pressure and understanding that "deliberate speed" was not being made, called in the National Guard in an effort to implement the desegregation rulings of the Supreme Court. Even then, the Court's ruling failed to provide school boards and states with enough guidance (i.e., an actual plan) regarding the implementation of its ruling, and the debate shifted from issues involving desegregation toward the proper integration of public schools.

Brown's failure to openly define why or how school officials should actively seek to integrate their campuses left lower federal courts struggling with the task of interpreting it for 14 years. Finally, in 1968, *Green v. County School Board of New Kent County* offered the Supreme Court an opportunity to clarify the integrative intent of *Brown. Green* focused on a school system located in New Kent County, Virginia, where the entire student population attended one of two schools, which were segregated by race. Officials in New Kent made virtually no attempt to integrate their schools and soon found themselves on the verge of losing federal financial aid because of their lack of purposeful effort. In 1965, under the threat of a federal financial penalty, the board instituted a "freedom-of-choice" plan that allowed for students to select the campus they would like to attend.

After several years of laissez-faire policy in New Kent County, the Supreme Court confronted the situation in *Green.* The Court determined New Kent's policy was ineffective and at risk of causing an "intolerable delay" in the realization of the Fourteenth Amendment's call for equal protection for all students. The Court's new posture set a precedent in public schools by insisting upon a "unitary" status where segregation would no longer be present.

Following Green, school boards were left with deciding on a proper way to create systems where all schools could be considered unitary in status. Federal judges, looking for the logistical means to ensure the racial balance of public schools, soon decided that busing students would be necessary to overcome the de facto segregation found in many of the school districts across the nation. It was then, in 1968, in *Swann v. Charlotte-Mecklenburg Board of Education,* that the plaintiff's legal representation sought further clarification on the "realistic plan" mandated in *Green.*

The Charlotte-Mecklenburg school district, located in North Carolina, was composed of 107 different schools. Of those 107 schools, 21 of the campuses had student populations where 99% of their students were of color. The Court, citing that school authorities failed to provide "effective remedies," found that district courts have the power to fashion a remedy that will ensure a unitary school. One of the remedies that the Supreme Court approved was altering school zones, requiring that some students be bused to campuses where racial diversity was not present. The Court's willingness to intercede in local and state educational affairs helped end the delay of school integration.

Seemingly countless cases have followed in the many years since *Brown*, further interpreting and honing its principles. Many of these cases interlocked with larger policy issues, such as busing. This interdependency on and interaction between legislation and judicial action can also be examined through policy work regarding gender.

Gender

In the 1970s, just as America's federal government and its school systems grappled with racial integration in public schools, they also struggled with how to attend to the overt discrimination being experienced by females within educational institutions. In 1972, when Title IX legislation was introduced, America had been primed for discussions focused upon social awareness, discrimination, and equity. Throughout public school history, discrimination against females appeared in many different forms, from overt exclusion from particular classes such as shop to the subtle discrimination delivered to females through conversations about their limited career orientations.

Title IX offered a comprehensive addendum to a bill that covered education on all levels from kindergarten to university. When Title IX was first enacted, it gave all schools and institutions six years to meet compliance standards. Moreover, as with previous

federal mandates, the stick being used for compliance was the threat of the loss of federal funds. After Congress enacted Title IX, the Office for Civil Rights (OCR), a body within the Department of Education, had the responsibility of developing and enforcing the regulations.

Much like the vague language found in *Brown,* Title IX regulations allowed local agencies to act on what they interpreted to be the law's correct manifestations. For instance, the first section of the regulations mandated that schools and institutions designate a responsible employee and adopt a set framework for grievance procedures. These loosely enforced designations led to inept follow-through, in which a marginal effort to disseminate information regarding the requirements was put forward. This type of loose interpretation ensured that many females in public institutions, both students and employees, did not initially receive the antidiscriminatory protection they deserved under Title IX.

Initially, under Title IX an individual's only choice for action against a discriminatory offense was to file an official complaint with the OCR. After complaints were filed, the OCR provided no possible options for financial reward. The only power available to OCR was the ability to withhold federal funds from institutions violating provisions under Title IX. After seven years of muted change under Title IX, the Supreme Court heard *Cannon v. University of Chicago* (1979). *Cannon* involved a student who alleged that her medical school application was not accepted because she was a female. *Cannon* created a significant shift, because Title IX enforcement became more than just the threat of federal funds being pulled; the government would now allow individuals to seek private recourse.

In 1982, in *North Haven Board of Education v. Bell,* the Supreme Court addressed the issue of who was to be protected under Title IX jurisdiction. *North Haven* was monumental in that employees had previously not been identified as protected under Title IX. In *North Haven,* a tenured public school teacher tried to return to her job after taking a full year of maternity leave, only to find out she was barred from doing so. The Court ruled that Title IX never excluded employees from its reach.

The still vague understanding of Title IX as an enforceable law was put to the test again in 1984 when the Supreme Court agreed to hear *Grove City College v. Bell.* Grove City, as a private institution, desired to preserve its autonomy from the reach of federal government by refusing to accept federal funding. Under Title IX, every institution that received federal funds was to file an official letter with the federal government stating that it was in compliance. Grove City, claiming that as an institution it did not receive federal funds, refused to sign any statement of compliance. The Court, able to highlight the fact that several of Grove City's students received Basic Educational Opportunity Grants (BEOG) from the government, ruled against the college, using the justification that students receiving federal funds qualified the college to fall within the purview of Title IX.

Even though this was a victory for Title IX supporters, another portion of the *Grove* decision facilitated a significant setback. The *Grove* court also determined Title IX protections to be program specific. This determination meant that as long as students were in departments that chose not to use federal funds, gender discrimination could continue without penalty, thereby leaving an entire generation of females unprotected by Title IX. Congress closed the Title IX loophole that *Grove* created in passing the Civil Rights Restoration Act of 1988. This act ensured that as long as federal aid is distributed to any part of an educational system, compliance under Title IX is mandatory.

Disability

Federal involvement concerning the education of disabled children from the 1940s through the 1960s was minimal, with only some states distributing categorical funds to local school districts for the education of handicapped children. Very similar to the gender discrimination legislation and the desegregation legislation before that, the 1975 Education for All Handicapped Children Act (EAHCA) was born from a societal shift toward those issues addressing equality.

An early federal case impacting the education of those with disabilities was *Mills v. Board of Education of District of Columbia* (1972). In a manner similar to

that of an earlier case, *Pennsylvania Association for Retarded Children v. Pennsylvania* (1971), *Mills* focused on the failure of the District of Columbia school district to provide publicly supported education to "exceptional" children. *Mills* also addressed the exclusion, suspension, expulsion, and reassignment of exceptional children without due process. The *Mills* case created a societal momentum toward an understanding that children with disabilities should have access to a free and appropriate education. This momentum led to the enactment of Section 504 of the Rehabilitation Act of 1973. The courts expanded the reach of Section 504, which was originally intended for individuals with disabilities in the workplace, by ensuring that children with disabilities received equal educational opportunities in public schools.

The EAHCA (later the Individuals with Disabilities Education Act) was passed just three years after the antidiscriminatory Title IX was introduced. The EAHCA was also originally known as Public Law 94–142, indicating that it was the 142nd piece of legislation introduced during the 94th Congress. In enacting the EAHCA, Congress disapprovingly commented on public education's track record in educating students with disabilities, on its failure to meet their needs, on the lack of equal opportunity in education for them, on their exclusion from classes with their able peers, and on the lack of early detection of those children who have academically challenging disabilities. Those who had been advocating for more attention to children with disabilities were elated with Congress and the passing of PL 94–142. A number of important Supreme Court cases followed the passage of PL 94–142, starting with *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982), further influencing not only the education of students with disabilities but also the practices of public school professionals across the nation.

In sum, ours is a litigious nation, and the field of education has had its fair share of court cases. However, the interplay between legislation and judicial action has been essential in shaping the educational landscape in this country. Each has helped to interpret and hone the other. As Fischer notes, the court has historically interpreted the Constitution and laws on issues related to schools and thus influences education policy.

Executive Initiatives

The reality of the federal system is that policy and practice can be designed and refined at all levels and in all branches, and what begins in one branch or level rarely is contained there for long. There are many examples of this dynamic; the leadership of President Johnson in the development of ESEA legislation is one such example, and the involvement of President George W. Bush in the No Child Left Behind (NCLB) legislation is another.

When President Johnson began working with the ESEA committee in the early 1960s, skepticism toward a controlling federal government was still abundant, yet many federal leaders believed that the states were not capable of providing educational justice without federal involvement. This law was a major turning point in federal policy, finally breaking through barriers to action that were posed by concerns over race, religion, and federal intervention.

Interestingly, the Gardner Education Task Force, one of 14 policy task forces created by President Johnson to assist in the development of his domestic and international agenda, asserted that state departments of education were too weak to effectively implement the education programs being developed by President Johnson and the ESEA committee. In response, the committee proposed removing the Office of Education from the Department of Health, Education, and Welfare and creating an independent federal department of education.

Reviewing the organizations that federal leaders have developed to help them design and implement policy (e.g., the U.S. Department of Education, the National Commission on Excellence in Education) provides an interesting way to examine the federal role in education. The federal department of education imagined by Gardner in the 1960s and introduced in bills by countless members of Congress during the first half of the 20th century finally became a reality in 1979, when President Jimmy Carter signed into law the Department of Education Organization Act (P.L. 96–98).

Interestingly, while it was a notable legislative accomplishment, at the time the development of the U.S. Department of Education was more symbolic than substantive. President Carter did not have any major substantive educational reform initiatives in mind, and the federal government was spending around $25 billion on public schools, which represented less than 10% of the total education spending by all levels of government. The U.S. Department of Education officially began operating in May of 1980, and in less than a year, newly elected President Reagan promised to abolish it.

Despite this promise, the department not only survived President Reagan's administration but also was used handily by his education secretary, Terrell Bell, to create the National Commission on Excellence in Education (NCEE) to examine the state of education in America. The commission presented its report, *A Nation at Risk,* in 1983, and the report became front page news. In the report's recommendations, a new role was assigned to the federal government: to identify the national interest in education and then to fund and support efforts to protect and promote that interest. Yet, during the 1980s, the federal government did not provide the leadership called for in the report, relying instead on states to provide such leadership.

President Bill Clinton, who had been considered a strong "education" governor in Arkansas, picked up the challenge identified by former President Bush of defining a federal role in the standards-based reform movement. With his Goals 2000 Act of 1993 and the Improving America's Schools Act (IASA) of 1994, Clinton made early though not lasting progress. The 1994 reauthorization of IASA represented a major shift for Title I from dictating what educators must do to determining educational outcomes. However, in 2001 Congress dissolved the National Educational Goals Panel, an entity developed to assess the nation's progress toward its goals.

The following six years signaled a steady decline in the role of the federal government in education. Yet, to the surprise of many, when George W. Bush became president, he did not act in accordance with the Republican platform of reducing the federal role in education. Rather, building on the federal education programs of former presidents Bush and Clinton as well as the programs he had supported in Texas, his presidency led to the development of the 2001 NCLB legislation and, as a result, a profound increase in federal involvement in schools.

The Expanding Federal Role

This entry has described some of the growth in federal involvement in the nation's schools. While most descriptions of the federal government characterize the legislative, judicial, and executive branches as separate, these entities and their effects often overlap. The most recent and significant example of this is NCLB, which epitomizes the trend of the federal government to shift its emphasis from issues of equity for certain populations of students to standards-based reforms that affect all public school students. Of particular consequence is NCLB's 2014 accountability goal of having 100% of all students in the United States meeting proficiency levels on adequate yearly progress (AYP) testable subjects, and the expectation that all students—not just those covered by Title I—will be assessed by the same measures.

Preliminary state-by-state statistics reported to the U.S. Department of Education do not indicate a positive trend. By one report, nearly 25,000 public schools, or more than one fourth of the total, failed to meet the NCLB criteria for AYP in 2004–2005. Among the most serious offenders were Florida; Hawai'i; Washington D.C.; Nevada; and New Mexico, where 72%, 66%, 60%, 56%, and 53% of the schools respectively failed to show "enough" improvement. Following these statistical trends, the United States should expect the number of failed schools to greatly increase as NCLB continues to raise its accountability standards, leading to questions about the effectiveness of the law and the fairness of its measures. Insofar as NCLB allows states to adjust both their tests and the formulas used to calculate AYP, critics and supporters alike have found it difficult to make definite conclusions about the law's impact on student achievement. Even so, it is less difficult to discern its impact on the work of school and state education budgets and educational practice. Since the inception of NCLB, states have endured an ongoing struggle to fund the required federal mandates and contend that the federal government offers an inadequate

amount of funds to implement NCLB's accountability system.

In 2005, the federal government appropriated $13 billion to support all of Title I and NCLB. Of that sum, $12 billion was allocated for grants to local education agencies, $948 million for grants under Reading First (a program to improve reading instruction for poor students in low-performing elementary schools), $389 million for state assessments, $96 million for state grants for innovative programs, $86 million for Even Start (preschool) programs, and $47 million for state education agencies to deal with migrant, childhood neglect, and delinquency issues. In contrast the 2005–2006 budget for just the Houston Independent School District—one city in one state—exceeded $1.5 billion.

NCLB, undoubtedly, ratcheted up the level of federal control over public school policies and activities previously overseen by state and local educational authorities. Critics argue that the federal government restricts spending in a way that constrains state choices while increasing intergovernmental regulation and tensions between states and the federal government.

The impact has not stopped with policymakers and state and local educational leaders, however. Rather, the impact can be traced into the classroom. The shift in priorities has encouraged instructional practices and curriculum offerings that are more likely to involve preparation for high-stakes tests rather than research-based offerings designed to support student learning. Moreover, in one survey, teachers from California and Virginia indicated that NCLB sanctions were causing teachers to ignore important aspects of the curriculum. Further, the survey found that even high-quality, experienced teachers were transferring out of schools identified for improvement, which ironically are the very schools that need experienced, high-quality teachers.

The significance of the increased federal role in education extends beyond direct impacts upon educational policy and practice. As education continues to garner increasing interest, more policymakers are paying attention, and the policy environment is becoming more pluralistic. The business community, governors, federal and state leaders, and political candidates are putting more emphasis on educational issues and playing an increased role in defining educational issues, from standards to school reform. Still, the struggle to define the federal government's role in education has been a continuing issue of concern and will likely maintain its permanency. Whatever else may be said about how this particular struggle will play out in the future, the role of the federal government in education will almost certainly be different from what it has been in the past.

Michelle D. Young and Bradley W. Carpenter

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; No Child Left Behind Act

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First Amendment

The First Amendment was enacted in response to the experiences that the American colonists had with their British government as that government established religions in some colonies and limited freedom of the press generally. The First Amendment guarantees five freedoms:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Supreme Court did not review litigation involving the First Amendment until the 20th century because the justices had not developed and applied the "incorporation doctrine," which made the Bill of Rights applicable to the states through the Fourteenth Amendment. In *Gitlow v. New York* (1925), the Court found that the states could not limit all forms of political expression. In *Near v. Minnesota* (1931), the Court ruled that a state law violated freedom of the press as guaranteed by the First Amendment. Further, in *Cantwell v. Connecticut* (1940), the Court extended the religion clauses of the First Amendment to the states through the Fourteenth Amendment

This entry summarizes Supreme Court rulings on the freedoms guaranteed in the first amendment as they relate to schools.

Religion and Public Schools

Insofar as the religion clauses in the First Amendment have generated a significant amount of litigation involving public schools, this section highlights key cases on this important topic. As to aid, in *Everson v. Board of Education of Ewing Township* (1947), the Supreme Court laid the foundation of the child benefit test, under which the government is free to provide specified types of aid to students who attend religiously affiliated nonpublic schools. In *Everson,* the Court allowed the state of New Jersey to reimburse parents for the cost of sending their children to religiously affiliated nonpublic schools. Almost 20 years later, in *Board of Education v. Allen* (1968), the Court upheld the loan of textbooks for secular instruction to students who attended religious schools.

In the Supreme Court's most important case involving aid to religion, *Lemon v. Kurtzman* (1971), the justices invalidated plans from Pennsylvania and Rhode Island that would have provided salary supplements for teachers in religious schools. In reaching its conclusion, the Court created the tripartite *Lemon* test, which reads: "First, the statute must have a secular legislative purpose; second, its principal or primary

effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'excessive entanglement with religion' " (p. 612–613). Following *Lemon,* the Court struck down a wide variety of forms of aid to religious schools until 1993.

Starting with *Zobrest v. Catalina Foothills School District* (1993), the Supreme Court reinvigorated the child benefit test in deciding that a school board could provide a sign-language interpreter to a deaf student who attended a religious school. The Court noted that the interpreter provided neutral aid to the student without offering financial benefits either to his parents or his school, and there was no governmental participation in the instruction, because the interpreter was only a conduit who effectuated the student's communications with school staff. Five years later, in *Agostini v. Felton* (1997), the Court permitted the on-site delivery of Title I services for poor students in recasting the *Lemon* test by leaving its purpose test unchanged but melding the effects and excessive entanglement tests into one. Finally, in 2002, in *Zelman v. Simmons-Harris,* the Court upheld a voucher program that allowed specified students to attend religious schools, because they did so based on the independent choices of their parents.

As to religion in schools, in *People of the State of Illinois ex rel. McCollum v. Board of Education of School District 71, Champaign County* (1948), the Supreme Court invalidated a plan that allowed religious leaders to teach religion classes on-site in public school on the basis that this violated the Establishment Clause. However, four years later in *Zorach v. Clauson* (1952), the Court said public schoolchildren could leave their schools during the class day to attend religious school to receive religious instruction, as long as they had the written permission of their parents.

Turning to prayer and other school-sponsored religious activities, in *Engel v. Vitale* (1962) the Supreme Court struck down a directive calling for the recitation of a prayer in public schools as an unconstitutional establishment of religion. A year later, in the companion cases of *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963), the Court ruled that the state could not require students to say the Lord's Prayer or listen to readings from the Bible, even if their parents could give written permission to excuse them from doing so, in creating the first two parts of what would become the *Lemon* test. More than 20 years later, the Court struck down silent meditation or voluntary prayer in public schools in *Wallace v. Jaffree* (1985) on the ground that the state legislature intended to use this as a means of introducing school prayer. The Court later invalidated prayer at graduation ceremonies in *Lee v. Weisman* (1992) and at football games in *Santa Fe Independent School District v. Doe* (2002).

Speech and Public Schools

Students

The Supreme Court did not directly address a case involving student rights of any kind until 1969. In *Tinker v. Des Moines Independent Community School District,* the first of its four cases on this point, the Court determined that school officials could not limit the free speech rights of students in a dispute over wearing black armbands to protest American involvement in Vietnam, absent a showing that doing so created a reasonable forecast of material and substantial disruption. However, in *Bethel School District No. 403 v. Fraser* (1986), the Court limited student speech rights in acknowledging that educators can limit expression—in this case, a nominating speech for student government—when a speaker uses lewd, vulgar language that is plainly offensive and lacks any political context.

In *Hazelwood School District v. Kuhlmeier* (1988), the Supreme Court considered the extent to which school officials could exercise editorial control over a school-sponsored newspaper. The Court reasoned that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 273). Most recently, in *Morse v. Frederick,* the Court ruled that a principal did not violate the First Amendment rights of a student who was suspended for displaying a sign reading "BONG HiTS [sic] 4 JESUS" (p. 2619) on a sidewalk across the street from his school during a parade. The Court concluded that the principal had the authority to restrict student speech that she perceived to be promoting illegal drug use.

Teachers

The most important case directly involving the free speech rights of public school employees is *Pickering v. Board of Education of Township High School District 205, Will County* (1968), in which a teacher was disciplined for criticizing his school board and superintendent. The Court held that the school officials exceeded their authority, because teachers do not forfeit their rights to speak out on matters of public concern. In another case directly involving a teacher, *Mt. Healthy City Board of Education v. Doyle* (1977), the Court agreed that a board could terminate the contract of a nontenured teacher because of a telephone call that he made to a radio station criticizing the principal's memo on professional appearance and because of other actions at school. The Court explained that although the teacher engaged in protected conduct by calling the radio station, there was enough in his record to dismiss him for other behavior.

Freedom of Association and Assembly

In perhaps the most important issue involving the rights of teachers to practice freedom of association and assembly, the Supreme Court, on four occasions, has tacitly acknowledged that teachers can organize and bargain collectively. Even so, in *Abood v. Detroit Board of Education* (1977), *Chicago Teachers Union, Local No. 1 v. Hudson* (1986), *Lehnert v. Ferris Faculty Association* (1991) (a case from higher education), and *Davenport v. Washington Education Association* (2007), the Court ruled that while unions can collect fair share fees—charges to nonmembers for representing them at bargaining—they must have safeguards in place to respect the free speech rights of nonmembers. Further, in *Perry Education Association v. Perry Local Educators' Association,* (1983), the Court asserted that a school board did not violate the rights of a union in limiting access to its in-house mail system and other forms of communication to the union that represented its employees.

Robert J. Safransky

See also Bill of Rights; Teacher Rights

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First Amendment: Speech in Schools

Free speech in the public schools is based on the First Amendment to the Constitution, according to which "Congress shall make no law . . . abridging the freedom of speech or of the press." In 1969, the U.S. Supreme Court interpreted the First Amendment as meaning that neither students nor teachers "shed their

rights to freedom of speech or expression at the schoolhouse gate" (*Tinker v. Des Moines Independent Community School District,* p. 506). However, the Court has recognized that no right is absolute. Therefore, when conflicts arise among students, teachers, administrators, and parents about free speech, judges balance the rights in conflict and determine when to protect and when to limit this freedom. This entry reviews Supreme Court decisions related to freedom of speech for students and teachers.

Student Speech

Four Supreme Court cases have addressed the scope and limits of student speech in the public schools. In its landmark decision in *Tinker,* the Supreme Court protected the rights of students who wore black armbands to protest against the Vietnam War. Even so, the *Tinker* Court acknowledged that school officials can limit student expression that "materially disrupts class work or involves substantial disorder or invasion of the rights of others" (p. 509).

In the next student speech case, *Bethel School District No. 403 v. Fraser* (1986), the Supreme Court ruled against a student who was punished for giving a nominating speech at a high school assembly that referred to his candidate using "an elaborate, graphic and explicit sexual metaphor" (p. 678). The Court was of the opinion that school officials have broad authority to punish students for using "offensively lewd and indecent speech" (p. 685) in classrooms, assemblies, and other school-sponsored activities—even if the speech does not cause disruption and is not legally obscene.

In 1988, the Court upheld the authority of a principal to censor two stories about pregnancy and divorce in a student newspaper that was published as part of a journalism course. In *Hazelwood School District v. Kuhlmeier,* the justices reasoned that educators have the authority to control school-sponsored publications and may prohibit articles that are "ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences" (p. 271).

The Supreme Court's most recent case on student free speech upheld the suspension of a student who unfurled a banner at a school event that said "BONG HiTS [sic] 4 JESUS." In *Morse v. Frederick* (2007), the Court ruled that schools "may restrict student expression that they reasonably regard as promoting illegal drug use" (p. 2639). At the same time, the Court also indicated that officials may not restrict student speech simply because it is offensive or promotes the repeal of controversial laws.

These four Supreme Court cases indicate that when students speak as individuals, their speech is protected by the First Amendment and may not be restricted unless it is lewd and indecent, causes substantial disruption, or interferes with the rights of others. This freedom protects controversial political, religious, or educational ideas in writing, on T-shirts, or on home computers. In contrast, educators have broad discretion to regulate and restrict student expression in school-sponsored activities, including curricular publications, plays, and the use of school computers. Further, clothing choice is not a First Amendment right, and schools have discretion to issue strict dress codes or require uniforms.

Teacher Speech

The Supreme Court has ruled on only one case directly involving the free speech rights of public school teachers. *Pickering v. Board of Education of Township High School District 205, Will County* (1968) concerned a teacher in Illinois who was fired for writing a letter to a newspaper criticizing the way his superintendent and school board spent funds and the "totalitarianism teachers live in" (p. 576). The teacher argued that his letter should have been protected by his right to free speech. The Supreme Court agreed, pointing out that school officials cannot punish teachers merely because they make critical statements about matters of public concern—even if the statements were unknowingly incorrect. Instead, the Court concluded that teachers should be able to speak out freely about education and policy issues "without fear of retaliatory dismissal" (p. 572).

Subsequent judicial decisions have clarified and limited teachers' free speech rights. Most recently, in *Garcetti v. Ceballos* (2006), the Supreme Court held that public employee expression is not protected if

made pursuant to official job duties. Also, after the Supreme Court's judgment in *Connick v. Myers* (1983), it is clear that when teachers speak, not as citizens about matters of public concern but as employees about matters of personal interest, the First Amendment will not protect them. Thus, free speech protects neither individual complaints nor private disagreements. Moreover, free speech does not protect disclosures of confidential information or unprofessional and insulting communications. Teachers usually are protected by state whistleblower statutes, though, when they report legal violations in their schools.

Academic freedom generally protects the rights of public university professors to speak out critically about their subject and to select teaching methods and materials of their choice. Yet, such freedom is limited among elementary and secondary teachers. Insofar as there is no Supreme Court decision directly on academic freedom in public schools, lower courts differ in their interpretations of the scope and limits of this freedom.

Some courts have ruled that academic freedom protects K–12 teachers in their use of controversial material if it is relevant to the subject, is appropriate to the age and maturity of the students, and does not cause disruption. Even so, school boards, not teachers, have primary control over the curriculum, and administrators may select or eliminate texts and courses.

Teachers usually may not be punished for using a controversial teaching method unless that method has been clearly prohibited. If teachers did not know a method was prohibited, it would probably be a due process violation to punish them for employing such methodologies unless the methodologies had no recognized educational purpose. On the other hand, school officials may refuse to rehire teachers who fail to cover material that they have been told to teach or who disagree with a board's philosophy and educational approach. In addition, while many schools permit teachers to dress as they wish, schools have authority to issue strict dress and grooming policies for teachers and to punish educators who violate such policies.

In sum, with regard to teachers, courts use a different approach when judging whether to protect their out-of-class or in-class speech. In determining whether a teacher's out-of-class speech is protected, judges first consider whether it was made pursuant to official job duties. If the expression was not related to official job duties, the courts will examine whether the speech was related to a personal grievance or a matter of public concern. If the speech is about a personal matter, it is not protected by the First Amendment. Conversely, if the speech is about a matter of public concern, courts balance the interests of the teacher as a citizen in commenting on matters of public interest against the interest of the government in promoting the efficient operation of the schools. The balance usually favors teachers whose criticism relates to violations of students' rights, or dangers to their health or safety, or illegal practices.

Schools have broad discretion to set the curriculum and texts while requiring approval of supplementary material. Still, courts have indicated that teachers should not be disciplined for using controversial materials or methods unless they know (or should know) that the materials or methods are prohibited.

David Schimmel

See also *Bethel School District No. 403 v. Fraser;* Free Speech and Expression Rights of Students; *Hazelwood School District v. Kuhlmeier; Morse v. Frederick; Pickering v. Board of Education of Township High School District 205, Will County;* Teacher Rights; *Tinker v. Des Moines Independent Community School District*

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Florence County School District Four v. Carter

Florence County School District Four v. Carter (1993) addressed the issue of the reimbursement of private tuition costs to parents who disagree with their child's individualized education program (IEP) and unilaterally place the child in a private school. The Supreme Court found that parents can indeed be compensated for these costs.

Facts of the Case

In *Carter,* the parents of a ninth grade student in South Carolina were dissatisfied with the educational goals outlined by the Florence County School District in their child's IEP, which called for the student to make four months' progress in reading and math during the course of her tenth grade year. Instead of letting the child remain in the public school, the parents placed their daughter in a private school specializing in educating children with disabilities while they appealed the board's proposed IEP. In their suit, the parents sought and were awarded reimbursement for the tuition they paid for their daughter to attend a private school under the Individuals with Disabilities Education Act (IDEA).

Eight years earlier, the U.S. Supreme Court issued a ruling in *School Committee of the Town of Burlington v. Department of Education* (1985), which also dealt with a parent-school dispute over an IEP and the placement of the child in a private rather than a public school setting without the consent of the school district. *Burlington* established a two-part legal test to evaluate whether parents are entitled to reimbursement from the public school for a private school placement. First, the Court maintained that it was necessary to consider whether a school board's placement for a child is inappropriate pursuant to a proposed IEP. Second, the Court found that it is necessary to evaluate whether the private school placement desired by the parents is appropriate based on the student's disabilities. The Court found that the child in *Burlington* belonged in a private rather than a public school setting. Thus, under IDEA, the Court ordered reimbursement to the child's parents for the costs of her private school tuition.

The Court's Ruling

In *Carter,* the Court applied and interpreted the rule from *Burlington.* First, *Carter* established that the board's IEP goals for a child, calling for only four months' progress in reading and mathematics during an academic year, were inadequate to satisfy the requirement that the child be provided a free appropriate public education. Second, *Carter* clarified that the standards for evaluating the appropriateness of parentally selected unilateral placements in private school are not as difficult to meet as those that apply to boards when they craft IEPs. According to the Court, reimbursement for private school tuition is available to parents so long as the private schools provide an appropriate education, even when they do not meet all of the IDEA's free appropriate education requirements. In Burlington, the Court pointed out that the private school placement was acceptable even though the school did not satisfy all of the state's education standards and even though it was not included on the state's approved list of private schools for special education students.

Both *Carter* and *Burlington* illustrate judicial ability to fashion discretionary equitable relief under IDEA in situations where school boards fail to provide students with disabilities with a free appropriate public education. The *Burlington* Court approved reimbursement of private tuition costs even though the remedy was not specifically mentioned in the IDEA under its power to "grant such relief as [it] determines is appropriate." This belated payment of private school tuition expenses is consistent with the purpose of IDEA to provide children with disability an education that is both free and appropriate to their unique needs in public schools if possible, but otherwise in private schools at public expense.

Additional guidance on the topic of the circumstances under which parents may be reimbursed under IDEA for placing their children in private schools without the consent of their public school boards is now included in the subsequent amendments to the IDEA and in various lower court judgments.

Regina R. Umpstead

See also Compensatory Services; Free Appropriate Public Education; Individualized Education Program (IEP); Least Restrictive Environment; Tuition Reimbursement

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Fourteenth Amendment

Ratified by the states in 1868 shortly after the end of the Civil War, the Fourteenth Amendment to the U.S. Constitution was enacted with multiple purposes in mind. First, the Fourteenth Amendment granted citizenship and the promise of equality for Black Americans, many of whom were freed slaves. In addition, the Fourteenth Amendment served as the centerpiece of legal challenges to achieve equity in many areas, beginning with school segregation, based on its Due Process and Equal Protection Clauses. This entry reviews its history and legal application in the 20th century and beyond.

Historical Background

Members of the Republican Party introduced the Fourteenth Amendment after the conclusion of the Civil War to ensure that the admission of Confederate states back into the Union would be accompanied by a guarantee of equal rights for Blacks, especially freed slaves, in the South. In enacting the Fourteenth Amendment, Congress essentially reversed the Supreme Court's opinion in *Dred Scott v. Sandford* (1857), which held that since Blacks, even free Blacks, were not citizens, they were not entitled to constitutional guarantees.

Not long after the Fourteenth Amendment was enacted, the Supreme Court, bowing to social pressures, greatly limited its effect in the *Slaughterhouse Cases* (1873). These limitations would remain until well into the 20th century. In adopting a very narrow interpretation of the federal constitutional guarantees, especially of those rights protected by the Fourteenth Amendment, the Court maintained that state laws were paramount over federal protections for rights and liberties. As such, the Court largely obviated the promise of the Fourteenth Amendment by granting states the authority to trump the federal Constitution.

In its infamous judgment in *Plessy v. Ferguson* (1896), the Supreme Court went so far as to offer its opinion that the State of Louisiana did not violate the Equal Protection Clause of the Fourteenth Amendment by requiring separate but equal public railroad accommodations for members of the different races. By extension, *Plessy* legitimized the pernicious doctrine of "separate but equal" in many areas of life, including schools, especially in the American South. The Court officially extended *Plessy* to schools in *Gong Lum v. Rice* (1927), when it upheld the exclusion of a student of Chinese origin from a school intended for White children.

Modern Court Rulings

After being unable to resolve the issue of school desegregation in 1953, the Supreme Court called for reargument later that year that focused on the Fourteenth Amendment. In listening to arguments led by Thurgood Marshall of the NAACP Legal Defense Fund, the Court addressed whether separate but equal schools violated the Equal Protection Clause of the Fourteenth Amendment. In helping to eradicate racial segregation in state supported higher education, Marshall had successfully advanced the position that such schools did constitute a violation. In response to the question of whether "segregation of children in public schools solely on the basis of race, even though the physical Facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities," the Court, in *Brown v. Board of Education of Topeka* (1954) explicitly answered "We believe that it does" (p. 493). As a result, the *Brown* Court concluded that state-mandated racial segregation in public schools violated the Fourteenth Amendment. Further, on the same day as it handed down *Brown,* in *Bolling v. Sharpe* (1954), the Court vitiated segregation in the public schools in Washington, D.C., finding that the practice violated the Due Process Clause of the Fifth Amendment, which applies to the federal government.

Brown thus opened the door to an era of equal educational opportunities for all children, advanced under

the Fourteenth Amendment in both the legislative and judicial arenas, by initiating the call for equal protection under the law for all students regardless of their race, gender, or physical (dis)abilities. Moreover, *Brown's* reliance on the Equal Protection and Due Process Clauses in the Fourteenth Amendment ushered in an era that has transformed American society in a myriad of areas, including public and nonpublic education, that the nation continues to experience to this day.

Paul Green

See also *Bolling v. Sharpe; Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Federal Role in Education

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Slaughterhouse Cases, 83 U.S. 36 (1873).

Frankfurter, Felix J. (1882–1965)

Felix Frankfurter served on the U.S. Supreme Court from 1939 until 1962. Prior to his appointment to the Court, he held positions with the federal government, was a respected professor of law, and was a renowned civil libertarian. In school-related cases, Frankfurter joined in Supreme Court judgments supporting school desegregation and the separation of church and state. However, his philosophy of judicial restraint influenced him to uphold government actions that led to the curtailment of individual rights. Consequently, Frankfurter had critics, including Justices Hugo Black and William O. Douglas, who accused him of abandoning his liberal principles.

Early Years

Felix J. Frankfurter was born in Vienna, Austria, on November 15, 1882, and was the last Supreme Court justice born outside the United States. When he was 12 years old, his parents immigrated to America where he grew up in a Jewish tenement on the east side of New York City. Frankfurter graduated from the City College of New York and attended Harvard Law School, ranking first in his class. He was then hired by a New York law firm, but he soon left private practice for government service when he was appointed as an assistant in the U.S. Attorney's office for the Southern District of New York in Manhattan.

Frankfurter worked closely with U.S. Attorney and future Secretary of War Henry Stimson, joining him in the War Department, where he served for four years as a legal officer in the Bureau of Insular Affairs. During World War I, Frankfurter was appointed assistant to the Secretary of War, served as secretary and counsel to President Woodrow Wilson's mediation commission, and subsequently became chairman of the Labor Policies Board.

In 1914, Frankfurter was appointed to the faculty of Harvard Law School. He continued to teach at Harvard, with some interruptions, for the next 25 years. As an academic, Frankfurter developed a reputation as a scholar and expert in constitutional and administrative law. During his tenure at Harvard, Frankfurter developed a close working relationship with Supreme Court Justices Louis Brandeis and Oliver Wendell Holmes, and he funneled many of his best students into positions as law clerks for the justices. Frankfurter especially admired Justice Holmes, whose legal philosophy of "judicial restraint" profoundly influenced Frankfurter when he later became a justice himself.

Professor Frankfurter did not confine himself to academia. He was an active Zionist, helped found *The New Republic* magazine and the American Civil Liberties Union, and vigorously defended the cause of two anarchists accused of robbery and murder, Sacco and Vanzetti. Frankfurter was a staunch supporter of the New Deal, and became a confidant, friend, and adviser to President Franklin D. Roosevelt. After joining the Court, Frankfurter continued to advise Roosevelt on political and legal matters, a practice that was common at the time but that would appear to be a breach of judicial ethics today.

On the Bench

In 1938, Justice Benjamin Cardozo died. President Roosevelt, after overcoming concerns that Frankfurter was too liberal and had no judicial experience, and that his appointment would create a Court with an excessive number of Jewish justices, nominated Frankfurter to fill the vacancy. Frankfurter was only the second nominee to the Supreme Court in history to testify in person before the Senate Judiciary Committee. He rebutted personal attacks and unfounded allegations that he was a Communist, but he did not answer questions about his views on specific legal issues. The Senate confirmed Frankfurter's appointment on January 17, 1939.

Although he was politically liberal, Frankfurter's restricted view of the role of judges and courts led him to vote frequently to uphold government actions that limited individual rights and liberties. An early indication of Frankfurter's jurisprudence can be found in *Railroad Commission of Texas v. Pullman Company* (1941), where, writing for the Court, he formulated the Pullman abstention doctrine. Under this doctrine, federal courts, while still retaining jurisdiction, could abstain from hearing cases involving constitutional or statutory questions while providing state courts with opportunities to first address and resolve the issues. In *Pullman,* the petitioners challenged a state agency rule requiring sleeping cars on trains to be staffed by conductors, all of whom were White, rather than by Black porters, as violating their right to equal protection under the Fourteenth Amendment.

Perhaps in part because of his immigrant status and successful embodiment of the American dream, Justice Frankfurter was a patriot who believed in defending the United States from perceived disloyalty and attack. In *Korematsu v. United States* (1944), he concurred in the Court's opinion upholding the relocation and internment of Japanese Americans during World War II. In *Dennis v. United States* (1951), he again concurred in the Court's affirming the conviction of leaders of the Communist Party for conspiring and organizing to overthrow the government of the United States in violation of the Smith Act, despite claims that the act violated the First Amendment.

Justice Frankfurter believed that the Supreme Court should not become embroiled in controversies that were not capable of judicial resolution and where attempted enforcement would harm its legitimacy as a neutral decision-maker. He wrote the opinion of the Court in *Colegrove v. Green* (1946), holding that the apportionment of Illinois congressional districts was a nonjusticiable political question, and he strongly dissented in *Baker v. Carr* (1962), where the Court decided that the issue of malapportionment of the Tennessee state legislature was justiciable under the Equal Protection Clause of the Fourteenth Amendment.

Frankfurter's ideological feud with fellow Justice Hugo Black became legendary. While Black thought that the Court should take an active role in protecting the rights of minorities and accused criminals, Frankfurter believed that the Court should defer when possible to the will of popularly elected legislatures and executives. Black strongly advocated that the protection of the U.S. Bill of Rights be totally incorporated under the Fourteenth Amendment and applied to the states. In contrast, Frankfurter believed that only those rights deemed "fundamental" by the Court should be incorporated and on a selective, case-by-case basis.

Justices Black, Douglas, and Frankfurter were all New Dealers appointed by President Franklin D. Roosevelt. Yet, over the years, they formed the axis of two separate blocks on the Court. Black and Douglas viewed Frankfurter as a traitor to the cause of liberalism, while Frankfurter criticized Black and Douglas as often acting like politicians rather than judges.

Although they disagreed philosophically, Frankfurter respected Black and Douglas intellectually. Further, Frankfurter could be rude and condescending to fellow justices he considered intellectually inferior. At conference, he would often lecture his colleagues as if they were students in his classroom. After one heated confrontation in conference, Chief Justice Fred Vinson threatened to punch Frankfurter.

Record on Education

Frankfurter's patriotism and philosophy of judicial restraint merged in what probably is his best-known decision in the law of education, *Minersville School District v. Gobitis* (1940). Justice Frankfurter wrote the majority opinion of the Court upholding the expulsion of Jehovah's Witness students from school for refusing to comply with the Pennsylvania mandatory flag salute law. Three years later, when patriotic fervor in the United States after World War II had subsided somewhat and the opinion had been widely criticized in legal circles, the Court overturned *Gobitis,* with Frankfurter dissenting, in *West Virginia State Board of Education v. Barnette* (1943).

Even though Justice Frankfurter often voted to uphold conservative laws, he never completely abandoned his liberal roots. He joined the Court's opinion in *Brown v. Board of Education of Topeka (*1954) and supported the Warren Court's major school desegregation decisions. Even so, typical of his concern that the Court not go beyond what was judicially enforceable, in *Brown v. Board of Education of Topeka II* (1955), Frankfurter convinced the Court to insert the phrase that, in implementing desegregation, states should proceed "with all deliberate speed."

Frankfurter was a proponent of separation of church and state. In *Everson v. Board of Education of Ewing Township* (1947), where the Supreme Court first incorporated the Establishment Clause of the First Amendment and applied it to the states, he concurred in the Court's analysis and history of the Establishment Clause erecting a "wall of separation between Church and State." Still, unlike the majority, he maintained that the New Jersey policy of reimbursing parents for the costs of transporting their children to parochial schools violated the First Amendment. Frankfurter also opposed "released time" for public school students to receive religious instruction during school hours, regardless of whether the instruction took place on or off campus. He concurred in the Court's opinion in *People of the State of Illinois ex rel. McCollum v. Board of Education of School District 71, Champagne* (1948), prohibiting released time programs in public schools while dissenting in *Zorach v. Clauson's* (1952) permitting such programs if conducted off campus at churches or religious schools.

Suffering from declining health, Justice Frankfurter resigned from the Court in 1962, and he died on February 22, 1965, at the age of 82. At the time of his death, Frankfurter and Justice Black had reconciled many of their differences, and they ended their lives as friends.

Felix Frankfurter possessed a towering intellect and was one of the leading jurists of his time. His admirers respected him for his brilliance, his well-crafted opinions, and his restrained view that judges should primarily be interpreters of the law, not lawmakers. Frankfurter's critics found him to be pompous and often overbearing and a man whose personality and cramped view of constitutionally protected rights and liberties limited his effectiveness as a justice.

Michael Yates

See also Equal Protection Analysis

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Franklin v. Gwinnett County Public Schools

Franklin v. Gwinnett County Public Schools (1992) is a seminal case with regard to sexual harassment in schools that receive federal financial assistance. In *Franklin,* the Supreme Court ruled that students who are subjected to sexual harassment in public schools may sue their boards for monetary damages under Title IX of the Education Amendments of 1972. *Franklin* is important because it was the first case wherein the Supreme Court upheld an award of monetary damages under Title IX. Six years later, the Supreme Court was called upon to delimit the circumstances for such damages to be recovered in *Gebser v. Lago Vista Independent School District* (1998).

Facts of the Case

Franklin, a female sophomore in a high school operated by the Gwinnett County Public Schools, alleged that she was subjected to continued sexual harassment and abuse by Hill, a male sports coach and teacher. Among the allegations that Franklin made were that Hill engaged her in sexually explicit conversations, forced kissing, and coercive intercourse on school grounds. Franklin claimed that although teachers and administrators were aware of the harassment, they did nothing to stop it, even discouraging her from bringing charges against Hill.

Franklin thus sued for monetary damages under Title IX. After a federal trial court in Georgia and the Eleventh Circuit rejected Franklin's claims, the U.S. Supreme Court reversed in her behalf.

The Court's Ruling

The Court made a crucial distinction in judicial power between finding a course of action and in awarding appropriate relief. Because it was established in *Cannon v. University of Chicago* (1979) that Title IX was enforceable through an implied right of action, the question over the course of action under Title IX had already been resolved. The issue in *Franklin* became whether monetary damages were available in a private action brought to enforce Title IX.

When it came to the issue of awarding remedies, the Court followed the traditional presumption that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute" (pp. 70–71). In terms of sexual harassment, the Court found no evidence that Congress intended to abandon the traditional presumption when it passed Title IX. Moreover, in two amendments to Title IX enacted after *Cannon,* the Court noted that Congress validated *Cannon*'s holding and showed no attempt to limit the remedies available.

Specifically, in the Rehabilitation Act Amendments of 1986, Congress withdrew the states' Eleventh Amendment immunity; in the Civil Rights Restoration Act of 1987, Congress expanded the coverage of the antidiscrimination provisions. In addition, the Court was of the opinion that unless it provided damages for plaintiffs such as Franklin, Title IX would be a law that did not afford any remedies.

The Court rejected the argument that the traditional presumption did not apply in Franklin because Title IX was enacted pursuant to the Congress' Spending Clause power. While recognizing that funding recipients should be given notice before they were held liable for damages for unintentional violations, the Court nevertheless found that the Gwinnett County Public Schools intentionally discriminated against Franklin on the basis of sex. As a

result, the Court pointed out that the problem of notice was not involved, and the remedies were not limited by the Spending Clause. The Court therefore determined that it had the authority to grant all necessary and appropriate remedies to private parties in teacher-to-student sexual harassment suits, including monetary damages.

Three justices filed a concurring opinion. They refused to apply the traditional presumption to an implied right of action because it would make "the most questionable of private rights . . . the most expansively remediable" (p. 78). In spite of this, they agreed with the majority's disposition on the ground that the Rehabilitation Act Amendments of 1986 not only validated *Cannon*'s holding but also implicitly acknowledged that damages were available.

Ran Zhang

See also Sexual Harassment of Students by Teachers; Title IX and Sexual Harassment

Legal Citations

Cannon v. University of Chicago, 441 U.S. 677 (1979).
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Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Franklin v. Gwinnett County Public Schools (Excerpts)

In Franklin v. Gwinnett County Public Schools, *the Supreme Court ruled that Title IX permits students who were sexually harassed by educators to file suit against their school boards to recover monetary damages.*

Supreme Court of the United States

FRANKLIN

v.

GWINNETT COUNTY PUBLIC SCHOOLS and William Prescott.

503 U.S. 60

Argued Dec. 11, 1991.

Decided Feb. 26, 1992.

Justice WHITE delivered the opinion of the Court.

This case presents the question whether the implied right of action under Title IX of the Education Amendments of 1972, which this Court recognized in *Cannon v. University of Chicago,* supports a claim for monetary damages.

I

Petitioner Christine Franklin was a student at North Gwinnett High School in Gwinnett County, Georgia, between September 1985 and August 1989. Respondent Gwinnett County School District operates the high school and receives federal funds. According to the complaint filed on December 29, 1988, in the United States District Court for the Northern District of Georgia, Franklin was subjected to continual sexual harassment beginning in the autumn of her tenth grade year (1986) from Andrew Hill, a sports coach and teacher employed by the district. Among other allegations, Franklin avers that Hill engaged her in sexually oriented conversations in which he asked about her sexual experiences with her boyfriend and whether she would consider having sexual intercourse with an older man; that Hill forcibly kissed her on the mouth in the school parking lot; that he telephoned her at her home and asked if she would meet him socially; and that, on three occasions in her junior year, Hill interrupted a class, requested that the teacher excuse Franklin, and took her to a private office where he subjected her to coercive intercourse. The complaint further alleges that though they became aware of and investigated Hill's sexual harassment of Franklin and other female students, teachers and administrators took no action to halt it and discouraged Franklin from pressing charges against Hill. On April 14, 1988, Hill resigned on the condition that all matters pending against him be dropped. The school thereupon closed its investigation.

In this action, the District Court dismissed the complaint on the ground that Title IX does not authorize an award of damages. The Court of Appeals affirmed. . . .

Because this opinion conflicts with a decision of the Court of Appeals for the Third Circuit we granted certiorari. We reverse.

II

In *Cannon v. University of Chicago,* the Court held that Title IX is enforceable through an implied right of action. We have no occasion here to reconsider that decision. Rather, in this case we must decide what remedies are available in a suit brought pursuant to this implied right. As we have often stated, the question of what remedies are available under a statute that provides a private right of action is "analytically distinct" from the issue of whether such a right exists in the first place Thus, although we examine the text and history of a statute to determine whether Congress intended to create a right of action, we presume the availability of all appropriate remedies unless Congress has expressly indicated otherwise. This principle has deep roots in our jurisprudence.

A

'[W]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." [*Bell v. Hood*] The Court explained this longstanding rule as jurisdictional and upheld the exercise of the federal courts' power to award appropriate relief so long as a cause of action existed under the Constitution or laws of the United States.

The *Bell* Court's reliance on this rule was hardly revolutionary. From the earliest years of the Republic, the Court has recognized the power of the Judiciary to award appropriate remedies to redress injuries actionable in federal court, although it did not always distinguish clearly between a right to bring suit and a remedy available under such a right. In *Marbury v. Madison,* for example, Chief Justice Marshall observed that our Government "has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right." This principle originated in the English common law, and Blackstone described it as "a general and indisputable rule, that where there is a legal right, there is also a legal remedy, by suit or action at law, whenever that right is invaded."

. . . .

B

Respondents and the United States as *amicus curiae,* however, maintain that whatever the traditional presumption may have been when the Court decided *Bell v. Hood,* it has disappeared in succeeding decades. We do not agree. In *J.I. Case Co. v. Borak,* the Court adhered to the general rule that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies. Relying on *Bell v. Hood,* the *Borak* Court specifically rejected an argument that a court's remedial power to redress violations of the Securities Exchange Act of 1934 was limited to a declaratory judgment. The Court concluded that the federal courts "have the power to grant all necessary remedial relief" for violations of the Act. . . .

That a statute does not authorize the remedy at issue "in so many words is no more significant than the fact that it does not in terms authorize execution to issue on a judgment." Subsequent cases have been true to this position. . . .

The United States contends that the traditional presumption in favor of all appropriate relief was abandoned by the Court in *Davis v. Passman* and that the *Bell v. Hood* rule was limited to actions claiming constitutional violations. The United States quotes language in *Davis* to the effect that "the question of who may enforce a *statutory* right is fundamentally different from the question of who may enforce a right that is protected by the Constitution." The Government's position, however, mirrors the very misunderstanding over the difference between a cause of action and the relief afforded under it that sparked the confusion we attempted to clarify in *Davis.* Whether Congress may limit the class of persons who have a right of action under Title IX is irrelevant to the issue in this lawsuit. To reiterate, "the question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive." *Davis,* therefore, did nothing to interrupt the long line of cases in which the Court has held that if a right of action exists to enforce a federal right and Congress is silent on the question of remedies, a federal court may order any appropriate relief.

Contrary to arguments by respondents and the United States that *Guardians Assn. v. Civil Service Comm'n of New York City* and *Consolidated Rail Corporation v. Darrone* eroded this traditional presumption, those cases in fact support it. Though the multiple opinions in *Guardians* suggest the difficulty of inferring the common ground

among the Justices in that case, a clear majority expressed the view that damages were available under Title VI in an action seeking remedies for an intentional violation, and no Justice challenged the traditional presumption in favor of a federal court's power to award appropriate relief in a cognizable cause of action. The correctness of this inference was made clear the following Term when the Court unanimously held that the 1978 amendment to § 504 of the Rehabilitation Act of 1973—which had expressly incorporated the "remedies, procedures, and rights set forth in Title VI"—authorizes an award of backpay. In *Darrone,* the Court observed that a majority in *Guardians* had "agreed that retroactive relief is available to private plaintiffs for all discrimination . . . that is actionable under Title VI." The general rule, therefore, is that absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute.

III

We now address whether Congress intended to limit application of this general principle in the enforcement of Title IX. Because the cause of action was inferred by the Court in *Cannon,* the usual recourse to statutory text and legislative history in the period prior to that decision necessarily will not enlighten our analysis. Respondents and the United States fundamentally misunderstand the nature of the inquiry, therefore, by needlessly dedicating large portions of their briefs to discussions of how the text and legislative intent behind Title IX are "silent" on the issue of available remedies. Since the Court in *Cannon* concluded that this statute supported no express right of action, it is hardly surprising that Congress also said nothing about the applicable remedies for an implied right of action.

During the period prior to the decision in *Cannon,* the inquiry in any event is *not* "'basically a matter of statutory construction,'" as the United States asserts. Rather, in determining Congress' intent to limit application of the traditional presumption in favor of all appropriate relief, we evaluate the state of the law when the Legislature passed Title IX. In the years before and after Congress enacted this statute, the Court "follow[ed] a common-law tradition [and] regarded the denial of a remedy as the exception rather than the rule." As we outlined in Part II, this has been the prevailing presumption in our federal courts since at least the early 19th century. In *Cannon,* the majority upheld an implied right of action in part because in the decade immediately preceding enactment of Title IX in 1972, this Court had found implied rights of action in six cases. In three of those cases, the Court had approved a damages remedy. Wholly apart from the wisdom of the *Cannon* holding, therefore, the same contextual approach used to justify an implied right of action more than amply demonstrates the lack of any legislative intent to abandon the traditional presumption in favor of all available remedies.

In the years *after* the announcement of *Cannon,* on the other hand, a more traditional method of statutory analysis is possible, because Congress was legislating with full cognizance of that decision. Our reading of the two amendments to Title IX enacted after *Cannon* leads us to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX. In the Rehabilitation Act Amendments of 1986, Congress abrogated the States' Eleventh Amendment immunity under Title IX, Title VI, § 504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975. This statute cannot be read except as a validation of *Cannon*'s holding. A subsection of the 1986 law provides that in a suit against a State, "remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State." While it is true that this saving clause says nothing about the nature of those other available remedies, absent any contrary indication in the text or history of the statute, we presume Congress enacted this statute with the prevailing traditional rule in mind.

In addition to the Rehabilitation Act Amendments of 1986, Congress also enacted the Civil Rights Restoration Act of 1987. Without in any way altering the existing rights of action and the corresponding remedies permissible under Title IX, Title VI, § 504 of the Rehabilitation Act, and the Age Discrimination Act, Congress broadened the coverage of these antidiscrimination provisions in this legislation. In seeking to correct what it considered to be an unacceptable decision on our part in *Grove City College v. Bell,* Congress made no effort to restrict the right of action recognized in *Cannon* and ratified in the 1986 Act or to alter the traditional presumption in favor of any appropriate relief for violation of a federal right. We cannot say, therefore, that Congress has limited the remedies available to a complainant in a suit brought under Title IX.

IV

Respondents and the United States nevertheless suggest three reasons why we should not apply the traditional presumption in favor of appropriate relief in this case.

A

First, respondents argue that an award of damages violates separation of powers principles because it unduly expands the federal courts' power into a sphere properly reserved to the Executive and Legislative Branches. In making this argument, respondents misconceive the difference between a cause of action and a remedy. Unlike the finding of a cause of action, which authorizes a court to hear a case or controversy, the discretion to award appropriate relief involves no such increase in judicial power. Federal courts cannot reach out to award remedies when the Constitution or laws of the United States do not support a cause of action. Indeed, properly understood, respondents' position invites us to abdicate our historic judicial authority to award appropriate relief in cases brought in our court system. It is well to recall that such authority historically has been thought necessary to provide an important safeguard against abuses of legislative and executive power as well as to ensure an independent Judiciary. Moreover, selective abdication of the sort advocated here would harm separation of powers principles in another way, by giving judges the power to render inutile causes of action authorized by Congress through a decision that no remedy is available.

B

Next, consistent with the Court of Appeals' reasoning, respondents and the United States contend that the normal presumption in favor of all appropriate remedies should not apply because Title IX was enacted pursuant to Congress' Spending Clause power. In *Pennhurst State School and Hospital v. Halderman,* the Court observed that remedies were limited under such Spending Clause statutes when the alleged violation was unintentional. Respondents and the United States maintain that this presumption should apply equally to intentional violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the receiving entity of federal funds lacks notice that it will be liable for a monetary award. This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. Moreover, the notion that Spending Clause statutes do not authorize monetary awards for intentional violations is belied by our unanimous holding in *Darrone.* Respondents and the United States characterize the backpay remedy in *Darrone* as equitable relief, but this description is irrelevant to their underlying objection: that application of the traditional rule in this case will require state entities to pay monetary awards out of their treasuries for intentional violations of federal statutes.

C

Finally, the United States asserts that the remedies permissible under Title IX should nevertheless be limited to backpay and prospective relief. In addition to diverging from our traditional approach to deciding what remedies are available for violation of a federal right, this position conflicts with sound logic. First, both remedies are equitable in nature, and it is axiomatic that a court should determine the adequacy of a remedy in law before resorting to equitable relief. Under the ordinary convention, the proper inquiry would be whether monetary damages provided an adequate remedy, and if not, whether equitable relief would be appropriate. Moreover, in this case the equitable remedies suggested by respondent and the Federal Government are clearly inadequate. Backpay does nothing for petitioner, because she was a student when the alleged discrimination occurred. Similarly, because Hill—the person she claims subjected her to sexual harassment—no longer teaches at the school and she herself no longer attends a school in the Gwinnett system, prospective relief accords her no remedy at all. The Government's answer that administrative action helps other similarly situated students in effect acknowledges that its approach would leave petitioner remediless.

V

In sum, we conclude that a damages remedy is available for an action brought to enforce Title IX. The judgment of the Court of Appeals, therefore, is reversed, and the case is remanded for further proceedings consistent with this opinion.

So ordered.

Citation: *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60 (1992).

Fraud

Educational institutions can be either the victims of fraud or, through their administration or governing boards, the perpetrators of fraud. When institutions are the victims, fraud may stem from the actions of employees, students, or contractors. Common types of fraud against institutions include unauthorized spending and the falsification of credentials or other documents. The penalties to follow findings of such fraud may include dismissal, suspension, or demotion of employees; criminal prosecution; voiding or rejecting renewal of credentials; and suspension of agency contracts.

When institutions are the perpetrators, fraud actions may arise within a variety of contexts. One notable area is fraudulent conduct by private institutions in order to enroll students. In this regard, the California legislature has noted that "Students have been induced to enroll . . . through various misrepresentations including misrepresentations related to the quality of education, the availability and quality of equipment and materials, the language of instruction and employment and salary opportunities" (California Education Code § 94850). Institutions also may commit fraud when, for example, failing to accurately report compensation for purposes of retirement benefits or when fraudulently appropriating institutional funds.

The act of fraud is a deceptive representation intended to induce another to give up property or legal rights. Fraud is a statutory or common-law tort action that allows for parties injured by fraud to take private actions in civil courts in order to recover damages. In some cases, fraud rises to the level of a criminal offense. For instance, the Federal Mail Fraud Act provides for criminal penalties for certain fraudulent acts.

Fraud can be distinguished from lying or perjury in that the victim of fraud must suffer actual harm from a reliance on the misrepresentation. Fraud is also distinct from general misrepresentation in that fraud traditionally requires deceptive intent.

According to Section 525 of the Restatement (Second) of Torts, four elements are usually required to establish fraud: (1) a knowingly false statement that might influence the victim's decision making, (2) an intent to deceive, (3) a reliance on the statement, and (4) resulting damages.

Establishing a fraud cause of action in court can be complicated by the difficulties posed by establishing the element of intent to deceive. But intent to deceive can be inferred from such elements as motive to conduct the fraud and opportunity to do so. There are certain types of fraud claims, however, in which deceptive intent is not required, provided that the facts of a situation meet particular requirements. For instance, a constructive fraud claim requires a breach of a legal duty to another, but the establishment of actual intent is not required. In addition, negligent fraud can occur when a person provides false information that he or she actually believes to be true, so long as that belief is not warranted by the information at hand and the person should have reasonably known it to be false.

Fraud based on deceptive intent can take a variety of forms. Fraud may be committed through statements or through conduct and may take the form of misrepresenting present circumstances or making false promises about the future. Furthermore, fraudulent statements or conduct may be outright false or merely misleading in nature. The U.S. Court of Appeals for the First Circuit, relying on Massachusetts law, has ruled that an educational institution may commit fraud even when its misleading statements are couched in terms of personal opinion if the opinion implies the existence of untrue facts upon which the opinion is based. The Court also found that school disclaimers disavowing statements of the type at issue (in this case, regarding the school's chances of accreditation) are an insufficient defense against fraud. In addition to these overt actions, fraud also may be committed through concealment or silence regarding that for which there is a duty to disclose, such as an error noticed in a contract.

Victims of fraud may understand what they are doing when they give up their rights or property but be encouraged to do so through misrepresentation (fraud in the inducement), or they may fail to actually understand what they are agreeing to (fraud in the inception or execution). In California, victims of fraud face a three-year statute of limitations for seeking damages or relief; however, the three-year clock does not begin to run until the victim discovers, or reasonably should have discovered, the existence of the fraud.

Rosalia Ibarrola

See also Educational Malpractice; School Boards; School Finance Litigation

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3 Witkin, *Summary of California Law,* Contracts (10th ed. 2005) §§ 298–299.

Free Appropriate Public Education

The Individuals with Disabilities Education Act (IDEA) (2005) mandates that school boards provide all students with disabilities with a free appropriate public education (FAPE). In so doing, school boards must maintain a "continuum of alternative placements." The continuum should range from placements within general education classrooms to private residential facilities to homebound instruction and instruction in hospitals or institutions. In addition, when school staff write an individualized education program (IEP) for a child with disabilities that specifies an alternative placement for the child, this placement must be in the least restrictive environment (LRE) in which the child can function.

Moreover, students with disabilities can be removed from the general education environment only to the extent necessary to provide special education services. All placements must be at public expense and must meet state educational standards. While states are required to adopt policies and procedures that are consistent with federal law, they may provide greater benefits than those required by the IDEA. When states do establish higher standards, the higher state standards may be enforced in federal as well as state courts. Court decisions related to this issue are summarized in this entry.

Defining *Appropriate*

The IDEA's language and legislative history provide little guidance regarding a definition of the term *FAPE.* According to the IDEA's implementing regulations, an appropriate education consists of special education and related services that are provided in conformance with an IEP (34 C.F.R. § 300.17). Another regulation further defines special education as "specially designed instruction, at no cost to the parents, to meet the unique needs of a child with a disability . . ." (34 C.F.R. § 300.38). Where all of these terms and definitions are open to interpretation, it is not surprising that much litigation has ensued over the meaning of the term *appropriate* as used in the IDEA

In 1982, in *Board of Education of the Hendrick Hudson Central School District v. Rowley,* the U.S. Supreme Court, in its first case involving a dispute under the IDEA, defined the term *appropriate* as used in the act. The Court proclaimed that a school board satisfies the IDEA's requirement of providing a FAPE when it provides "personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (p. 203). In addition, the court found that IEPs must be formulated in accordance with the IDEA's procedural requirements.

In order to provide additional clarification, the Court indicated that other provisions of the IDEA are pertinent in evaluating whether proposed IEPs are appropriate. Specifically, the Court noted that educational programs must be provided in the LRE, and that related or supportive services that may be required to assist children in benefiting from special education programs also need to be included in the child's overall program. The Court reiterated that all services must be furnished at public expense and must meet state educational standards.

Although *Rowley* provided greater clarification, it did not end the legal debate over what constitutes a FAPE. In the immediate aftermath of *Rowley,* most lower courts wrote that IEPs and the educational programs that they called for were appropriate if they resulted in some educational benefit to students, even if that benefit was minimal. Most lower federal courts initially concurred that Congress only intended for the IDEA to provide students with disabilities with access to educational programs.

Clarifying *Benefit*

Rowley plainly states that students with disabilities must be placed in educational programs that will confer some educational benefit. Even so, the First

Circuit determined that a student with severe disabilities need not demonstrate an ability to benefit from a special education program to be eligible for services (*Timothy W. v. Rochester, New Hampshire, School District,* 1989). In confirming the IDEA's zero reject principle, the court emphasized that education encompasses a wide spectrum of training, including instruction in even the most basic life skills. Thus, school boards cannot refuse to provide services to students even when they deem children too disabled to derive benefit from those services.

A few years after *Rowley,* the lower courts began to expand their interpretation of the *some educational benefit* criteria. While the first decisions maintained that minimal benefits met this standard, later cases interpreted the IDEA as requiring something more. The Fourth Circuit commented that *Rowley* allowed a court to make a case-by-case analysis of the substantive standards needed to meet the criteria that IEPs must reasonably have been calculated to enable students to receive educational benefits (*Hall v. Vance County Board of Education,* 1985). Under the circumstances of this suit, the court was of the opinion that the minimal progress that the student made was insufficient in view of his intellectual potential. The court insisted that Congress certainly did not intend for any school board to provide programs that produced only trivial academic advancements. Subsequently, the same court pointed out that an IEP with a goal of four months' progress during an academic year was unlikely to allow a student to advance from grade to grade with passing marks, and thus was insufficient to provide the student with an appropriate education (*Carter v. Florence County School District Four,* 1991, 1993).

Other cases helped to clarify the principle that trivial educational benefit is not sufficient to confer a FAPE under the IDEA. In particular, the Third Circuit frequently decided that satisfying *Rowley's* mandate required plans likely to produce progress, not trivial educational advancements, and that Congress intended to provide all students with disabilities with educational placements that would have resulted in meaningful benefits (*Board of Education of East Windsor Regional School District v. Diamond,* 1986; *M.C. ex rel. J.C. v. Central Regional School District,* 1996; *Polk v. Central Susquehanna Intermediate Unit 16,* 1988).

The disagreements over FAPE notwithstanding, the Supreme Court made it clear that school boards are not required to develop IEPs designed to maximize the potential of students with disabilities. In *Rowley,* the Court specifically rejected the view that the IDEA requires programs to provide students with disabilities with opportunities to achieve their full potential commensurate with the opportunities given to students who are not disabled.

Allan G. Osborne, Jr.

See also *Board of Education of the Hendrick Hudson Central School District v. Rowley;* Disabled Persons, Rights of; Inclusion; Individualized Education Program (IEP); Least Restrictive Environment; Related Services; *Timothy W. v. Rochester, New Hampshire, School District;* Zero Reject

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M. C. ex rel. J. C. v. Central Regional School District, 81 F.3d 389 (3d Cir. 1996).

Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171 (3d Cir. 1988).

Timothy W. v. Rochester, New Hampshire, School District, 875 F.2d 954 (1st Cir. 1989).

Freeman v. Pitts

In *Freeman v. Pitts* (1992), the U.S. Supreme Court was asked to determine whether a trial federal court had discretion to relinquish jurisdiction over portions of a

school board's constitutionally required desegregation plan before it declared that all aspects of a school district's operations were declared "unitary" or free from discrimination. The Court ruled that a federal trial court does have such authority to release a school board from active judicial oversight incrementally before the board's district achieves full unitary status as long as officials observe specified equitable principles. This entry describes *Freeman's* facts, its historic context, and the equitable principles that the Court identified. *Freeman* was a significant step toward ending decades-long judicial supervision of desegregating districts and accelerating the process of returning control of schools to local officials, even where dramatic demographic changes in the region had resulted in resegregation.

Facts of the Case

At the time of the Supreme Court's decision in *Brown v. Board of Education of Topeka* (1954), the segregation of children on the basis of race in the 21 southern and border states was nearly complete, with few Blacks attending other than virtually all-Black schools. The problem was exacerbated because in *Brown II* (1955) the Court gave a vague deadline, requiring officials to dismantle dual systems "with all deliberate speed." Thus, segregation persisted for more than a generation of school-aged children.

It was not until the late 1960s that the Supreme Court, in *Green v. New Kent County School Board* (1968), ordered school officials in local districts to take affirmative steps to eliminate unconstitutional segregation "root and branch" by coming forward with plans that "promise realistically to work, and work now" (p. 439). In *Green,* the Court went on to command the creation of unitary systems free from discrimination not only in student assignment, but also in five additional areas of school system operations: curriculum, staffing, extracurricular activities, facilities, and transportation.

Between 1968 and 1972, in the wake of *Green,* over 1 million Black children entered formerly all-White schools in districts across the southeast. One of these districts was the DeKalb County School System (DCSS) serving suburban Atlanta, the focus of *Freeman.* DCSS entered into a consent order in 1969 to dismantle its unlawfully segregated school system. Seventeen years later, in 1986, the school board petitioned a federal trial court to declare it unitary and relieve it of judicial oversight.

A federal trial court in *Freeman* ruled that while the school system achieved unitary status in four of the six areas required by the Supreme Court in *Green,* it had not yet completely eliminated discrimination in two areas—faculty assignments and the allocation of resources. The court thus proceeded to order more relief with respect to those two facets of district operations, but declined to exert continuing control over the four other areas of school operations. One of the areas the court indicated it would order no additional relief in was student assignment, noting that officials had acted in good faith in attempting to balance the schools racially, even though the balance was fleeting due to dramatic changes in the system's Black enrollment, which grew from less than 6% to more than 47% between 1969 and 1986.

On appeal, the Eleventh Circuit reversed, concluding that, as a matter of law, a trial court must retain full remedial authority over a school system until it achieves unitary status in all of the *Green* categories at the same time for a period of years, even if doing so necessitates making continuing corrections in student assignments to compensate for changing demographics within a school system.

The Court's Ruling

The Supreme Court granted review and, in an opinion authored by Justice Kennedy, reversed and remanded the decision of the Eleventh Circuit. In *Freeman,* the Court held that in appropriate circumstances, "Federal courts have the authority to relinquish control of a school district in incremental stages, before full compliance has been achieved in every area of school operations" (p. 490). The Court also found that the circumstances in this case appeared to reflect the appropriate exercise of equitable authority.

In determining whether federal courts are exercising their authority appropriately in such situations, the Court identified three factors: whether school officials provided full compliance in the areas to be withdrawn

from court supervision; whether retaining control of some areas was necessary to achieve compliance in other areas not yet considered unitary; and whether school officials demonstrated good faith commitment to the whole plan.

The Court suggested that the board met all three of the conditions even though resegregation was evident in the DCSS. In doing so, the Court maintained,

> Where segregation is the product not of state action but of private choices, it does not have constitutional implications. It is beyond the authority and beyond the practical ability of the federal courts to try to counteract these kinds of continuous and massive demographic shifts. (p. 495)

The Court remanded the dispute to the Eleventh Circuit for possible further consideration of the question of whether continuing control over pupil assignment was needed in order for the school system to achieve compliance in the two areas not yet in full compliance.

With this ruling, one of the major obstacles facing desegregating schools—sustaining racial balance in the face of dramatic demographic changes—was lessened, contributing to the immediate relaxation and accelerating the ultimate ending of federal court supervision more than 35 years after the Court's ruling in *Brown.*

Charles B. Vergon

See also *Dowell v. Board of Education of Oklahoma City Public Schools; Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *Green v. County School Board of New Kent County*

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Free Speech and Expression Rights of Students

There has always been a fundamental tension between public school students and educational authorities in determining the parameters of acceptable student behavior. Particularly volatile controversies have focused on identifying when school personnel may restrict student verbal, symbolic, or written expression. In light of this tension, this entry focuses on these disputes and the legal principles that the courts apply in seeking resolution of differences.

Most of the disputes over student expression focus on the First Amendment to the U.S. Constitution that, in part, prohibits Congress from enacting laws abridging the freedoms of speech or press. First Amendment restrictions on Congress are applied to the states through the Fourteenth Amendment, which the U.S. Supreme Court interprets as incorporating the Bill of Rights and protecting these freedoms against state interference.

In the United States, free expression rights are perhaps the most highly valued individual liberties. The government, including public school boards, must have a compelling justification to curtail citizens' freedom of expression. Free expression rights extend to minority views as well as to the right to remain silent, including the placement of a cross on public property by the Ku Klux Klan, the burning of the American flag by political protesters, and refusal to participate in the Pledge of Allegiance in public schools.

For almost four decades, the Supreme Court has recognized that students do not shed their constitutional rights when they enter public schools. Moreover, the Court has noted that public schools provide the appropriate environment for children to acquire an understanding of and respect for these rights. However, the Court has also stated that students' constitutional rights in public schools are not automatically the same as those of adults in other settings and may be limited by reasonable policies that

take into consideration the special circumstances of the educational environment. This entry explores the scope of students' First Amendment rights pertaining to private and school-sponsored expression, including literature distribution, student clubs, and appearance.

Unprotected Conduct and Expression

Speech is protected by the First Amendment only when it communicates an idea that is likely to be understood by the target audience. Thus, before First Amendment guarantees are implicated, a threshold question is whether student conduct involves expression at all for First Amendment purposes. To illustrate, some courts have concluded that student dancing is *not* a form of expression deserving First Amendment protection. Thus, public school officials have been upheld in their efforts to curtail suggestive student dancing at school-sponsored events.

Even if specific conduct qualifies as expression, it is not assured constitutional protection; the judiciary has recognized that defamatory, obscene, and inflammatory communications are outside the protective arm of the First Amendment. In addition, expression viewed as lewd and vulgar or the promotion of illegal activity for minors is not protected in the public school context, even though such expression may be protected for the general citizenry.

Defamatory Expression

Defamation includes verbal (slander) and written (libel) expression that is false, that is communicated to a third party, and that exposes another person to shame or ridicule. Courts have upheld school authorities in banning libelous content from student literature distributed at school and in disciplining students who have distributed such materials. Even so, regulations may not be vague or grant school officials complete discretion to censor *potentially* libelous materials.

In evaluating defamation claims, courts will assess whether the comments are directed toward a private person or a public figure or official. Private persons can establish that they have been defamed with proof that the defendant made a damaging false statement to a third party, but public figures or officials must also show that the statement was made with malice or reckless disregard for the truth. Courts generally consider teachers to be private persons, but school board members are usually considered public officials for defamation purposes. Courts have differed regarding the status of public school administrators and coaches in this regard.

Obscene, Lewd, or Vulgar Expression

The First Amendment does not extend to public school students the right to publish or voice obscenities. In 1986, the Supreme Court went further in *Bethel School District No. 403 v. Fraser,* allowing school personnel to curtail lewd and vulgar student expression that may not be considered obscene. In *Fraser,* the Court agreed with school officials that they had the right to discipline a student who presented a student government nomination speech structured as a sexual metaphor. The school's interest in protecting its captive student audience from speech considered offensive to both students and teachers alike was enough to override expression rights that adults might enjoy in other settings. The Court emphasized that speech protected by the First Amendment for adults is not always protected for students, reasoning that local school boards retain the authority to regulate student speech in both classrooms and assemblies. The Court further held that notice of such policies was given to Fraser via school rules and warnings by teachers that his intended speech was out of place for a school assembly.

For more that a decade, lower courts interpreted *Fraser* as granting broad discretion to school authorities in identifying indecent student expression that would not warrant First Amendment protection. Yet, some courts recently have interpreted the reach of *Fraser* more narrowly as restricting only expression of a sexual nature and/or pertaining only to the manner of expression rather than the content. This topic is revisited in the concluding section of this essay.

Inflammatory Expression

The judiciary also has upheld school policies that prohibit students from engaging in inflammatory expression in public schools. Courts have recognized

the difference between fighting words that threaten or incite violence and expression that advocates an idea or position in an orderly fashion. Inflammatory student expression can be curtailed at school, but more ambiguity surrounds the discretion of school authorities to punish students for off-campus inflammatory expression. Courts usually have ruled that such off-campus expression must have a significant negative impact on the school, its staff, or its students for the speaker to be punished by school personnel.

Alleged threats made by students toward classmates or school employees are generating an increasing number of lawsuits. Courts examine several factors to determine if a true threat has been made, such as reactions of the recipient and other listeners, whether the maker of the alleged threat had made similar statements to the victim in the past, if the utterance was conditional and communicated directly to the victim, and whether the victim had reason to believe that the speaker would engage in violence. Where courts have reasoned that an ordinary, reasonable recipient of the communication would interpret it as a serious threat of injury, courts have found the comments to be unprotected. Also, students may be punished for unprotected inflammatory expression, even though it is not considered to be a true threat.

Expression Promoting Illegal Activity for Minors

The judiciary traditionally has upheld school authorities when they seek to bar student expression that promotes illegal activity, such as including advertisements for drug paraphernalia in student publications. In its first case pertaining to student expression in almost 20 years, the Supreme Court in 2007 held that students may be disciplined for expression that school authorities viewed as promoting illegal drug use, despite controversy over the intent of the plaintiff's message.

In *Morse v. Frederick,* a student unfurled a banner reading "BONG HiTS [sic] 4 JESUS" (p. 2619) as the Olympic torch relay passed by students who had been released from school to cross the street and see the procession. The principal confiscated the banner and suspended the student, and the Supreme Court rejected the student's claim that the principal's actions abridged the Free Speech Clause. The Court reiterated that students' expression rights in schools are not the same as rights of adults in other settings, holding that student expression viewed by school personnel as celebrating unlawful conduct is not protected by the First Amendment, even though the expression does not incite lawless action.

Commercial Expression

While the First Amendment does not protect the types of expression discussed above, student expression with financial motives (commercial speech) enjoys some constitutional protection. Even so, this protection is at a lower level than that afforded pure speech designed to convey a political or ideological viewpoint. The Supreme Court has ruled that the government may place constraints on commercial speech as long as there is a reasonable fit between the restrictions and a governmental goal. Courts have upheld regulations barring fund-raising activities in public schools in order to enable schools to remain focused on their educational function and to deter the commercial exploitation of students.

Students also have asserted a First Amendment right *not* to be exposed to commercial expression in public schools. Illustrative are the legal developments pertaining to Channel One. Numerous school boards received free equipment by entering into contracts with Channel One under which all students were to watch a 10-minute news program and 2 minutes of commercials each day. The judiciary has upheld the discretion of school boards to enter into contracts with Channel One and other companies offering services that require students to view or listen to commercials, but some courts have ruled that offended students must be excused from the activities. Additional litigation in this arena seems likely, given the popularity of such commercial activities in public schools.

Protected Student Expression

Students' expression of political or ideological views in public schools *is* protected by the First Amendment as long as it is not libelous, defamatory, inflammatory, lewd, vulgar, or viewed as promoting illegal activity.

Whether such protected expression may be censored depends in part on the distinction between *private* speech and *school-sponsored* speech.

In deciding whether expression may be restricted, the type of forum the government has created for expression often is a crucial consideration. Speech in a public forum, such as public streets and parks, may not be limited based on its content. In an open forum, officials may impose content-based restrictions only if they are justified by a compelling government interest. Conversely, speech in a nonpublic forum, such as a public school, may be confined to the government's intended purpose for use of the property, such as education. Limitations on expression in a nonpublic forum still must be reasonable and not involve viewpoint discrimination.

Public schools may create a limited public forum for expression. This category refers to a forum that would otherwise be nonpublic, but that school officials have designated for a certain group of speakers, such as students, and/or for certain topics to be discussed. Illustrative are student activities held during a period designated for student clubs to meet. A limited forum is subject to the same protections that are applied to a traditional public forum, except for the allowable restrictions on categories of speakers and topics.

Private Expression

Private student expression of ideological views is governed by the landmark Supreme Court decision, *Tinker v. Des Moines Independent Community School District,* rendered in 1969. In *Tinker,* a few students were disciplined for wearing black armbands to protest the Vietnam War, in violation of a policy enacted when school board members learned about the planned silent protest. The board policy did not ban the wearing of all symbols but was very specific in prohibiting armbands. The Supreme Court found no evidence of any disturbance from the students wearing the armbands and ruled that student expression may not be curtailed merely because it causes school officials some discomfort. The Court emphasized that students do not shed their constitutional rights when they enter a public school.

In *Tinker,* the Supreme Court articulated the disruption standard, echoing statements made in an earlier federal appellate ruling. The Court declared that students may express their ideological views in the classroom, cafeteria, or any other place, as long as they do not substantially disrupt the education process or interfere with the rights of others. At the same time, the Court also recognized that school personnel have the right as well as the duty to maintain discipline in schools and an environment conducive to learning.

Once courts determined that protected private student expression is at stake, they had to assess whether restrictions may be imposed in particular situations. Students have prevailed where their expression critical of school authorities or school policies has been the basis for disciplinary action, which would cause ordinary students to refrain from such expression in the future.

Under the *Tinker* principle, private expression may be curtailed if it is likely to disrupt the educational process; examples of such expression include wearing gang symbols or voicing racist comments. Prior restraints placed on student expression (e.g., a rule prohibiting students from wearing any buttons with printed words) must be justified as bearing a substantial relationship to an important government interest. Of course, students always may be punished after the fact if their expression causes a disruption or interferes with others' rights. Courts have condoned disciplinary action against students who have engaged in walkouts, boycotts, sit-ins, or other protests involving conduct that blocks hallways, damages property, causes students to miss class, or in other ways interferes with school activities.

Distribution of Non–School-Sponsored Literature

As will be discussed, school authorities have considerable discretion in censoring *school-sponsored* publications for legitimate pedagogical reasons. Yet, students have a First Amendment right to distribute *private* literature at school as long as the expression does not fall in one of the unprotected categories and the distribution does not disrupt school activities or interfere with others' rights. Over time, students have attempted to distribute underground (not school-sponsored) newspapers and other materials at school, ranging from articles criticizing governmental policies to literature promoting religious beliefs.

Courts have ruled that school authorities must justify any policies that require administrative approval of the distribution of private student literature. If a school is going to impose prior restraints, it must set clear, narrow, and objective standards to judge what expression is barred, and it must establish mechanisms for a timely determination as to whether the criteria are met. The federal Constitution requires policies to be very specific when they limit *private* expression, and expression may not be censored for the viewpoint it promotes. Policies subjecting *all* nonschool publications to prior review for the purpose of censorship may be considered unconstitutionally overbroad.

When students' distribution of religious messages has been challenged as abridging the Establishment Clause, some courts have upheld prohibitions on such distribution for elementary students, concluding that elementary-age children are vulnerable and impressionable, and thus they need to be protected from proselytizing activities of their classmates. However, in a number of cases involving high school students, courts have upheld their rights to distribute religious literature during noninstructional time at school. These courts have reasoned that religious and nonreligious publications distributed by high school students are subject to the same First Amendment protections.

As noted previously, the courts have been more likely to support school officials when they have taken disciplinary action after students engaged in questionable expression. School officials are not required to demonstrate that a publication encouraging actions that endanger students' health or safety, such as promoting drug use, would lead to a substantial disruption. Additionally, Courts have allowed students to be disciplined after the fact for distributing material that is abusive toward classmates or teachers or that advocates the destruction of school property.

Antiharassment Policies

"Hate speech" policies have been struck down in municipalities and public higher education, but traditionally K–12 school board policies barring expression that constitutes verbal harassment based on race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics have not seemed as susceptible to successful First Amendment claims. Public schools have enjoyed this judicial deference due to their purpose in educating and instilling basic values such as respect, good manners, and habits of civility. Nonetheless, courts have struck down some school board antiharassment policies, because they were found to be overbroad in curtailing protected expression or arbitrarily or discriminatorily applied. Questions remain regarding the legality of antiharassment policies, especially those adopted in the absence of disruptive incidents.

Some cases have focused on students displaying confederate flags during class in violation of school districts' antiharassment policies. Courts in general have upheld disciplinary action for such displays in schools that have experienced racial tensions, because the confederate flag can lead to a disruption in such environments. However, students have prevailed in challenging bans on displaying the confederate flag where there is no evidence that such emblems of students' southern heritage are linked to a school disruption.

Particularly sensitive questions are raised when antiharassment provisions collide with students' expression of their religious views. Courts have recognized the tension between the school's duty to instill civil behavior and students' rights to express their opinions at school. Conflicting decisions have been rendered regarding whether schools may prohibit students from airing their religious beliefs regarding lifestyle choices. Some courts have upheld school districts' efforts to prohibit expression that demeans homosexuality, noting that public schools have a legitimate role in promoting respectful discourse among students and in barring harassing expression. Other courts have upheld students' rights to express their sincerely held religious beliefs that homosexuality is a sin, even though such expression may offend some classmates.

Electronic Expression

The judiciary usually has applied the *Tinker* principle in addressing First Amendment protections afforded to students' expression via the Internet,

because the expression is private rather than school sponsored. Frequently, these cases involve student materials that are created and distributed off school grounds but are easily accessible to the entire school during school hours.

Students have prevailed in several instances where they have challenged disciplinary action for Web pages they created at home in the absence of evidence that the material threatened or intended harm to anyone or interfered with school discipline. Other students have been disciplined for Internet communications that have defamed classmates or teachers or have been sufficiently connected to a disruption of the school. The key determinant in these cases appears to be whether the material created off campus has a direct and detrimental impact on the school, its staff, and/or its students. Of course, as discussed previously, electronic communication that poses a genuine threat may not deserve constitutional protection at all.

School-Sponsored Expression

The amount of protection afforded student speech is based on whether it is private expression that happens to occur at school in contrast to expression that *represents* the school. While the courts afford private expression extensive constitutional protection under *Tinker,* student expression appearing to be school sponsored can be limited based on legitimate pedagogical reasons. The federal courts have broadly interpreted what constitutes school-sponsored speech, thus reducing the circumstances under which student expression is protected by the First Amendment.

The legality of school censorship of student expression in school publications and other school-sponsored activities is governed by the principle recognized in the 1988 Supreme Court decision, *Hazelwood School District v. Kuhlmeier.* In *Hazelwood,* the controversy focused on the high school principal's censorship of material from a student newspaper for its content dealing with divorce and teenage pregnancy and for fears that specific students could be identified in the articles. The Court found the newspaper to be a school-sponsored forum, not a public forum, reasoning that only through clear intent of school officials is a limited public forum created for student expression. The Court held that expression appearing to bear the school's imprimatur can be censored based on legitimate pedagogical concerns, and it distinguished a public school's *toleration* of private student expression, which is constitutionally required under some conditions, from its *promotion* of student speech that represents the school and may contradict the message the school wants to promote.

In subsequent cases, courts have broadly interpreted school-sponsored expression, noting that limitations may be placed on speech in schools that would not be allowed elsewhere. Courts have reasoned that the school has the right to disassociate itself from controversial expression that conflicts with its objectives and have considered school-sponsored activities to include student newspapers supported by the public school, extracurricular activities sponsored by the school (including those that take place off school grounds), school assemblies, and classroom activities.

It is important to note that *Hazelwood* does not give school authorities unlimited discretion to censor student expression that bears the public school's imprimatur. Even in a nonpublic forum, viewpoint discrimination is not allowed. To illustrate, a school board could not bar antidraft organizations' advertisements from the school newspaper while allowing the paper to include advertisements pertaining to military recruitment. Moreover, if viewpoint discrimination is not at issue, censorship of student expression in a nonpublic forum must still be related to legitimate pedagogical concerns to comply with the principle articulated in *Hazelwood.*

Some disputes have focused on student religious expression in school-sponsored activities, and as is true with claims involving the distribution of religious literature and antiharassment provisions, these controversies are particularly volatile. Courts have ruled that students do not have a free expression right to infuse their religious beliefs in course assignments when clearly instructed to do research on specific topics or to investigate subjects that are new to them. However, if students are given discretion in selecting the topic for an assignment, they may not be barred from including religious content. And, of course, courts

have recognized that it is permissible, and indeed desirable, for public schools to teach *about* religion as long as public school personnel do not cross the line to religious indoctrination.

A controversial issue recently has been the application of *Hazelwood* to institutions of higher education. There are obvious differences between high schools and postsecondary education. College students attend voluntarily, while at least part of high school is compulsory in all states. Also, college students are older and thus expected to be more mature than high school students. Based on these differences, student expression has been subject to somewhat different standards in postsecondary institutions. Still, some courts have applied *Hazelwood* to classroom expression in public institutions of higher education, reasoning that such expression represents the institution and can be censored for pedagogical reasons.

Time, Place, and Manner Regulations

Courts agree that school authorities may impose reasonable policies regulating the time, place, and manner of private and school-sponsored expression. Thus, courts have upheld school policies that limit expression to prevent a disruption of the educational environment or school activities, such as prohibiting literature distribution in classrooms or on stairways when students are changing classes or exiting the building.

Even when the courts have upheld them, time, place, and manner restrictions must be reasonable, avoid viewpoint discrimination, and be applied consistently to all students. In addition, school officials should provide students with clear guidelines regarding when and where literature distribution and other expressive activities are appropriate. A policy would not be considered a reasonable time, place, or manner regulation if it confined student literature distribution to an hour after school ends or to a remote place off school grounds.

At the same time, regulations must not interfere with students' rights to receive or reject literature that is offered in conformance with the school's policies. School regulations should be specific as to when and where students may gather, distribute petitions and other materials, and otherwise express their ideas in nondisruptive ways. Absent such clearly articulated guidelines, time, place, and manner restrictions may be vulnerable to successful judicial challenges.

Student and Community Meetings in Public Schools

School policies that limit meetings of student and community groups also have generated a significant amount of litigation. The First Amendment does not protect certain student groups such as secret societies that determine membership by a student vote. Schools are not expected to recognize such groups and usually prohibit membership in secret societies. In addition, faculty may exert control over some school-sponsored organizations, such as the National Honor Society, and students have not been successful in contesting faculty decisions regarding who is admitted to such honor societies. As discussed below, other student groups have been the focus of frequent First Amendment controversies.

Student-Initiated Clubs

Prohibitions on meetings of student-initiated groups with open membership are vulnerable to challenges under the First Amendment and the Equal Access Act (EAA). The EAA was enacted in 1984 and specifies that if federally assisted secondary schools provide a limited open forum for noncurricular student groups to meet during noninstructional time, access cannot be denied based on the religious, political, philosophical, or other content of the groups' meetings. Strong advocates of the EAA were groups associated with the religious right, but some more liberal groups also supported this law to derail efforts to impose daily prayer in public schools.

The EAA's protection extends far beyond student-initiated religious expression. If officials in a federally assisted high school allow even one noncurricular group to use school facilities during noninstructional time, the EAA guarantees equal access for other noncurricular student groups as long as they are not disruptive. In several cases, courts have agreed that

school authorities may not justify denying school access to particular student groups, such as peace activist organizations or the gay-straight alliances, when other student groups are allowed to hold meetings during noninstructional time.

Federally assisted high schools may decline to establish a limited open forum for student-initiated meetings and thus limit school access to student organizations that are curriculum related, such as language clubs and athletic teams. Yet, even if a secondary school has *not* established a limited open forum, it still cannot exert viewpoint discrimination against particular curriculum-related groups.

The Supreme Court rejected a challenge to the EAA in *Board of Education of Westside Community Schools v. Mergens* (1990). The Court found the law to be religiously neutral and designed to expand students' expression rights, so it does not abridge the Establishment Clause of the First Amendment. The Court thus concluded that allowing student-initiated religious meetings to take place during noninstructional time does not give the impression that the school endorses the groups' religious views.

Courts recently also have relied on the Free Speech Clause of the First Amendment to require schools to provide equal treatment of student religious and other groups in terms of access to school facilities, bulletin boards, and other school resources. In light of how broadly courts have interpreted First Amendment protections in this regard, there is some sentiment that the EAA is no longer needed.

Community Meetings

Along with its other elements, the First Amendment affords considerable protections to community groups that wish to meet in public schools, including groups involving children. Controversies over school access for community groups focus on the First Amendment rather than the EAA, as the latter provision pertains only to student-initiated groups in secondary schools. A key First Amendment consideration is whether the public school has established a forum for groups to meet.

The Supreme Court has delivered several significant decisions holding that if schools create a limited open forum for community groups to meet by allowing school access to one such group, the school may not deny access to other organizations. Selective access based on the content of the meetings constitutes viewpoint discrimination in violation of the Free Speech Clause. For example, in *Good News Club v. Milford Central School,* the Supreme Court in 2002 upheld the right of an evangelical Christian organization to hold meetings in the public school right after school hours, even though the club targets elementary-age children attending the school. The Court rejected the assertion that allowing the club to meet in public schools abridged the Establishment Clause. Subsequently, lower courts have condoned the distribution of flyers in public schools to publicize the Good News Club meetings and have allowed teachers to attend the club's meetings that are held after school hours, even in the elementary school where they teach.

School access for the Boy Scouts has been controversial following the Supreme Court's decision that allows this organization to deny homosexuals the opportunity to be group leaders, which conflicts with some school districts' antidiscrimination policies. Courts have recognized the free speech rights of this organization to use school facilities after school hours if other groups are granted such access, even though this practice conflicts with districts' policies prohibiting discrimination on the basis of sexual orientation. In light of the complex issues involved, the scope of constitutional and statutory protections afforded to student and community groups seeking school access seems likely to remain contentious.

Student Appearance

Students' and schools' interests often collide in connection with student appearance. Whether it is the latest fad in hairstyles or clothing, courts often have been called on to determine how much discretion school authorities have when attempting to regulate student appearance in public schools.

Hairstyle

Student hair length, grooming, and hair color have generated many First Amendment disputes.

Unfortunately, courts have not been uniform in their assessments of school restrictions on students' hairstyle. Some courts have found that such constraints impair students' protected liberties, but others have supported the discretion of school authorities to govern student hair length and style.

The length of male students' hair was an especially litigious issue in the 1970s, and the U.S. Supreme Court declined to render a decision in any of the cases appealed to it. Thus, legal standards varied across federal circuits that dealt with this issue. Where the school's justification for a grooming regulation has been based on concern for student health, such as requiring hairnets for cafeteria workers, the restrictions usually have been upheld. In addition, school officials have been allowed to impose grooming restrictions on students participating in extracurricular activities for safety reasons and on those enrolled in vocational programs where prospective employers often visit.

Of course, students may be disciplined for hairstyles that cause a disruption, such as hair groomed or dyed in a manner that distracts classmates from educational activities. But hairstyle regulations may not be arbitrary or devoid of an educational rationale. Several courts have allowed different hair-length restrictions to be applied to male and female students to reflect community norms or to curtail the influence of gangs.

Attire

Courts have upheld schools in barring student attire that is immodest, suggestive, disruptive, or unsanitary or that promotes unlawful behavior for minors. The principles articulated by the Supreme Court in *Tinker, Fraser,* and *Frederick* govern the constitutionality of student attire.

Only when school-sponsored expression is at issue would the *Hazelwood* principle be implicated, and there usually is no contention that student clothing represents the school. Students may be asked not to wear attire that is disruptive or intrudes on the rights of others under *Tinker.* Lewd and vulgar attire may be censored applying *Fraser,* and attire viewed as promoting unlawful conduct for minors can be barred under *Frederick,* regardless of whether the attire would meet the *Tinker* test of threatening a disruption. Some courts have broadly interpreted *Fraser,* reasoning that school boards and educational officials may prevent students from wearing attire that is disrespectful to school authorities, that undermines their authority, or that conflicts with school goals of denouncing drugs and promoting human dignity and democratic ideals (e.g. Marilyn Manson T-shirts, gang symbols, antigay shirts). These courts have recognized that a school may prohibit student expression that is inconsistent with its educational mission even though such speech might be protected by the First Amendment outside the school environment.

As noted previously, though, other courts have narrowly interpreted *Fraser,* reasoning that it allows school authorities to curtail sexually oriented expression considered lewd or vulgar, but does not extend to political or other expression. Moreover, whether *Fraser* applies to the *content* of expression or only to the *manner* of expression remains controversial. In *Frederick,* the Supreme Court declined to extend *Fraser* to any expression school authorities consider plainly offensive, but otherwise it did not resolve the conflicting interpretations of the reach of *Fraser.* If a court narrowly interprets the application of *Fraser,* then *Tinker's* disruption standard will likely be evoked to determine the constitutionality of the student attire at issue unless it promotes illegal conduct, which is governed by *Frederick.*

As with hairstyle regulations, there must be a legitimate educational rationale for the school to regulate student attire. In addition, dress codes must not discriminate on the content of students' messages or be discriminatorily enforced. Targeted bans toward particular expression are considered viewpoint discrimination. Still, courts have not been consistent in deciding whether students' First Amendment rights to convey their religious beliefs on T-shirts (e.g., homosexuality is shameful) or the school's duty to maintain a respectful environment should prevail. In several cases, courts have concluded that the *Tinker* disruption standard has not been satisfied by the school's restrictions on students' political or religious statements on T-shirts in the absence of a disruption. Other courts have ruled in favor of the school's authority to adopt policies that bar such attire to ensure a respectful educational environment and to avoid intruding on the rights of other students.

Different attire rules for male and female students have been condoned by courts. For example, the judiciary has upheld dress codes that prohibit male students from wearing earrings to inhibit gang influences and promote community values, rejecting the assertion that jewelry restrictions must be applied equally to male and female students. Also, courts have upheld school boards in prohibiting students from wearing clothing of the opposite sex to school dances and other events.

Some schools are adopting restrictive dress codes or student uniforms to avoid the sensitive controversies pitting expression rights against schools' interests in promoting civil expression. And courts have been inclined to uphold such policies as long as there are waivers for students who are opposed to uniforms on religious grounds and provisions are made to assist students who cannot afford the specified attire.

Prescribed student uniforms are gaining popularity, particularly in urban areas. Recognizing that attire can communicate a message entitled to First Amendment protection, courts nonetheless have found student uniform policies justified by substantial government interests unrelated to suppressing expression. Both restrictive dress codes and uniforms have been successfully defended to advance legitimate school objectives such as enhancing learning, reducing discipline problems, eliminating gang influences, decreasing socioeconomic tensions, increasing attendance, and improving the school climate. Courts have rejected parental assertions that prescribed student uniforms violate their Fourteenth Amendment right to direct the upbringing of their children or impair the First Amendment's religion clauses. Also, the judiciary has not been persuaded that rights are violated because those who opt out of attire requirements are stigmatized or ridiculed by classmates.

Controversies over student attire are likely to persist into the foreseeable future as students continue to find new ways to offend school personnel through their dress and appearance. School boards would be wise to ensure that they have legitimate educational reasons before disciplining students for their appearance. Restrictions designed to ensure health, reduce violence and discipline problems, or improve learning have been upheld. Attire restrictions should not be imposed to suppress student expression or applied in a discriminatory fashion. Also, they should not place a burden on religious expression without a compelling justification. Additional litigation in this area seems assured, because the distinctions between legitimate restrictions and those that impair free expression rights are not always clear.

Conclusion

Courts will continue to be called upon to balance students' rights to express views and receive information with educators' obligations to maintain an appropriate educational environment. In the past decades, the controversial issues have reflected shifts in cultural tides. For example, student hair length is not the significant issue that it was in the 1970s. Many current conflicts between students and school personnel over the parameters of protected expression focus on students' controversial postings to broad audiences via the Internet.

While *Tinker* has not been overturned, restrictions have been placed on when its disruption principle applies. The reach of *Tinker* was narrowed after the Supreme Court ruled in *Fraser* and *Hazelwood* that lewd and vulgar student speech and attire are not protected by the First Amendment and that public school authorities may censor student expression that represents the school. More recently, in *Frederick,* the Court clarified that student expression viewed by school authorities as promoting illegal activity may be the basis for disciplinary action. Nonetheless, the *Tinker* disruption standard recently appears to have been revitalized in cases addressing student expression rights in connection with antiharassment policies, postings on personal Web pages, and some attire restrictions. Moreover, students do not need to base claims solely on constitutional protections, as federal and state laws also protect students' expression and association rights. The one certainty in the student expression arena is that judicial criteria applied in weighing the competing interests of students and school personnel will continue to be refined.

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See also *Bethel School District No. 403 v. Fraser; Board of Education of Westside Community Schools v. Mergens;* Equal Access Act; First Amendment; *Hazelwood School District v. Kuhlmeier; Morse v. Frederick; Tinker v. Des Moines Independent Community School District*

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Gangs

A gang, essentially, is a group of two or more people whose primary purposes include the commission of illegal and/or violent acts, usually designed to mark territory and preserve a sense of belonging and protection in a geographical area. Gangs and gang violence pervade both schools and communities as a whole. No community, whether urban, suburban, or rural, is immune from the effects of gang violence. Gang activity is often associated with areas that also experience disruptions in families, high poverty, school overcrowding, low student self-esteem, teacher apathy, low cultural and ethnic understanding on the part of educators, and continued race discrimination in schools.

From the schools' perspective, combating gang presence is a matter of strong policy and practice, usually through conduct and discipline measures like zero tolerance policies, antihazing policies, strict dress codes and uniforms, and random and suspicion-based search and seizure. Perhaps the most popular and noticeable antigang measure that school officials employ is a strict dress code or, in some instances, mandatory uniform policies. This entry looks at typical practices and related court rulings.

Student Challenges

Challenges to dress codes and uniforms typically come through the First Amendment Free Speech Clause; a related claim often falls under the freedom of assembly. However, almost invariably, these challenges fail for one or more important reasons.

Some courts hold that student dress does not rise to the level of expressive conduct necessary to warrant First Amendment protection (*Olesen v. Board of Education,* 1987). In *Olesen,* a high school student was suspended for violating an antigang policy, which included a provision against wearing clothing, jewelry, or other symbols that signified gang membership. School officials targeted a student who was believed to be wearing an earring that identified membership in a local gang. The student claimed he was merely expressing his "individuality" and argued that the policy violated his free speech rights. The court found for the officials, holding that a message of individuality was not particularized enough to fall within First Amendment protection.

On a second issue in *Olesen,* the student argued that the antigang policy unfairly targeted boys, in that the policy did not prohibit girls from wearing earrings. The court rejected that claim, too, as the policy targeted gang affiliation clothing, jewelry, and other signs and symbols, regardless of the student's sex. It is important for educators to review applicable dress and uniform codes for their currency, as gangs change symbols, colors, and other identifying messages often. Flexibility and coverage are a must for antigang policies to succeed.

School Actions and Defenses

Schools defend their dress codes, uniforms, and antigang policies on the disruption standard from *Tinker*

v. Des Moines Independent Community School District (1969). In *Tinker,* the Supreme Court ruled that school officials may not restrict the silent, passive, political speech of students without evidence that the speech materially or substantially interferes with or disrupts the work of the school or the rights of others or has the reasonable likelihood of doing so. It is clear that the signs and symbols of gang affiliation in a school could substantially disrupt the work of the school, as one of the well-known goals of gangs is to provoke conflict and violence.

School officials also defend their dress codes, uniforms, and antigang policies on the civility standard from *Bethel School District No. 403 v. Fraser* (1986). In *Bethel,* the Supreme Court reasoned that students' rights in schools are not automatically coextensive with adults' rights in other settings. In other words, the Court was of the opinion that it is appropriate for educators to disassociate their schools from the expressive conduct of students to make the point that lewd, vulgar, and profane speech is inconsistent with the fundamental values of public education. Civility and socially appropriate behavior are part of a school's curricular and cultural mission, and antigang policies are often well within these important institutional missions.

With respect to Fourth Amendment search and seizure, courts are almost uniformly favorable to the work of school officials and their antiviolence measures. To this end, courts typically agree that both suspicion-based and random, suspicionless searches are lawful in schools. Suspected gang membership may support reasonable suspicion and a justified search. The totality of the circumstances is analyzed when judging the reasonableness of a search, including known or suspected gang affiliation, tips from credible witnesses, and the likelihood that a search will turn up evidence of a violation of a law or school rule (*New Jersey v. T. L. O.,* 1985; *United States v. White,* 1995).

Random, suspicionless searches, such as those involving drug-sniffing dogs, are also effective in defusing gang activity and are commonly upheld in the courts. School officials regularly work with local law enforcement to conduct these searches, which often take school authority off school premises and into the community, where gang activity is often higher.

Punishment for gang-related activity in schools is often severe, defended with the application of zero tolerance policies and calling for expulsions that last as much as 1 year or even motions for permanent exclusion for the most serious offenders—those also charged and convicted of felonies. Among the applicable infractions are drug and weapon offenses and other acts involving serious bodily harm. While the authority of school officials to impose such penalties remains high, especially in light of the seriousness of the infractions, due process is still in order, with constitutional and statutory requirements for notice of the charges against the student and the requisite opportunity for a hearing. The more serious and/or long-term the penalty is, the more formal the procedures and hearings must be. It is important for educators to consult their state statutes and local ordinances for applicable antigang measures.

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See also Dress Codes; Drugs, Dog Searches for; Free Speech and Expression Rights of Students; Gun-Free Schools Act; Hazing; Zero Tolerance

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Gay, Lesbian, Bisexual, and Transgendered Persons, Rights of

The legal rights of gay, lesbian, bisexual, and transsexual/transgendered (GLBT) persons in the United States

largely depend on the state in which individuals reside. Whereas other historically marginalized American populations have federal constitutional or statutory protections, no federal constitutional or statutory protections, including federal hate crime laws, specifically address GLBT people, as laws do in most European and Scandinavian countries, Further, there are specific federal penalties in the United States for being "publicly queer," that is, being honest and open about one's sexual orientation and/or gender identity. These penalties include involuntary separation in the armed forces; spousal employee benefits considered as taxable income for domestic partners/civil union spouses; and the federal rejection of legal domestic partnerships, civil unions, and "gay" marriages under the federal Defense of Marriage Act passed in 1996.

At the state level, the situation is even more complex. At present, there is an incoherent quilt of state-level legislation around GLBT rights. Some states provide either full GLBT equality (Massachusetts) or something slightly less than equality (Vermont, Connecticut, New Jersey). Further, 18 states and the District of Columbia ban discrimination based on sexual orientation or sexual orientation and gender identity (see Table 1). However, 14 other states refuse to decriminalize queer identity despite the U.S. Supreme Court's decision in *Lawrence v. Texas* (2003), wherein the justices struck down an antisodomy law as it applied to consenting adults in the privacy of their homes. These states prevent GLBT people from adopting children; forbid "gay marriages" in their own states; and refuse to recognize legally sanctioned relationships contracted in other states, either under defense-of-marriage acts (DOMA) or specific constitutional amendments that outlaw "gay marriage."

The federal and multistate rejection of "gay marriage," according to proponents, possibly violates the Full Faith And Credit Clause of the federal constitution, which demands that the legal contracts entered into in one state be recognized by other states and the federal government. That said, GLBT activists have been slow to bring suits against state-level DOMA laws, doing so only when issues such as child custody are involved. The results of these cases have been mixed, ranging from outright defeat to narrow, tightly circumscribed victories for GLBT litigants.

For educators working in public schools, this patchwork of GLBT-supportive to GLBT-hostile laws means that being "out" at work can threaten their jobs. While most public teachers may be protected to some extent by tenure laws (nontenured GBLT teachers have no protections whatsoever), most public administrators do not have tenure and are largely "at-will" employees. Consequently, in most states, being "out" threatens not only one's job but also possibly one's license, particularly in states that have refused to rescind their laws banning consensual sodomy, which have historically criminalized GLBT identity. Such laws make GLBT people "statutory criminals" and, in turn, threaten professional licenses.

Table 1 States With Specific Civil Rights Protections

States With LGBT Civil Rights Protections	*States With LGB Civil Rights Protections*
California (1992, added "Transgender" in 2003)	Wisconsin (1982)
Minnesota (1993)	Massachusetts (1989)
Washington, D.C. (2001)	Connecticut (1991)
Rhode Island (2001)	Hawaii (1991)
New Mexico (2003)	New Jersey (1992)
Illinois (2005)	Vermont (1992)
Maine (2005)	New Hampshire (1997)
Colorado (2007)	Nevada (1999)
Iowa (2007)	Maryland (2001)
	New York (2002)

Unlike adults in the United States, students in public schools do have a measure of federal protection provided by the Equal Access Act of 1984—protection that is largely unintentional, since the act was designed to protect prayer and Bible study clubs. Passed and signed into law during the presidency of Ronald Reagan, the act guarantees that public school districts that maintain a "limited public forum" may not discriminate against noncurricular, student-initiated groups. Yet this legislation is so expansively written that federal courts have subsequently ruled that boards may not ban student-initiated gay-straight alliances (GSAs). In some locales, school boards have responded to the rise of GSAs by requiring students to seek written parental permission to join any student group. While on the surface, this requirement appears neutral, this response limits student participation in GSAs, particularly given the evidence that GLBT students are at risk of violence from their own family members, or even of being thrown out of their very homes, if their status becomes known.

In sum, the legal status of GLBT people in the United States varies widely. In most areas in the United States, GLBT persons can be fired from their jobs, denied employment and housing, barred from seeing their hospitalized partners, denied survivorship rights, and even denied child custody merely because of their status.

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See also Equal Access Act; Gay, Lesbian and Straight Education Network (GLSEN)

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Gay, Lesbian and Straight Education Network (GLSEN)

Founded in 1990 as the Gay and Lesbian Independent School Teachers Network (GLISTN), the Gay, Lesbian and Straight Education Network (GLSEN) became a national organization in 1995. Kevin Jennings was GLISTN's founder and has served as GLSEN's executive director since 1995.

First, GLISTN and then GLSEN focused on improving conditions for lesbian, gay, bisexual, and transsexual/transgendered (LGBT) students attending primarily American public schools. In addition, GSLEN publishes national surveys on the climate of public schools for LGBT youth. GLSEN also advocates for local, state, and national educational policies that help public schools to be free of the kind of anti-LGBT harassment and bullying reflected in a 2005 poll conducted by Harris Poll Interactive with GLSEN.

GLSEN is best known for providing support for gay-straight alliances (GSAs). GSAs are student-initiated and student-run extracurricular clubs that provide a "safe space" for LGBT students and their allies. As student-initiated and student-run clubs, GSAs are protected by the 1984 Equal Access Act, which Congress passed and President Ronald Reagan signed into law to permit student-organized prayer and Bible study clubs in public secondary schools that receive federal financial aid. Pursuant to the terms of the Equal Access Act, educational officials cannot discriminate against students on the basis of the religious, political, or philosophical content of their speech as long as it is not reasonably forecast to create a material and substantial interference with school activities.

The U.S. Supreme Court upheld the constitutionality of the Equal Access Act in *Board of Education of Westside Community Schools v. Mergens* (1990). At the time, religious proponents of the Equal Access Act hailed the Court's judgment in *Mergens.* However, *Mergens* has been used by GSAs to obtain more access to school facilities for meetings, which has created dismay and discontent among religious

groups. For example, federal courts in California (*Colin ex rel. Colin v. Orange Unified School District,* 2000) and Utah (*East High Gay/Straight Alliance v. Board of Education,* 1999a, 1999b; *East High School Prism Club v. Seidel,* 2000) agreed that educational officials could not deny clubs sponsored by GSAs the right to use school facilities under the terms of the Equal Access Act.

Since the mid-1990s, GSAs have experienced slow growth, which is not surprising given the hostility in many locales to queer-related student groups. While GSAs are federally protected "queer-space," some states and school boards have begun to require parental permission for students participating in any extracurricular activities. Insofar as it can be dangerous for LGBT students to come out to their parents, such a tactic effectively stops many students from participating in GSAs. In 2005, GLSEN listed 40 GSA chapters.

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See also *Board of Education of Westside Community Schools v. Mergens;* Equal Access Act

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Gebser v. Lago Vista Independent School District

Gebser v. Lago Vista Independent School District (1998) established the legal standards under which school boards that receive federal funds can be liable for damages for teacher-to-student sexual harassment under Title IX of the Education Amendments of 1972. *Gebser* is one of the Supreme Court's three rulings on sexual harassment in schools and was the second to address teacher-to-student harassment. The Court's other case involving sexual harassment by a teacher of a student was *Franklin v. Gwinnett County Public Schools* (1992). The Court's final case on the topic, *Davis v. Monroe County Board of Education* (1999), addressed student-to-student sexual harassment.

Facts of the Case

Gebser was a ninth-grade student in the Lago Vista Independent School District, a public school system in Texas that received federal funds. A male teacher made sexually suggestive comments to Gebser in school and initiated sexual contact with her during a home visit. For about a half year, the teacher engaged the student in sexual relations but never on school grounds. This relationship ended when police arrested the teacher after the two were discovered having sexual relations. The board fired the teacher and sought to have his credentials revoked. At that time, the board did not have an antiharassment policy or an official grievance procedure as required by federal regulations.

The student and her mother unsuccessfully sued the school board for monetary damages under Title IX. Both a federal trial court in Texas and the Fifth Circuit ruled in favor of the board. On further review, the U.S. Supreme Court affirmed by a 5-to-4 margin.

The Court's Ruling

The Court held that a school board that receives federal funds cannot be liable for damages for teacher-to-student

sexual harassment unless officials with the authority to correct the harassment had actual notice of, and were deliberately indifferent to, the actions of the harasser.

The majority opinion distinguished Title IX suits from Title VII claims in refusing to apply common-law agency principles to teacher-student harassment. The Court pointed out that Title VII of the Civil Rights Act of 1964 governs employment discrimination, and it is applicable to staff-to-staff sexual harassment in schools. The Court explained that Title VII explicitly defines *employer* to include any "agent," and it holds the employer responsible for its employees' misconduct of sexual harassment based on the principles of *respondeat superior* and *constructive notice.* In other words, the Court ruled that a school board can be liable only if harassment is aided by a person in authority and in situations where they should have known about the behavior but failed to discover it and/or prevent it from occurring. The Court indicated that Title VII also contains an express cause of action, provides monetary damages as a remedy, and establishes the maximum amount of such damages.

In contrast, the Supreme Court majority in *Gebser* found that under Title IX, "agent" was not included in the definition of employer and that a private right of action was judicially implied. The Court decided that Title IX is "contractual" in nature, because based on the Spending Clause of the U.S. Constitution, Congress awards federal funds conditioned on funding recipients' compliance with federal nondiscrimination law. When Congress does not explicitly provide a private course of action, the Court was of the opinion that its duty was to reconcile its judicial power in granting all appropriate relief with congressional purpose. The Court reasoned that Title IX focused more on protection of individuals from sexual harassment, while Title VII aimed to remedy individuals for injuries from past discrimination. Here, the Court was unable to uncover congressional intent to grant monetary damages to private parties when funding recipients are unaware of discrimination.

The Court added that the legal standards for an implied-damages remedy should be fashioned similarly to the express remedial scheme under Title IX, which requires that appropriate persons in the funding recipient have actual notice of, but demonstrate deliberate indifference to, the discrimination. The Court specified that such appropriate persons should at least have authority to take corrective action to stop discrimination. The Court concluded that since the school board's failure to develop an antiharassment policy or a grievance procedure did not constitute actual notice or deliberate indifference, it was not liable for damages under Title IX.

The remaining four members of the Court authored two dissents in *Gebser.* Regarding the majority opinion as a departure from *Franklin v. Gwinnett County Public Schools* (1992), the dissent endorsed the application of agency law principles, under the belief that the school board should have been liable for damages when the teacher misused his authority in sexually harassing a student. The dissents further maintained that the board may well have been able to use an affirmative defense if it had already had a well-publicized antiharassment policy and an effective grievance procedure in place.

Ran Zhang

See also *Davis v. Monroe County Board of Education; Franklin v. Gwinnett County Public Schools;* Sexual Harassment of Students by Teachers; Title VII; Title IX and Sexual Harassment

Legal Citations

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), *on remand,* 206 F.3d 1377 (11th Cir. 2000).

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Gebser v. Lago Vista Independent School District (Excerpts)

In Gebser v. Lago Vista Independent School District, *the Supreme Court clarified the limits of liability under Title IX for school boards when teachers sexually harass students. The Court explained that boards cannot be liable under Title IX for the sexual misconduct of teachers unless officials with authority to institute corrective measures have actual notice of and act with deliberate indifference to the misbehavior.*

Supreme Court of the United States

GEBSER

v.

LAGO VISTA INDEPENDENT SCHOOL DISTRICT.

524 U.S. 274

Argued March 25, 1998.

Decided June 22, 1998.

Justice O'CONNOR delivered the opinion of the Court.

The question in this case is when a school district may be held liable in damages in an implied right of action under Title IX of the Education Amendments of 1972 (Title IX), for the sexual harassment of a student by one of the district's teachers. We conclude that damages may not be recovered in those circumstances unless an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct.

I

In the spring of 1991, when petitioner Alida Star Gebser was an eighth-grade student at a middle school in respondent Lago Vista Independent School District (Lago Vista), she joined a high school book discussion group led by Frank Waldrop, a teacher at Lago Vista's high school. Lago Vista received federal funds at all pertinent times. During the book discussion sessions, Waldrop often made sexually suggestive comments to the students. Gebser entered high school in the fall and was assigned to classes taught by Waldrop in both semesters. Waldrop continued to make inappropriate remarks to the students, and he began to direct more of his suggestive comments toward Gebser, including during the substantial amount of time that the two were alone in his classroom. He initiated sexual contact with Gebser in the spring, when, while visiting her home ostensibly to give her a book, he kissed and fondled her. The two had sexual intercourse on a number of occasions during the remainder of the school year. Their relationship continued through the summer and into the following school year, and they often had intercourse during class time, although never on school property.

Gebser did not report the relationship to school officials, testifying that while she realized Waldrop's conduct was improper, she was uncertain how to react and she wanted to continue having him as a teacher. In October 1992, the parents of two other students complained to the high school principal about Waldrop's comments in class. The principal arranged a meeting, at which, according to the principal, Waldrop indicated that he did not believe he had made offensive remarks but apologized to the parents and said it would not happen again. The principal also advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting, but he did not report the parents' complaint to Lago Vista's superintendent, who was the district's Title IX coordinator. A couple of months later, in January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse and arrested Waldrop. Lago Vista terminated his employment, and subsequently, the Texas Education Agency revoked his teaching license. During this time, the district had not promulgated or distributed an official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.

Gebser and her mother filed suit against Lago Vista and Waldrop in state court in November 1993, raising claims against the school district under Title IX, 42 U.S.C. § 1983, and state negligence law, and claims against Waldrop primarily under state law. They sought compensatory and punitive damages from both defendants. After the case was removed, the United States District Court for the Western District of Texas granted

summary judgment in favor of Lago Vista on all claims, and remanded the allegations against Waldrop to state court. . . .

Petitioners appealed only on the Title IX claim. The Court of Appeals for the Fifth Circuit affirmed, *Doe v. Lago Vista Independent School Dist.*, . . .

. . . . The Fifth Circuit's analysis represents one of the varying approaches adopted by the Courts of Appeals in assessing a school district's liability under Title IX for a teacher's sexual harassment of a student. We granted certiorari to address the issue and we now affirm.

II

Title IX provides in pertinent part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." The express statutory means of enforcement is administrative: The statute directs federal agencies that distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through "any . . . means authorized by law," including ultimately the termination of federal funding. The Court held in *Cannon v. University of Chicago,* that Title IX is also enforceable through an implied private right of action, a conclusion we do not revisit here. We subsequently established in *Franklin v. Gwinnett County Public Schools,* that monetary damages are available in the implied private action.

In *Franklin,* a high school student alleged that a teacher had sexually abused her on repeated occasions and that teachers and school administrators knew about the harassment but took no action, even to the point of dissuading her from initiating charges. The lower courts dismissed Franklin's complaint against the school district on the ground that the implied right of action under Title IX, as a categorical matter, does not encompass recovery in damages. We reversed the lower courts' blanket rule, concluding that Title IX supports a private action for damages, at least "in a case such as this, in which intentional discrimination is alleged." *Franklin* thereby establishes that a school district can be held liable in damages in cases involving a teacher's sexual harassment of a student; the decision, however, does not purport to define the contours of that liability.

We face that issue squarely in this case. Petitioners, joined by the United States as *amicus curiae,* would invoke standards used by the Courts of Appeals in Title VII cases involving a supervisor's sexual harassment of an employee in the workplace. In support of that approach, they point to a passage in *Franklin* in which we stated: "Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and 'when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor "discriminate[s]" on the basis of sex.' We believe the same rule should apply when a teacher sexually harasses and abuses a student." *Meritor Savings Bank, FSB v. Vinson* directs courts to look to common law agency principles when assessing an employer's liability under Title VII for sexual harassment of an employee by a supervisor. Petitioners and the United States submit that, in light of *Franklin*'s comparison of teacher-student harassment with supervisor-employee harassment, agency principles should likewise apply in Title IX actions.

Specifically, they advance two possible standards under which Lago Vista would be liable for Waldrop's conduct. First, relying on a 1997 "Policy Guidance" issued by the Department of Education, they would hold a school district liable in damages under Title IX where a teacher is "'aided in carrying out the sexual harassment of students by his or her position of authority with the institution,' " irrespective of whether school district officials had any knowledge of the harassment and irrespective of their response upon becoming aware. That rule is an expression of *respondeat superior* liability, *i.e.,* vicarious or imputed liability under which recovery in damages against a school district would generally follow whenever a teacher's authority over a student facilitates the harassment. Second, petitioners and the United States submit that a school district should at a minimum be liable for damages based on a theory of constructive notice, *i.e.,* where the district knew or "should have known" about harassment but failed to uncover and eliminate it. Both standards would allow a damages recovery in a broader range of situations than the rule adopted by the Court of Appeals, which hinges on actual knowledge by a school official with authority to end the harassment.

Whether educational institutions can be said to violate Title IX based solely on principles of *respondeat superior* or constructive notice was not resolved by *Franklin*'s citation of *Meritor.* That reference to *Meritor* was made with regard to the general proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX, an issue not in dispute here. In fact, the school district's liability in *Franklin* did not necessarily turn on principles of

imputed liability or constructive notice, as there was evidence that school officials knew about the harassment but took no action to stop it. Moreover, *Meritor*'s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX: Title VII, in which the prohibition against employment discrimination runs against "an employer," explicitly defines "employer" to include "any agent." Title IX contains no comparable reference to an educational institution's "agents," and so does not expressly call for application of agency principles.

In this case, moreover, petitioners seek not just to establish a Title IX violation but to recover *damages* based on theories of *respondeat superior* and constructive notice. It is that aspect of their action, in our view, that is most critical to resolving the case. Unlike Title IX, Title VII contains an express cause of action and specifically provides for relief in the form of monetary damages. Congress therefore has directly addressed the subject of damages relief under Title VII and has set out the particular situations in which damages are available as well as the maximum amounts recoverable. With respect to Title IX, however, the private right of action is judicially implied and there is thus no legislative expression of the scope of available remedies, including when it is appropriate to award monetary damages. In addition, although the general presumption that courts can award any appropriate relief in an established cause of action, coupled with Congress' abrogation of the States' Eleventh Amendment immunity under Title IX led us to conclude in *Franklin* that Title IX recognizes a damages remedy, we did so in response to lower court decisions holding that Title IX does not support damages relief at all. We made no effort in *Franklin* to delimit the circumstances in which a damages remedy should lie.

III

Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute. That endeavor inherently entails a degree of speculation, since it addresses an issue on which Congress has not specifically spoken. To guide the analysis, we generally examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose.

Those considerations, we think, are pertinent not only to the scope of the implied right, but also to the scope of the available remedies. We suggested as much in *Franklin,* where we recognized "the general rule that all appropriate relief is available in an action brought to vindicate a federal right," but indicated that the rule must be reconciled with congressional purpose. The "general rule," that is, "yields where necessary to carry out the intent of Congress or to avoid frustrating the purposes of the statute involved."

Applying those principles here, we conclude that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.,* without actual notice to a school district official. Because Congress did not expressly create a private right of action under Title IX, the statutory text does not shed light on Congress' intent with respect to the scope of available remedies. Instead, "we attempt to infer how the [1972] Congress would have addressed the issue had the . . . action been included as an express provision in the" statute.

As a general matter, it does not appear that Congress contemplated unlimited recovery in damages against a funding recipient where the recipient is unaware of discrimination in its programs. When Title IX was enacted in 1972, the principal civil rights statutes containing an express right of action did not provide for recovery of monetary damages at all, instead allowing only injunctive and equitable relief. It was not until 1991 that Congress made damages available under Title VII, and even then, Congress carefully limited the amount recoverable in any individual case, calibrating the maximum recovery to the size of the employer. Adopting petitioners' position would amount, then, to allowing unlimited recovery of damages under Title IX where Congress has not spoken on the subject of either the right or the remedy, and in the face of evidence that when Congress expressly considered both in Title VII it restricted the amount of damages available.

Congress enacted Title IX in 1972 with two principal objectives in mind: "[T]o avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices." The statute was modeled after Title VI of the Civil Rights Act of 1964, which is parallel to Title IX except that it prohibits race discrimination, not sex discrimination, and applies in all programs receiving federal funds, not only in education programs. The two statutes operate in the same manner, conditioning an offer of federal funding on a promise by the

recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds.

That contractual framework distinguishes Title IX from Title VII, which is framed in terms not of a condition but of an outright prohibition. Title VII applies to all employers without regard to federal funding and aims broadly to "eradicat[e] discrimination throughout the economy." Title VII, moreover, seeks to "make persons whole for injuries suffered through past discrimination." Thus, whereas Title VII aims centrally to compensate victims of discrimination, Title IX focuses more on "protecting" individuals from discriminatory practices carried out by recipients of federal funds. That might explain why, when the Court first recognized the implied right under Title IX in *Cannon,* the opinion referred to injunctive or equitable relief in a private action but not to a damages remedy.

Title IX's contractual nature has implications for our construction of the scope of available remedies. When Congress attaches conditions to the award of federal funds under its spending power, . . . as it has in Title IX and Title VI, we examine closely the propriety of private actions holding the recipient liable in monetary damages for noncompliance with the condition. Our central concern in that regard is with ensuring that "the receiving entity of federal funds [has] notice that it will be liable for a monetary award." . . . If a school district's liability for a teacher's sexual harassment rests on principles of constructive notice or *respondeat superior,* it will likewise be the case that the recipient of funds was unaware of the discrimination. It is sensible to assume that Congress did not envision a recipient's liability in damages in that situation.

Most significantly, Title IX contains important clues that Congress did not intend to allow recovery in damages where liability rests solely on principles of vicarious liability or constructive notice. Title IX's express means of enforcement—by administrative agencies—operates on an assumption of actual notice to officials of the funding recipient. The statute entitles agencies who disburse education funding to enforce their rules implementing the nondiscrimination mandate through proceedings to suspend or terminate funding or through "other means authorized by law." Significantly, however, an agency may not initiate enforcement proceedings until it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." The administrative regulations implement that obligation, requiring resolution of compliance issues "by informal means whenever possible" and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and "the recipient . . . has been notified of its failure to comply and of the action to be taken to effect compliance."

In the event of a violation, a funding recipient may be required to take "such remedial action as [is] deem[ed] necessary to overcome the effects of [the] discrimination." While agencies have conditioned continued funding on providing equitable relief to the victim, the regulations do not appear to contemplate a condition ordering payment of monetary damages, and there is no indication that payment of damages has been demanded as a condition of finding a recipient to be in compliance with the statute. In *Franklin,* for instance, the Department of Education found a violation of Title IX but determined that the school district came into compliance by virtue of the offending teacher's resignation and the district's institution of a grievance procedure for sexual harassment complaints.

Presumably, a central purpose of requiring notice of the violation "to the appropriate person" and an opportunity for voluntary compliance before administrative enforcement proceedings can commence is to avoid diverting education funding from beneficial uses where a recipient was unaware of discrimination in its programs and is willing to institute prompt corrective measures. The scope of private damages relief proposed by petitioners is at odds with that basic objective. When a teacher's sexual harassment is imputed to a school district or when a school district is deemed to have "constructively" known of the teacher's harassment, by assumption the district had no actual knowledge of the teacher's conduct. Nor, of course, did the district have an opportunity to take action to end the harassment or to limit further harassment.

It would be unsound, we think, for a statute's express system of enforcement to require notice to the recipient and an opportunity to come into voluntary compliance while a judicially *implied* system of enforcement permits substantial liability without regard to the recipient's knowledge or its corrective actions upon receiving notice. Moreover, an award of damages in a particular case might well exceed a recipient's level of federal funding. Where a statute's express enforcement scheme hinges its most severe sanction on notice and unsuccessful efforts to obtain compliance, we cannot attribute to Congress the intention to have implied an enforcement scheme that allows imposition of greater liability without comparable conditions.

IV

Because the express remedial scheme under Title IX is predicated upon notice to an "appropriate person" and an opportunity to rectify any violation, we conclude, in the absence of further direction from Congress, that the implied damages remedy should be fashioned along the same lines. An "appropriate person" under § 1682 is, at a minimum, an official of the recipient entity with authority to take corrective action to end the discrimination. Consequently, in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond.

We think, moreover, that the response must amount to deliberate indifference to discrimination. The administrative enforcement scheme presupposes that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise, in other words, is an official decision by the recipient not to remedy the violation. That framework finds a rough parallel in the standard of deliberate indifference. Under a lower standard, there would be a risk that the recipient would be liable in damages not for its own official decision but instead for its employees' independent actions. Comparable considerations led to our adoption of a deliberate indifference standard for claims under § 1983 alleging that a municipality's actions in failing to prevent a deprivation of federal rights was the cause of the violation.

Applying the framework to this case is fairly straightforward, as petitioners do not contend they can prevail under an actual notice standard. The only official alleged to have had information about Waldrop's misconduct is the high school principal. That information, however, consisted of a complaint from parents of other students charging only that Waldrop had made inappropriate comments during class, which was plainly insufficient to alert the principal to the possibility that Waldrop was involved in a sexual relationship with a student. Lago Vista, moreover, terminated Waldrop's employment upon learning of his relationship with Gebser.

. . . . Where a school district's liability rests on actual notice principles, however, the knowledge of the wrongdoer himself is not pertinent to the analysis.

Petitioners focus primarily on Lago Vista's asserted failure to promulgate and publicize an effective policy and grievance procedure for sexual harassment claims. They point to Department of Education regulations requiring each funding recipient to "adopt and publish grievance procedures providing for prompt and equitable resolution" of discrimination complaints and to notify students and others that "it does not discriminate on the basis of sex in the educational programs or activities which it operates." Lago Vista's alleged failure to comply with the regulations, however, does not establish the requisite actual notice and deliberate indifference. And in any event, the failure to promulgate a grievance procedure does not itself constitute "discrimination" under Title IX. Of course, the Department of Education could enforce the requirement administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate, even if those requirements do not purport to represent a definition of discrimination under the statute. We have never held, however, that the implied private right of action under Title IX allows recovery in damages for violation of those sorts of administrative requirements.

V

The number of reported cases involving sexual harassment of students in schools confirms that harassment unfortunately is an all too common aspect of the educational experience. No one questions that a student suffers extraordinary harm when subjected to sexual harassment and abuse by a teacher, and that the teacher's conduct is reprehensible and undermines the basic purposes of the educational system. The issue in this case, however, is whether the independent misconduct of a teacher is attributable to the school district that employs him under a specific federal statute designed primarily to prevent recipients of federal financial assistance from using the funds in a discriminatory manner. Our decision does not affect any right of recovery that an individual may have against a school district as a matter of state law or against the teacher in his individual capacity under state law or under 42 U.S.C. § 1983. Until Congress speaks directly on the subject, however, we will not hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference. We therefore affirm the judgment of the Court of Appeals.

It is so ordered.

Citation: *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998).

Gifted Education

Few areas of education are as controversial as gifted education. Programs for children who are gifted have been present in varying forms for many years. The first American programs for gifted children were established in the late 1800s, with such programming not uncommon in cities by the early 1900s. These often-limited efforts were greatly expanded in response to the launching of *Sputnik* in 1957, most notably via the National Defense Education Act in 1958.

State and Federal Actions

Gifted education, like most other aspects of American public education, was seen primarily as a state responsibility for most of the previous century. The first major federal study on gifted education, the "Marland Report," produced in 1972, included a definition that became the basis for many state definitions: Gifted students exhibit general intellectual ability, specific academic aptitude, creative or productive thinking, leadership ability, visual and performing arts aptitude, and/or psychomotor ability. This definition helped to expand the range of possible areas of giftedness, which had previously been quite limited.

Over the next 20 years, the field of gifted education was seriously impacted by the economic recessions that occurred throughout the 1970s and 1980s, as well as the observation that minority and poor students are often severely underrepresented in gifted programs. Partially as a result of these developments, Congress passed the Jacob K. Javits Gifted and Talented Students Education Act in 1988. The Javits Act funded a research center on gifted students and several local and statewide demonstration projects to increase the nation's capacity to provide services to underserved gifted students. However, the Javits Act is small by federal standards (e.g., peaking at just over $11 million dollars from 2002–2005) and is routinely threatened with elimination.

In 1993, the U.S. Department of Education issued *National Excellence: A Case for Developing America's Talent.* This report included the following definition, which is incorporated in the No Child Left Behind Act (2002), within which the Javits Act is included:

> Children and youth with outstanding talent perform or show the potential for performing at remarkably high levels of accomplishment when compared with others of their age, experience, or environment. These children and youth exhibit high performance capability in intellectual, creative, and/or artistic areas, possess an unusual leadership capacity, or excel in specific academic fields. (p. 26)

The lack of a strong federal role results in most relevant legislation occurring at the state level. As might have been expected, this situation led to a wide range of policies: In some states, identification and programming for gifted students is mandated; in others, only identification is mandated; in some, neither is mandated. Definitions of giftedness vary from state to state, as do programming requirements and funding. It is within this context that legal issues within gifted education have developed.

Case Law

The most interesting characteristic of case law regarding gifted education is its limited size, which may be due to parental perceptions that the legal system moves too slowly to rule about a specific issue in a specific grade, which is the focus of most parental concerns about gifted education. Some principal themes are discussed here.

Case law in gifted education focuses primarily on requests for special services for gifted students, such as early entrance to individualized programs; parents are the plaintiffs. These rulings tend to favor school boards, even in states with strong mandates for gifted education services. In general, since even states with strong programming mandates delegate the final decisions about the types of programming and access to it to the district level, local boards rarely face challenges from parents that they violated state laws with regard to the delivery of gifted education.

In like fashion, rulings in cases involving students who are exceptional in more than one area also tend to favor school boards. Some legal scholars believe this may be due to a lack of judicial understanding of the complex issues involved with students with multiple

exceptionalities. These issues are qualitatively different from those of gifted students without exceptionalities due to the role of the Individuals with Disabilities Education Act (IDEA) (2005) and relevant state special education statutes.

A handful of cases have involved disputes over the qualifications of teachers who have been hired to work with students who are gifted. In most of these cases, the arbitrators and courts ruled that teachers with special preparation, especially credentials, in teaching students who are gifted is a more appropriate educator in a gifted program than one lacking such background, credentialing, and/or experience. Even so, these observations are based on a limited number of cases and should be interpreted with caution.

Finally, the consensus in the legal literature on gifted education is that disputes are best resolved using the least contentious forms of dispute resolution, such as mediation. More simply, many believe that direct communication between parents and educators can often address many parents' concerns about the education (or lack thereof) for their gifted children, with minimal dispute. Still, this ideal is often difficult to realize.

Outlook

The presence of the Javits Act notwithstanding, proponents have had only moderate progress in identifying and serving minority and poor students who are gifted students. Questions still remain about whether the underrepresentation is due to access, inappropriate identification procedures, or preparation. Given the lack of progress in this area, it is surprising that legal activity about minority underrepresentation has not been more pronounced.

As tempting as it may be to draw parallels from special education case law, this is not practical for at least two reasons. First, the presence of the federal mandate for special education services contrasts sharply with the weak federal legislation on gifted education. Gifted education has been added to some federal special education statutes, but the impact is not yet noticeable. Second, the philosophical foundations for gifted education are relatively underdeveloped compared with those for special education: For example, the concept of a free and appropriate public education (FAPE) has been widely studied and applied to special education under the IDEA, but analyses of the appropriateness of applying FAPE to gifted students are few and far between. Research on the effectiveness of gifted programming is also rather thin, providing advocates with little data with which to argue for expanded services. In addition, the lack of consensus on definitions of giftedness stands in stark contrast to, for example, the definitions of various categories of mental retardation found in the *Diagnostic and Statistical Manual of Mental Disorders.*

One of the most significant recent developments in education is the growth of nontraditional educational options, including charter schools, magnet schools, voucher programs, and homeschooling. The legal issues surrounding the education of gifted students attending, or attempting to attend, various nontraditional schools and programs will be a hot topic in coming years.

The growth of school accountability systems, which focus attention on students' progress toward meeting state standards, puts the emphasis on achieving minimum competency. Insofar as students who already meet the standards are seen as successful, school officials have little incentive to serve the needs of the highest-achieving students. As such, the national media and politicians are starting to react to increasing grassroots pressure to address this problem.

In light of the lack of standard definitions and identification practices, piecemeal legislation and policy, and thin philosophical and empirical bases, it should be expected that legal disputes about gifted education will occur. Until advocates for the gifted address these serious weaknesses within their field, the casework on gifted education will continue to grow, with little palpable progress in providing gifted education to all deserving students.

Jonathan A. Plucker

See also Ability Grouping; Charter Schools; Homeschooling; No Child Left Behind Act

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Ginsburg, Ruth Bader (1933–)

In 1993, President Clinton appointed Ruth Bader Ginsburg as the second woman to serve on the U.S. Supreme Court. Ginsburg is best known for her passionate advocacy of equal rights for women. In light of her pioneering efforts in the field, she has been called the "Thurgood Marshall of gender equality law." Not surprisingly, it is in the area of sex discrimination that Ginsburg has had the greatest influence on education law.

Early Years

Ginsburg was born on March 15, 1933, in an ethnically diverse neighborhood in Brooklyn, New York. Her mother stressed the importance of education and played a formative role in Ruth's upbringing. Tragically, Ginsburg's mother died the day before her daughter's high school graduation ceremony.

The future justice attended college at Cornell University, where she graduated Phi Beta Kappa and met her future husband, Martin Ginsburg. Martin entered Harvard Law School but was drafted into the army. After his discharge, the Ginsburgs returned to Harvard, where Ruth also enrolled in law school, a year behind her husband.

Ginsburg entered Harvard at a time when few women were admitted to law school. She and her fellow female students faced a hostile educational environment and at one point were asked by the dean how it felt to take seats that otherwise could have been held by deserving men. Despite the difficulties she confronted, Ginsburg excelled academically and made law review. During Ginsburg's second year, misfortune struck when her husband was diagnosed with testicular cancer that required major surgery and extensive radiation treatment. Fortunately, he recovered, and graduated on schedule. When her husband went to work for a New York City law firm, Ginsburg transferred to Columbia Law School, where she graduated at the top of her class and again made law review, becoming the first woman to be selected for law review at two universities.

Despite Ginsburg's high grades and strong academic background, no major law firm would hire her. Eventually, she obtained a position as a law clerk position with a federal district court judge. After completing her clerkship, Ginsburg worked for Columbia University on a comparative civil law project, coauthoring a book on Swedish judicial procedure.

Law Career

In 1963, Ginsburg was hired as a faculty member at Rutgers University. While teaching at Rutgers, Ginsburg began assisting the American Civil Liberties Union (ACLU) in sex discrimination litigation. In one case, she worked with women schoolteachers who were required to quit their jobs when they became pregnant; they sought the right to maternity leave. In 1972, Ginsburg joined the faculty as a professor at Columbia University, where she became the first woman to be granted tenure by the law school. While teaching at Columbia, Ginsburg also served as general counsel for the ACLU and in 1972 was named the head of its Women's Rights Project.

During Ginsburg's association with the ACLU, she was involved in some of the most important sex discrimination litigation in Supreme Court history. In Ginsburg's first major case, she assisted in writing the ACLU's amicus brief in the case of *Reed v. Reed* (1971), in which the Supreme Court struck down an Idaho statute granting an automatic preference for men over women in the administration of decedents' estates.

In the 1970s, Ginsburg argued major sex discrimination cases before the Supreme Court, five of which she won. In *Frontiero v. Richardson* (1973), Ginsburg successfully challenged the government's discriminatory practices in awarding benefits to spouses of military personnel based on their gender. In *Craig v. Boren* (1976), she filed an amicus brief that was instrumental in the Court's striking down Oklahoma's statute allowing females to purchase beer at the age of 18 but requiring males to be 21. Ginsburg was unsuccessful in convincing the Court that "strict scrutiny" should be the proper standard to apply in gender discrimination cases. However, in *Craig v. Boren,* the Court adopted a "midlevel" heightened-scrutiny test requiring laws that classified on the basis of sex be substantially related to an important government objective. This elevated level of judicial review has since become the standard applied by courts in sex discrimination cases.

In 1980, President Jimmy Carter appointed Ginsburg to a seat on the U.S. Court of Appeals for the District of Columbia. During her tenure as a federal appellate court judge, she gained a reputation as a hardworking jurist who paid attention to detail and drafted well-reasoned opinions. In 1993, President Clinton nominated Ginsburg to fill the vacancy on the Supreme Court left by the resignation of Justice Byron White. The American Bar Association awarded Ginsburg its highest rating, and with bipartisan support from both parties, her appointment was easily confirmed by the Senate.

Supreme Court Record

On the Court, Justice Ginsburg has been an active participant in oral arguments and is known for asking attorneys probing questions. Unlike some of her fellow justices, she is a frequent lecturer and continues to express her commitment to civil liberties and women's issues. However, as a liberal on a generally conservative Rehnquist, and now Roberts, Court, Ginsburg's influence has been limited, and her role is often that of forceful dissenter.

Appropriately, the major school law decision that Ginsburg authored is in the sex discrimination case of *United States v. Virginia* (1996). Writing for the majority, Ginsburg ruled that the Virginia Military Institute's single-sex admissions policy denied women the right of equal protection of the laws under the Fourteenth Amendment.

On Establishment Clause issues, Justice Ginsburg has consistently taken a separationist position. In *Mitchell v. Helms* (2000), *Agostini v. Felton* (1997), and *Zelman v. Simmons-Harris* (2002), she voted against expanding the use of public funds to assist religiously affiliated private schools. In *Good News Club v. Milford Central School* (2001) and *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), she dissented from holdings that granted religious organizations access to public school facilities and funding for printing of a Christian group's newsletter. In *Sante Fe Independent School District v. Doe* (2002), Ginsburg joined the Court's opinion that a board policy of allowing student-led prayers on the public address system at high school football games violated the Establishment Clause.

In the area of student drug testing, Justice Ginsburg joined in the Court's decision allowing drug testing for athletes in the case of *Vernonia School District 47J v. Acton* (1995). However, in the case of *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), she dissented from extending random drug testing to students engaged in any extracurricular activity

Ginsburg has been supportive of affirmative action. In *Adarand Constructors v. Pena* (1995), she dissented from the Court's decision rejecting awarding preferences to minorities in federal construction projects. In the two University of Michigan disputes, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), Ginsburg voted to uphold both undergraduate and law school programs that had taken race into account as a factor in the admission of minority students.

Although Justice Ginsburg has not authored a large number of opinions in the area of education law, her impact has been significant. In light of Ginsburg's landmark efforts in the field of gender equality, the legal status and the rights of women, including those of female students and faculty, have been greatly expanded.

Michael Yates

See also Equal Protection Analysis; *United States v. Virginia*

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Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), *on remand,* 300 F.3d 1222 (10th Cir. 2002).
Craig v. Boren, 429 U.S. 190 (1976).
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Sante Fe Independent School District v. Doe, 530 U.S. 290 (2002).
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).
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Givhan v. Western Line Consolidated School District

Givhan v. Western Line Consolidated School District (1979) addressed a teacher's right to free speech under the First and Fourteenth Amendments. The Supreme Court found that public employees are permitted within specific boundaries to express their opinions, whether positive or negative, without fear of reprisal. The court identified the need to balance the teacher's constitutional right on a matter of public concern and the interests of the employer. The constitutional freedom of speech is not lost to public employees when communicating privately with their employers, the Court decided.

Facts of the Case

In *Givhan,* a teacher went into the principal's office and expressed her opinion regarding the school's hiring practices and policies, which she believed were racially discriminatory. School officials claimed that during the meeting with the principal, the teacher made unreasonable and hostile demands. Subsequently, the superintendent gave the teacher a letter at the end of the school year identifying reasons for the nonrenewal of her contract.

The teacher sued the school board in a federal trial court in Mississippi, alleging that officials terminated her employment for exercising her First Amendment rights to free speech. After the trial court ordered the teacher's reinstatement, the Fifth Circuit reversed in favor of the board. The court held that since the teacher's expression was private, she was not protected under the First Amendment. In so doing, the court relied on Supreme Court precedent, which explained the circumstances under which the private expression of a public educational employee is not constitutionally protected, namely *Pickering v. Board of Education of Township High School District 205, Will County* (1968); *Perry v. Sindermann* (1972); and *Mt. Healthy City Board of Education v. Doyle* (1977).

The Court's Ruling

On further review, a unanimous U.S. Supreme Court, with one justice filing a concurring opinion, vacated in part and remanded for further consideration as to whether the board would have terminated the teacher's employment regardless of her "demands." The Court ruled that the First Amendment forbids abridgment of the freedom of speech but recognized

that the content of public employees' speech must be assessed to evaluate whether it in any way impedes the proper performance of daily duties or interferes with the regular operations of schools. Further, the Court identified that public employees who arrange to communicate in private rather than in public forums are not entitled to First Amendment protection. The Court added that the board did not prove that it would have acted as it did regardless of the opinions that the teacher expressed, but instead justified that it would have reached the same outcome.

The Fifth Circuit, on remand, sent the case back to a trial court for further consideration. The trial court found that since the teacher's criticisms were expressed privately to her superior and were not delivered in a manner so as to threaten the school board's efficiency, she had not lost her constitutional protection. Moreover, the court pointed out that the board's alleged reasons for discharging the teacher were afterthoughts or pretextual. The Fifth Circuit then affirmed an order in favor of the teacher, awarding her attorney's fees and back pay.

In disputes over the free speech rights of public school employees, *Givhan* fits into a set of cases wherein the Supreme Court has developed a three-part test to be considered in evaluating whether the matter is protected by the First Amendment. First, courts must review the manner, time, and place of delivery of an employee's comments or speech. Second, courts must examine the comments or speech to assess whether they in any way impeded proper performance of classroom duties or interfered with the regular operation of the schools in general. Third, when employment termination is at stake, courts must determine whether the termination of an employee's contract was due to the exercise of a protected constitutional right, such as speech, or whether the employee would have been dismissed regardless of his or her constitutionally protected actions.

Michael J. Jernigan

See also Due Process Rights: Teacher Dismissal; First Amendment: Speech in Schools; *Mt. Healthy City Board of Education v. Doyle; Perry v. Sindermann; Pickering v. Board of Education of Township High School District 205, Will County;* Teacher Rights

Legal Citations

Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).
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Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).

Global Positioning System (GPS) Tracking

The Global Positioning System (GPS) is the name for the U.S. global navigation satellite system. Originally created for use by the military, GPS is now appearing in a number of educational, institutional, and consumer products. Some educators and parents have expressed concerns about the impact of schools' use of GPS on student and employee privacy.

The current GPS network consists of 31 satellites in orbit around the earth. The satellite system is designed so that any global location is within sight of at least 6 satellites. Using a special receiver that can communicate with the satellites, individuals or vehicles can locate themselves on the globe within a range of a few meters. In 1996, President Clinton declared the GPS network a "dual-use" technology, allowing for civilian use of the satellites. Today, GPS is widely used to aid navigation and to assist with surveying, mapmaking, and telecommunications network synchronization.

School Uses

School boards have begun using GPS technologies to track the location and speed of buses and other school vehicles. In such a system, vehicles are equipped with small transmitters that transmit radio signals several times a minute. District receivers can pick up signals within a 20-mile radius, thus allowing dispatchers to determine a vehicle's location, when and where it stops, and how fast it is traveling.

School board officials have espoused a number of reasons for using GPS technologies with school buses. School officials want to know where buses

are at all times and want the ability to monitor school bus speeds and stops, both for driver monitoring and for increasing the time or fuel efficiency of bus routes. In another use of GPS systems, school Web sites or cell phone alerts for caregivers of children in dangerous neighborhoods can be used to notify parents exactly where children are and when they will arrive at their stops. Many GPS-equipped school buses have an emergency button that drivers can use in case of accidents or hijackings. The button alerts dispatchers while also identifying the exact location of school buses, making it easier for emergency vehicles to provide assistance. Moreover, some school GPS systems have a feature that alerts school officials when buses travel outside of their designated geographic zones.

Legal Issues

School uses of GPS technologies raise several legal issues. Some truck drivers and police officers have expressed concern about their institutions' right to monitor their driving habits. As school board GPS usage becomes more widespread, it is likely that there also will be some backlash from drivers of buses and other school vehicles, accompanied by union management discussions and/or grievances. Some analysts anticipate that federal and state agencies will begin requesting access to school GPS tracking data for a variety of purposes, including monitoring of compliance with wage hour and Occupational Safety and Health Administration regulations.

The admissibility of GPS tracking data in court currently is unknown, as is the liability of schools and other government entities for losses due to equipment malfunction or failure. Gross negligence claims against school boards and their employees may be possible as injured parties claim that failure to implement GPS-based safety systems falls below relevant standards of care.

Insofar as GPS tracking data can be used for external monitoring of individuals or vehicles, many critics are concerned that it contributes to what they call the "surveillance society." Along with other technologies, such as networked public cameras, radio frequency identification (RFID) tags, bar codes, swipe cards, biometrics, and microchip implantation, the concern is that the United States is becoming a society in which individuals' movements and actions are tracked, monitored, and recorded to the greatest extent possible.

Although GPS tracking of school buses has yet to raise such an outcry, some systems do monitor students' departure from buses as well as unauthorized persons' entry onto buses. Monitoring thus shifts from vehicles to individuals, which may also implicate student privacy and parental consent provisions of the Children's Online Privacy Protection Act of 1998 (COPPA). Under COPPA's provisions, Web site operators and other commercial entities must comply with restrictions on how they collect and store data on children under the age of 13, devise their privacy policies, and seek verifiable consent from a parent or guardian.

Although nonprofit entities typically are exempt from the COPPA regulations, the ability of schools to allow GPS companies to monitor and compile student locational data is an unresolved legal issue. Recent parent protests over schools' use of RFID tags to track individual students' locations and attendance demonstrates that GPS technologies must be used sensitively in order to avoid public disapproval and legal disputes.

Scott McLeod

See also Privacy Rights of Students; Regulation; Technology and the Law; Video Surveillance

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GLSEN

See Gay, Lesbian and Straight Education Network (GLSEN)

Gong Lum v. Rice

Gong Lum v. Rice (1927) stands out as the case within which the U.S. Supreme Court explicitly extended the pernicious doctrine of "separate but equal" that it introduced at the national level to public education in *Plessy v. Ferguson* (1896). At issue in *Gong Lum,* which was decided 27 years prior to *Brown v. Board of Education of Topeka* (1954), were two related issues. The first issue was whether the state of Mississippi was required to provide a Chinese citizen equal protection of the law under the Fourteenth Amendment when he was taxed to pay for public education but was forced to send his daughter to a school for children of color. The second question that the Court addressed was whether the state denied a Chinese citizen of the United States equal protection of the law in classifying her among the "colored" races, and provided facilities for education that, although separate, were equal to those offered to all children, regardless of their race.

Facts of the Case

Gong Lum was a resident of Rosedale, Mississippi, father of 9-year-old Martha Lum. Martha, a native-born citizen of the United States, attended the first day of school at the Rosedale Consolidated School. However, at the noon recess, the superintendent notified her that she would not be allowed to return to the school, solely on the ground that she was of Chinese descent and not a member of the White or Caucasian race.

After a state trial court entered a mandamus order in favor of Gong Lum, directing officials to readmit his daughter, the Supreme Court of Mississippi reversed in favor of the board. On further review, a unanimous Supreme Court affirmed in favor of the state of Mississippi.

The Court's Ruling

Citing *Cumming v. Richmond County Board of Education* (1899), wherein it upheld a state law that allowed separate high schools for Black and White students, in *Gong Lum,* the Supreme Court asserted that the state has the right and power to regulate the method of providing for the education of its youth at public expense. To this end, the Court found that the circumstances in 1927 prevented it from finding that the state's action was a denial of the plaintiff's Fourteenth Amendment rights. The Court indicated that there could be no denial of equal protection of the laws or denial of any privileges belonging to the plaintiff since he was not a citizen of the United States.

The Supreme Court next rejected the plaintiff's claim that he was required to pay taxes but could not send his daughter to the school of his choice. The Court was of the opinion that because state taxes supported education, the issue had to be resolved by the states. Accordingly, the Court observed that any interference on the part of federal judiciary with the management of the schools could not be justified except in the case of a clear and unmistakable disregard of rights secured by the supreme law of the land.

By borrowing heavily from the *Cumming* case, in *Gong Lum,* the Court orchestrated a decision that left a system in place that required all residents to pay taxes with no regard to race, but organized schools along racial lines, denying attendance for those of the so-called colored races. The Court was satisfied that since the entire activity was a state endeavor, it was thereby insulated from interference by the federal judiciary.

The second question addressed was whether a Chinese citizen of the United States, Martha Gong Lum, had been denied equal protection of the laws when educational officials classified her among the "colored" races and had been furnished with facilities for education equal to those offered to all, no matter what "color." The Supreme Court essentially answered the major part of this inquiry when it implicitly considered whether Martha was classified as "White" or "colored." Even though Martha and her family attempted to separate themselves from those of color, the law of the state and the Supreme Court saw this differently, declaring that she was, in fact, not White.

In reaching its judgment on the second issue, the Supreme Court was mostly finished with its analysis in pointing out that since this was not a new question, it did not call for a full argument. Citing a long list of cases reaching back as far as *Roberts v. City of Boston* (1849), apparently the first case to introduce the notion of "separate but equal," and highlighting its

extension to the national scene in *Plessy* (1896), the Court concluded that this same question had been decided many times, with the same result. According to the Court, the answer was that classifying students based on race to receive the benefit of education is within the constitutional power of the state legislatures of Mississippi and that the U.S. Constitution protected this action from the intervention of the federal judiciary.

Mark A. Gooden

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment; *Plessy v. Ferguson*

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Cumming v. Richmond County Board of Education, 175 U.S. 528 (1899).
Gong Lum v. Rice, 275 U.S. 78 (1927).
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Good News Club v. Milford Central School

In *Good News Club v. Milford Central School* (2001), the Supreme Court ruled that a religious group could not be denied the use of a public school's facilities after school hours if the facilities were available to other groups promoting similar issues, namely, the moral and character development of children.

Facts of the Case

Under the Milford Central School's facility community use policy, which governed after-hours use of its facilities, district residents could use the school for "instruction in any branch of education, learning or the arts [or] social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community" (*Good News Club,* 1998, p. 149). However, when the Good News Club, a private Christian group that uses Bible lessons and religious songs for children between the age of 6 and 12, sought to conduct its meetings in the school cafeteria after school, the Milford Board of Education denied the group's request on the grounds that its activities amounted to religious instruction.

The Good News Club filed a suit under 42 U.S.C. § 1983, alleging that the denial of its request to use the facilities violated its rights to free speech, equal protection, and religious freedom. A federal trial court in New York and the Second Circuit rejected the club's arguments. The courts essentially determined that the school's actions were constitutional because the club's activities were "quintessentially religious" and that religious instruction and worship can be excluded from public school facilities even when a public school has designated after-hours use of its cafeteria to be a limited public forum.

The Court's Ruling

On further review in *Good News Club* (2001), a divided U.S. Supreme Court, in an opinion by Justice Clarence Thomas, with separate dissents by Justices Stevens and Souter (joined by Justice Ginsburg), reversed in favor of the club. The Court observed that when a state actor, such as a public school board, creates a limited public forum, it is free to restrict certain types of speech as long as the limitations do not discriminate on the basis of viewpoint and are reasonable in light of the purpose that the forum serves. Applying this standard, the Court found that the board's exclusion of the club constituted viewpoint discrimination.

In its analysis, the Supreme Court acknowledged that the board allowed a variety of groups to use its facilities for purposes dealing with the welfare of the community, such as moral and character development. The Court observed that the club clearly promoted community welfare through moral development but did so from a religious perspective and through openly religious activities, such as religious songs and biblical stories, unlike other groups; the Boy Scouts, Girl Scouts, and 4-H Club approached the same issues from secular perspectives.

Noting that the board disregarded the club's primary purpose as being the moral development of children, which was a goal closely aligned with its community use policy, the Court ruled that the board discriminated against the club because of its religious grounding. To this end, the Court reasoned that the board's exclusion of the club on this basis was unconstitutional viewpoint discrimination. The Court added that the board's exclusion of the club was virtually indistinguishable from the unconstitutional exclusion of the adult sectarian group from after-hours use of public school facilities in its earlier judgment in *Lamb's Chapel v. Center Moriches Union Free School District* (1993).

The Supreme Court also rejected the school board's contention that its desire to avoid an Establishment Clause violation warranted its exclusion of the club. The Court was not persuaded that elementary schoolchildren would have experienced coercive pressure to participate in the club's activities or that the young, impressionable students would have perceived the board's actions as endorsing the Good News Club. With respect to the threat of coercion, the Court explained that insofar as children could not participate in the club's activities without the written permission of their parents, it was unlikely that they would have felt coerced to participate in the club's religiously motivated activities. At the same time, the Court was of the opinion that the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse" (*Good News Club,* 2001, p. 114).

Turning to the threat of unconstitutional endorsement, the Supreme Court stated as follows: "We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive" (*Good News Club,* 2001, p. 119). To this end, the Court concluded that the board must grant the club access to its facilities to address the same topics as the other groups that worked with children in the school.

Amy M. Steketee

See also *Lamb's Chapel v. Center Moriches Union Free School District;* Religious Activities in Public Schools

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Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).

Goss v. Board of Education

At issue in *Goss v. Board of Education* (1963) was the constitutionality of the transfer provisions of a desegregation plan in Tennessee. *Goss* stands out as an example of the Supreme Court's growing impatience with both the slow rate of desegregation and ongoing state-created barriers to the efforts to dismantle segregated school systems. *Goss* is additionally noteworthy insofar as it is a forerunner of later choice plans that were litigated in the fight to remedy segregated schools and districts.

Facts of the Case

A county board of education, which was home to a number of school systems, submitted a plan in an attempt to desegregate its formerly unitary schools through rezoning. Under the desegregation plan, the terms of the transfer provisions allowed students who lived in areas that were rezoned and were minorities at their newly assigned schools to transfer, based on

race, back to their formerly segregated schools, where their race would have been in the majority.

Both a federal trial court and the Sixth Circuit approved the transfer plan, though it did not address students who wished to transfer from a segregated school to a desegregated school. As such, African American parents and students challenged the validity of the transfer plan, because insofar as its provisions were based solely on race, it perpetuated a racially segregated school system.

The Court's Ruling

On further review, a unanimous U.S. Supreme Court reversed in favor of the plaintiffs in holding that the racial classifications for transfers between schools violated the Equal Protection Clause of the Fourteenth Amendment. The Court noted that in *Brown v. Board of Education of Topeka I* (1954), it had ruled that state-imposed separation in public schools was inherently unequal. The Court added that the transfer provisions ran counter to its opinion in *Brown v. Board of Education of Topeka II* (1955), wherein it directed federal trial courts to consider the adequacy of plans in creating unitary, racially nondiscriminatory school systems.

The Court indicated that the fact that each race was free to transfer to a segregated school did not save the plans, because the transfer provisions would clearly have operated in one direction and would have tended to perpetuate segregation. The Supreme Court also reasoned that the transfer provisions did not meet the *Brown II* mandate of good-faith compliance at the earliest practicable date and with all deliberate speed due to the local difficulties and barriers that it created. In reversing, the Court concluded by remanding for further proceedings.

Deborah Curry

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; Dual and Unitary Systems; Equal Protection Analysis

Further Readings

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Goss v. Board of Education, 373 U.S. 683 (1963).

Goss v. Lopez

Are students entitled to due process if they are suspended from public schools for 1 to 10 days? If so, what process is due? These were the questions that confronted the U.S. Supreme Court in *Goss v. Lopez* (1975), its most significant case involving the due process rights of students who are subject to exclusion from school for disciplinary infractions.

Goss arose when Dwight Lopez and other students from the Columbus, Ohio, public schools were suspended for up to 10 days due to a disturbance in the lunchroom. Lopez testified that he did not participate in the destructive conduct, but was just a bystander. He claimed that his suspension without a hearing violated his Fourteenth Amendment right to due process. On further review of a judgment from a federal trial court, the Supreme Court agreed.

The Court ruled that the Fourteenth Amendment, which prohibits states from depriving persons of "life, liberty or property without due process," applied to Lopez's case. Specifically, the Court held that the suspension of students could affect both their property and liberty interests. First, the Court explained that a student's right to an education is a property or economic interest that cannot be taken away without fair procedures. Second, the Court maintained that when school officials suspend students, they also affect student's liberty or reputation interests. For example, suspensions for misconduct on students' records could harm their opportunities for employment or college admissions.

Having determined that the Due Process Clause applies to student suspensions, the next question was, what process was due? The answer, wrote the Court, is "some kind of notice and . . . some kind of hearing." The specific process required before a suspension of 19 days or less is that the student be given "[1] oral or written notice of the charges against him, and [2] if he denies them, [A] an explanation of the evidence the authorities have and [B] an opportunity to present his side of the story." The purpose of these procedures, according to the Court, is to provide "rudimentary precautions against unfair or mistaken findings of misconduct."

The Court does not require any delay between the informal notice and the hearing, which usually would consist of a discussion of the alleged misconduct with the student, who would have an opportunity to present his or her version of the facts before the disciplinarian ruled on the case. While a hearing would usually be required before suspension, the Court would allow students to be removed immediately when they posed "a continuing danger to persons or property" or an ongoing threat of disruption. In such cases, the notice and hearing would follow as soon as was feasible.

On behalf of the Court, Justice Byron White emphasized the limited procedures that were required before a short-term suspension. In these cases, the Court does not require that students have a right to a lawyer, to confront and cross-examine witnesses against them, or to call witnesses on their behalf. On the other hand, after listening to the students' versions of events, conscientious disciplinarians may decide that they should call the accusers and witnesses to make more informed decisions.

In conclusion, Justice White indicated that the informal notice and hearing required by the Court in this case is "less than a fair-minded principal would impose upon himself in order to avoid unfair suspensions."

David Schimmel

See also Due Process

Legal Citations

Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir. 1961).
Goss v. Lopez, 419 U.S. 565 (1975).
Hardy v. University Interscholastic League, 759 F.2d 1233 (5th Cir. 1985).
Ingraham v. Wright, 430 U.S. 651 (1977).

Goss v. Lopez (Excerpts)

Goss v. Lopez *stands out as the first case within which the Supreme Court addressed the due process rights of students who were subject to exclusion from school for disciplinary infractions.*

Supreme Court of the United States

GOSS

v.

LOPEZ

419 U.S. 565

Argued Oct. 16, 1974.

Decided Jan. 22, 1975.

Mr. Justice WHITE delivered the opinion of the Court.

This appeal by various administrators of the Columbus, Ohio, Public School System (CPSS) challenges the judgment of a three-judge federal court, declaring that appellees—various high school students in the CPSS—were denied due process of law contrary to the command of the Fourteenth Amendment in that they were temporarily suspended from their high schools without a hearing either prior to suspension or within a reasonable time thereafter, and enjoining the administrators to remove all references to such suspensions from the students' records.

I

Ohio law, Rev. Code Ann. s 3313.64 (1972), provides for free education to all children between the ages of six and 21. Section 3313.66 of the Code empowers the principal of an Ohio public school to suspend a pupil for misconduct for up to 10 days or to expel him. In either case, he must notify the student's parents within 24 hours and state the reasons for his action. A pupil

who is expelled, or his parents, may appeal the decision to the Board of Education and in connection therewith shall be permitted to be heard at the board meeting. The Board may reinstate the pupil following the hearing. No similar procedure is provided in s 3313.66 or any other provision of state law for a suspended student. Aside from a regulation tracking the statute, at the time of the imposition of the suspensions in this case the CPSS itself had not issued any written procedure applicable to suspensions. Nor, so far as the record reflects, had any of the individual high schools involved in this case. Each, however, had formally or informally described the conduct for which suspension could be imposed.

The nine named appellees, each of whom alleged that he or she had been suspended from public high school in Columbus for up to 10 days without a hearing pursuant to s 3313.66, filed an action under 42 U.S.C. s 1983 against the Columbus Board of Education and various administrators of the CPSS. The complaint sought a declaration that s 3313.66 was unconstitutional in that it permitted public school administrators to deprive plaintiffs of their rights to an education without a hearing of any kind, in violation of the procedural due process component of the Fourteenth Amendment. It also sought to enjoin the public school officials from issuing future suspensions pursuant to s 3313.66 and to require them to remove references to the past suspensions from the records of the students in question.

The proof below established that the suspensions arose out of a period of widespread student unrest in the CPSS during February and March 1971. Six of the named plaintiffs, Rudolph Sutton, Tyrone Washington, Susan Cooper, Deborah Fox, Clarence Byars, and Bruce Harris, were students at the Marion-Franklin High School and were each suspended for 10 days on account of disruptive or disobedient conduct committed in the presence of the school administrator who ordered the suspension. One of these, Tyrone Washington, was among a group of students demonstrating in the school auditorium while a class was being conducted there. He was ordered by the school principal to leave, refused to do so, and was suspended. Rudolph Sutton, in the presence of the principal, physically attacked a police officer who was attempting to remove Tyrone Washington from the auditorium. He was immediately suspended. The other four Marion-Franklin students were suspended for similar conduct. None was given a hearing to determine the operative facts underlying the suspension, but each, together with his or her parents, was offered the opportunity to attend a conference, subsequent to the effective date of the suspension, to discuss the student's future.

Two named plaintiffs, Dwight Lopez and Betty Crome, were students at the Central High School and McGuffey Junior High School, respectively. The former was suspended in connection with a disturbance in the lunchroom which involved some physical damage to school property. Lopez testified that at least 75 other students were suspended from his school on the same day. He also testified below that he was not a party to the destructive conduct but was instead an innocent bystander. Because no one from the school testified with regard to this incident, there is no evidence in the record indicating the official basis for concluding otherwise. Lopez never had a hearing.

Betty Crome was present at a demonstration at a high school other than the one she was attending. There she was arrested together with others, taken to the police station, and released without being formally charged. Before she went to school on the following day, she was notified that she had been suspended for a 10-day period. Because no one from the school testified with respect to this incident, the record does not disclose how the McGuffey Junior High School principal went about making the decision to suspend Crome, nor does it disclose on what information the decision was based. It is clear from the record that no hearing was ever held.

There was no testimony with respect to the suspension of the ninth named plaintiff, Carl Smith. The school files were also silent as to his suspension, although as to some, but not all, of the other named plaintiffs the files contained either direct references to their suspensions or copies of letters sent to their parents advising them of the suspension.

On the basis of this evidence, the three-judge court declared that plaintiffs were denied due process of law because they were 'suspended without hearing prior to suspension or within a reasonable time thereafter,' and that [state law] and regulations issued pursuant thereto were unconstitutional in permitting such suspensions. It was ordered that all references to plaintiffs' suspensions be removed from school files.

Although not imposing upon the Ohio school administrators any particular disciplinary procedures and leaving them 'free to adopt regulations providing for fair suspension procedures which are consonant with the educational goals of their schools and reflective of the characteristics of their school and locality,' the District Court declared that there were 'minimum requirements

of notice and a hearing prior to suspension, except in emergency situations.' In explication, the court stated that relevant case authority would: (1) permit '(i)mmediate removal of a student whose conduct disrupts the academic atmosphere of the school, endangers fellow students, teachers or school officials, or damages property'; (2) require notice of suspension proceedings to be sent to the students' parents within 24 hours of the decision to conduct them; and (3) require a hearing to be held, with the student present, within 72 hours of his removal. Finally, the court stated that, with respect to the nature of the hearing, the relevant cases required that statements in support of the charge be produced, that the student and others be permitted to make statements in defense or mitigation, and that the school need not permit attendance by counsel.

The defendant school administrators have appealed the three-judge court's decision. Because the order below granted plaintiffs' request for an injunction—ordering defendants to expunge their records—this Court has jurisdiction of the appeal. . . . We affirm.

II

At the outset, appellants contend that because there is no constitutional right to an education at public expense, the Due Process Clause does not protect against expulsions from the public school system. This position misconceives the nature of the issue and is refuted by prior decisions. The Fourteenth Amendment forbids the State to deprive any person of life, liberty, or property without due process of law. Protected interests in property are normally 'not created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits.

Accordingly, a state employee who under state law, or rules promulgated by state officials, has a legitimate claim of entitlement to continued employment absent sufficient cause for discharge may demand the procedural protections of due process. . . .

Here, on the basis of state law, appellees plainly had legitimate claims of entitlement to a public education. [State law] direct[s] local authorities to provide a free education to all residents between five and 21 years of age, and a compulsory-attendance law requires attendance for a school year of not less than 32 weeks. It is true that s 3313.66 of the Code permits school principals to suspend students for up to 10 days; but suspensions may not be imposed without any grounds whatsoever. All of the schools had their own rules specifying the grounds for expulsion or suspension. Having chosen to extend the right to an education to people of appellees' class generally, Ohio may not withdraw that right on grounds of misconduct, absent fundamentally fair procedures to determine whether the misconduct has occurred.

Although Ohio may not be constitutionally obligated to establish and maintain a public school system, it has nevertheless done so and has required its children to attend. Those young people do not 'shed their constitutional rights' at the schoolhouse door. 'The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted.' The authority possessed by the State to prescribe and enforce standards of conduct in its schools, although concededly very broad, must be exercised consistently with constitutional safeguards. Among other things, the State is constrained to recognize a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause.

The Due Process Clause also forbids arbitrary deprivations of liberty. 'Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him,' the minimal requirements of the Clause must be satisfied. School authorities here suspended appellees from school for periods of up to 10 days based on charges of misconduct. If sustained and recorded, those charges could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment. . . .

Congress has recently enacted legislation limiting access to information contained in the files of a school receiving federal funds. . . . That section would preclude release of 'verified reports of serious or recurrent behavior patterns' to employers without written consent of the student's parents. While [the law] permits [the] release of such information to 'other schools . . . in which the student intends to enroll,' it does so only upon condition that the parent be advised of the release of the information and be given an opportunity at a hearing to challenge the content of the information to insure against inclusion of inaccurate or misleading information. The statute does not expressly state whether the parent can

contest the underlying basis for a suspension, the fact of which is contained in the student's school record.

Appellants proceed to argue that even if there is a right to a public education protected by the Due Process Clause generally, the Clause comes into play only when the State subjects a student to a 'severe detriment or grievous loss.' The loss of 10 days, it is said, is neither severe nor grievous and the Due Process Clause is therefore of no relevance. Appellants' argument is again refuted by our prior decisions; for in determining 'whether due process requirements apply in the first place, we must look not to the "weight" but to the nature of the interest at stake.' Appellees were excluded from school only temporarily, it is true, but the length and consequent severity of a deprivation, while another factor to weigh in determining the appropriate form of hearing, 'is not decisive of the basic right' to a hearing of some kind. The Court's view has been that as long as a property deprivation is not de minimis, its gravity is irrelevant to the question whether account must be taken of the Due Process Clause. A 10-day suspension from school is not de minimis in our view and may not be imposed in complete disregard of the Due Process Clause.

A short suspension is, of course, a far milder deprivation than expulsion. But, 'education is perhaps the most important function of state and local governments' and the total exclusion from the educational process for more than a trivial period, and certainly if the suspension is for 10 days, is a serious event in the life of the suspended child. Neither the property interest in educational benefits temporarily denied nor the liberty interest in reputation, which is also implicated, is so insubstantial that suspensions may constitutionally be imposed by any procedure the school chooses, no matter how arbitrary.

III

'Once it is determined that due process applies, the question remains what process is due.' We turn to that question, fully realizing as our cases regularly do that the interpretation and application of the Due Process Clause are intensely practical matters and that '(t)he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' We are also mindful of our own admonition:

'Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. . . . By and large, public education in our Nation is committed to the control of state and local authorities.'

There are certain bench marks to guide us, however. *Mullane v. Central Hanover Trust Co.*, a case often invoked by later opinions, said that '(m)any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.' The fundamental requisite of due process of law is the opportunity to be heard,' a right that 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to . . . contest.' At the very minimum, therefore, students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and afforded some kind of hearing. 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.'

It also appears from our cases that the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved. The student's interest is to avoid unfair or mistaken exclusion from the educational process, with all of its unfortunate consequences. The Due Process Clause will not shield him from suspensions properly imposed, but it disserves both his interest and the interest of the State if his suspension is in fact unwarranted. The concern would be mostly academic if the disciplinary process were a totally accurate, unerring process, never mistaken and never unfair. Unfortunately, that is not the case, and no one suggests that it is. Disciplinarians, although proceeding in utmost good faith, frequently act on the reports and advice of others; and the controlling facts and the nature of the conduct under challenge are often disputed. The risk of error is not at all trivial, and it should be guarded against if that may be done without prohibitive cost or interference with the educational process.

The difficulty is that our schools are vast and complex. Some modicum of discipline and order is essential if the educational function is to be performed. Events calling for discipline are frequent occurrences and sometimes require immediate, effective action. Suspension is considered not only to be a necessary tool to maintain order but a valuable educational device. The prospect of imposing elaborate hearing requirements in every suspension case is viewed with great concern, and many school authorities may well prefer the untrammeled power to act unilaterally, unhampered by rules about notice and hearing. But it would be a strange disciplinary system in an educational institution if no communication was sought

by the disciplinarian with the student in an effort to inform him of his dereliction and to let him tell his side of the story in order to make sure that an injustice is not done. '(F)airness can rarely be obtained by secret, one-sided determination of facts decisive of rights. . . .' 'Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it.'

We recognize that both suspensions were imposed during a time of great difficulty for the school administrations involved. At least in Lopez' case there may have been an immediate need to send home everyone in the lunchroom in order to preserve school order and property; and the administrative burden of providing 75 'hearings' of any kind is considerable. However, neither factor justifies a disciplinary suspension without at any time gathering facts relating to Lopez specifically, confronting him with them, and giving him an opportunity to explain.

We do not believe that school authorities must be totally free from notice and hearing requirements if their schools are to operate with acceptable efficiency. Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his side of the story. The Clause requires at least these rudimentary precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.

There need be no delay between the time 'notice' is given and the time of the hearing. In the great majority of cases the disciplinarian may informally discuss the alleged misconduct with the student minutes after it has occurred. We hold only that, in being given an opportunity to explain his version of the facts at this discussion, the student first be told what he is accused of doing and what the basis of the accusation is. Lower courts which have addressed the question of the nature of the procedures required in short suspension cases have reached the same conclusion. Since the hearing may occur almost immediately following the misconduct, it follows that as a general rule notice and hearing should precede removal of the student from school. We agree with the District Court, however, that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable, as the District Court indicated.

In holding as we do, we do not believe that we have imposed procedures on school disciplinarians which are inappropriate in a classroom setting. Instead we have imposed requirements which are, if anything, less than a fair-minded school principal would impose upon himself in order to avoid unfair suspensions. Indeed, according to the testimony of the principal of Marion-Franklin High School, that school had an informal procedure, remarkably similar to that which we now require, applicable to suspensions generally but which was not followed in this case. Similarly, according to the most recent memorandum applicable to the entire CPSS, school principals in the CPSS are now required by local rule to provide at least as much as the constitutional minimum which we have described.

We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process.

On the other hand, requiring effective notice and informal hearing permitting the student to give his version of the events will provide a meaningful hedge against erroneous action. At least the disciplinarian will be alerted to the existence of disputes about facts and arguments about cause and effect. He may then determine himself to summon the accuser, permit cross-examination, and allow the student to present his own witnesses. In more difficult cases, he may permit counsel. In any event, his discretion will be more informed and we think the risk of error substantially reduced.

Requiring that there be at least an informal give-and-take between student and disciplinarian, preferably prior to the suspension, will add little to the factfinding function where the disciplinarian himself has witnessed the conduct forming the basis for the charge. But things are not always

as they seem to be, and the student will at least have the opportunity to characterize his conduct and put it in what he deems the proper context.

We should also make it clear that we have addressed ourselves solely to the short suspension, not exceeding 10 days. Longer suspensions or expulsions for the remainder of the school term, or permanently, may require more formal procedures. Nor do we put aside the possibility that in unusual situations, although involving only a short suspension, something more than the rudimentary procedures will be required.

IV

The District Court found each of the suspensions involved here to have occurred without a hearing, either before or after the suspension, and that each suspension was therefore invalid and the statute unconstitutional insofar as it permits such suspensions without notice or hearing. Accordingly, the judgment is

Affirmed.

Citation: *Goss v. Lopez,* 419 U.S. 565 (1975).

GPS

See GLOBAL POSITIONING SYSTEM (GPS) TRACKING

GRADING PRACTICES

The issuance of formal grades or other forms of assessment of student performance is a time-honored practice designed to offer formative and summative feedback to students and their parents. Grades are used to evaluate advancement from course to course; promotion and retention; placement in special education and gifted education; class rank; eligibility for extracurricular activities; eligibility for academic awards, honor societies, scholarships, and graduation; employment outside of school; and admission to colleges and universities. Consequently, grades are important to students and families and occasionally generate legal claims. While many students are disappointed with their grades from time to time, they have rarely mounted successful legal claims designed to change grades and related decisions, such as those for promotion and retention. In *Sandlin v. Johnson* (1981), for example, the Fourth Circuit stated as follows:

> Decisions by educational authorities which turn on evaluation of the academic performance of a student as it relates to promotion are peculiarly within the expertise of educators and are particularly inappropriate for review in a judicial context. (p. 1029)

A case involving higher education, from the Supreme Court, made a similar point:

> The decision of an individual professor as to the proper grade for a student in his course . . . requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decision making. (*Board of Curators of University of Missouri v. Horowitz,* 1978, p. 90)

These holdings illustrate the important point that courts will most often defer to the day-to-day decision making of educators at all levels, except in the most egregious cases.

Those egregious cases generally involve alleged violation of due process in the form of liberty and/or property. A liberty interest in grades, if one exists, is found in the academic records of students, just as their liberty interests are recognized in their reputations, good names, honor, and ability to use their records for employment or further education. While it is not universally agreed that grades constitute liberty interests, such a claim is conceivable. As such, it is important that educators do not abuse the discretion they have to assess student performance and assign grades.

As another example, it is important that school officials be aware of arbitrary and unreasonable attendance policies. A policy that enforces legitimate truancy laws is fine, yet a policy that makes no

distinction between excused and unexcused absences could be applied to unreasonably harm a student's progress toward promotion or graduation (*Barno v. Crestwood Board of Education,* 1998). Similarly, it is important for schoolteachers and administrators to be aware of the imposition of excessive academic penalties, such as those administered in cases of plagiarism, or other discipline that results in students' exclusion from academic activities or from school altogether.

A property interest in grades would most likely be found in a claim for a denied diploma, should a student feel that adverse and unlawful decisions had been made to deny him or her that right. School officials should be careful not to impose excessive disciplinary penalties too close to graduation dates for students who have earned the requisite amount of credits (*Shuman v. Cumberland Valley School District Board of Directors,* 1988) or suspend or expel students near the end of semesters and refuse academic credit already earned for that term (*South Gibson School Board v. Sollman,* 2000). Having written this, notions of academic freedom and deference to educational decision making remain strong and diminish the likelihood of success in a property deprivation lawsuit, except in cases of clear abuse of discretion.

Recommendations for Practice

Given court rulings with regard to grading practices, the following recommendations should be considered:

- Administrative and educational decisions regarding the issuance of grades are given great deference by the courts, but decision makers should exercise discretion wisely, objectively, and consistently.
- The laws and regulations of promotion, retention, and graduation vary by state; readers are encouraged to check their jurisdiction for the applicable laws.
- As long as promotion and retention decisions are made with solid evidence of academic progress and social growth; made consistently with established policies, practices, and state regulations; and made with some rational basis, courts will not intervene.
- Policies for the naming of valedictorian and salutatorian should be clearly articulated and be applied consistently, avoiding discrimination on factors such as disability. (*Hornstine v. Township of Moorsetown,* 2003).
- Students should be given a fair opportunity to take courses, including those with weighted grades for purposes of grade point averages, and to earn grades and credits.
- Educators should be careful not to impose excessive disciplinary penalties that would harm the student's legitimate opportunity to earn academic credit and advance from grade to grade.

Patrick D. Pauken

See also Ability Grouping; Academic Freedom; Due Process; Gifted Education; Zero Tolerance

Further Readings

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Graduation Requirements

Graduation is typically the closing chapter in any student educational enterprise. At the graduation ceremony, students are rewarded for their achievements, and schools bestow some degree, certificate, or other recognition of the fulfillment of the predetermined academic requisites. Because of its importance as a marker of achievement and a rite of passage, graduation has generated a number of legal issues, as summarized in this entry.

Setting Standards

Schools are generally given the authority to govern the standards for graduation. However, these standards must fall within the state graduation requirements. Generally, states set minimum credit hour requirements both for graduation generally and for individual subject areas, such as English, mathematics, science, social studies, and physical education. A small number of jurisdictions, such as Colorado, Massachusetts, and Pennsylvania, allow local boards much greater latitude in setting graduation requirements.

States and schools must also provide adequate notice of the requirements the student must fulfill to achieve graduation. In 1981, the Fifth Circuit, in *Debra P. v. Turlington,* found that students have a property interest in a diploma once they complete the specified requirements. Further, the court explained that educational institutions cannot withhold or revoke diplomas or degrees without first providing some amount of due process to candidates.

To maintain value in degrees or diplomas awarded at graduation, institutions enact policies that require students to meet certain grade, testing, service, or other requirements, such as paper completion at the higher-education level. These grades, testing, and other policies have frequently been challenged in court but have generally been upheld.

An array of cases in the early 1990s challenged community service requirements that school officials and states adopted as a prerequisite to graduation. These provisions were questioned not only under standard constitutional provisions related to education, such as the First and Fourteenth Amendment, but also pursuant to the Thirteenth Amendment's prohibition against involuntary servitude. However, the courts that examined the issue dismissed these claims, citing the differences in the kind of servitude the Thirteenth Amendment originally sought to prohibit; the educational nature of the service requirements; and the choices, such as private school education, that would allow the students to avoid the requirement. Although the courts differed somewhat in how they upheld service-oriented graduation requirements, all of the courts that considered the issue have ruled in favor of the educational institutions, reasoning that service requirements are constitutional.

Testing Cases

Graduation testing requirements have seen more litigation recently. Nearly half the states now require students to pass tests to qualify for high school graduation; in the year 2008, 7 out of 10 high school students must meet this criterion. Unlike the relatively established law surrounding service requirements, the challenges to exit examinations are presently ongoing. For instance, just in 2005 to 2006, a single state, California, had suits attacking the state's exit examination requirements on their inequitable application to low-income and minority students, unfairness to special education students who may not be able to answer most questions, and the failure of the state to consider alternative measures to the exit exam that could provide similar assurances of graduate competency.

At the same time, recent litigation in other states challenged mandating a state test written solely in English for English language learners and directly attacked state exit examinations as unconstitutional. However, while these cases successfully delayed the implementation of the exit examinations in many states, they have not been successful in permanently eliminating them as a graduation requirement. Generally, if students receive proper prior notice that they will be required to take examinations when entering schools, are prepared for them throughout their course work, and are given opportunities to retake the test if they fail, the examination passage requirement for high school graduation has been upheld, at least for students in regular education.

As for students in special education, the graduation requirement of having to pass examinations must include alternative means of completion and other accommodations in order to withstand legal scrutiny. These accommodations can include different passing scores; different test presentation means, such as Braille; and timing and setting alternatives. As to the tests themselves, some states offer alternate diplomas if students do not pass or choose not to take the standard examinations, other states offer alternate examinations, and still other states exempt special education students from mandatory exit examinations altogether.

There are substantial differences between awarding degrees or diplomas effectively constituting graduation and allowing students to participate in graduation ceremonies. While many cases have been brought

seeking to establish a constitutionally protected right to attend the graduation ceremony because of its important place as a marker of completion, courts have uniformly rejected such attempts. Mere participation in graduation ceremonies, however, does not entitle the participants to the corresponding degree.

Justin M. Bathon

See also *Debra P. v. Turlington;* Prayer in Public Schools; Religious Activities in Public Schools; Testing, High-Stakes

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Grand Rapids School District v. Ball

At issue in *Grand Rapids School District v. Ball* (1985) was the constitutionality of two educational programs of the Grand Rapids, Michigan, School District that served the students of nonpublic schools, most of them religiously affiliated. The U.S. Supreme Court in *Ball* found that the programs were an impermissible mixture of state and religion, but in subsequent cases, it drew back from this position and revised the criteria for judging Establishment Clause cases.

Facts of the Case

The first program, the Shared Time program, offered classes during the school day that supplemented the core curriculum at nonpublic schools and included remedial and enrichment subjects. The Shared Time teachers were full-time employees of the public schools. The public school board provided supplies, instructional materials, and equipment. The second program, the Community Education program, was offered after school throughout the Grand Rapids community, on a voluntary basis for children and adults. Community Education teachers were part-time employees who were often instructors at the same nonpublic school. Both programs were conducted in leased classrooms of the nonpublic schools. Almost all of the nonpublic schools were religiously affiliated.

Taxpayers challenged the constitutionality of the programs under the Establishment Clause of the First Amendment to the U.S. Constitution. After a federal trial court in Michigan agreed that both programs violated the First Amendment, the Supreme Court agreed to hear an appeal.

The Court's Ruling

On further review, the Supreme Court affirmed that the programs were unconstitutional. In its analysis, the Court applied its tripartite test of *Lemon v. Kurtzman* (1971), which looks at the purpose, effect, and entanglement aspects of interactions between the state and religious institutions. While the Court found that the programs had secular purposes, it thought that their primary effect impermissibly advanced religion. The Court explained that the programs advanced religion in three ways. First, the Court noted that the public school employees who taught at the private schools might intentionally or inadvertently have become involved in inculcating religious beliefs in classes. Second, the Court was of the opinion that the programs would have created a symbolic link between church and state, thereby giving students an impression of support of a particular religion. Third, the Court maintained that the programs directly promoted religion by subsidizing religious institutions by payment of public funds to teachers.

The outcome in *Ball* was consistent with the Supreme Court's judgment in *Meek v. Pittenger*

(1975), wherein it upheld the loans of textbooks but struck down the loans of instructional materials, equipment, and services. The Court observed that the use of materials and equipment in sectarian institutions assisted the educational functions of the schools by diverting aid to religious purposes and causing the government to indirectly aid religious institutions. Relying on *Meek,* the *Ball* Court determined that the potential for teachers paid by the state, unless monitored, posed the risk of state-sponsored indoctrination.

Ball was handed down on the same day as *Aguilar v. Felton* (1985), wherein the Supreme Court considered the constitutionality of the use of Title I funds to provide instructional services for religiously affiliated nonpublic schools in New York City and their schools. Title I of the Elementary and Secondary Education Act of 1965 provides instructional services to meet the needs of educationally deprived children from low-income families. In *Aguilar,* the Court indicated that the use of Title I funds was unconstitutional based on the excessive-entanglement prong of the *Lemon* test. *Ball* and *Aguilar* are examples of the Court's earlier view of state aid to religiously affiliated nonpublic schools.

The Supreme Court effectively overruled both *Aguilar* and *Ball* in *Agostini v. Felton* (1997), wherein it dissolved the injunction that enforced its order in *Aguilar.* In *Agostini,* the Court reheard the issues raised in *Aguilar* and came to a different result. While acknowledging that the principles for evaluating an Establishment Clause claim had not changed since *Aguilar,* the Court affirmed that the question to ask was whether the government acted with a secular purpose and whether the government's aid had the effect of advancing or inhibiting religion. The Court rejected the presumptions of *Ball* and *Meek* that placement of public school teachers in religiously affiliated nonpublic schools inevitably resulted in state-sponsored indoctrination.

Further, the *Agostini* Court reasoned that it would no longer be presumed, as in *Ball,* that government aid indirectly subsidizes the educational functions of religious schools. Instead, the Court expressed its intention of looking at the neutrality of the criteria for identifying beneficiaries in considering subsidies and incentives to engage in religious indoctrination. The Court added that *Lemon*'s excessive-entanglement prong was to be treated as one aspect under its effects test.

When *Agostini* came up for review, the Court had already begun to change its view of the Establishment Clause in other cases. For those who believe in strict separation of church and state, the Court's overturning of *Ball* and *Aguilar* can be viewed as eroding the principles underlying this perspective. Conversely, for proponents of the child benefit test, the Court's shift advances opportunities for children.

Deborah Curry

See also *Agostini v. Felton;* Child Benefit Test; *Lemon v. Kurtzman; Meek v. Pittenger;* State Aid and the Establishment Clause

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Aguilar v. Felton, 473 U.S. 402 (1985).
Grand Rapids School District v. Ball, 473 U.S. 373 (1985).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Meek v. Pittenger, 421 U.S. 395 (1975).

Gratz v. Bollinger

In *Gratz v. Bollinger* (2003), White applicants who were not admitted as undergraduates to the University of Michigan filed suit claiming racial discrimination. In a companion case, *Grutter v. Bollinger* (2003), another plaintiff challenged the University of Michigan Law School admissions process. Both cases drew extensive media coverage, as approximately 100 amicus (friend of the court) briefs were filed by a variety of organizations to provide the Supreme Court with additional evidence and arguments. The Supreme Court threw out the undergraduate policy *(Gratz),* while sustaining the other *(Grutter).*

Gratz and *Grutter* were controversial because the undergraduate and law school admissions policies at the University of Michigan included voluntary race-based affirmative action to ensure the educational benefits of a diverse student body. Both cases raised the question of whether diversity was an important enough educational goal that the race of applicants could be considered during the admissions process. In *Gratz,* the Supreme Court ruled that diversity is a compelling

interest in higher education. However, the Court ruled that the University's Office of Undergraduate Admissions (OUA) award of a predetermined 20 points for being an underrepresented minority violated the Equal Protection Clause of the U.S. Constitution because it did not include a significant individualized review of applications.

Compelling Interest

When institutions of higher education use race and ethnicity as categories in the admissions process to diversify their student bodies, the Supreme Court applies a two-part test to evaluate whether the use of race passes "strict scrutiny" and is therefore constitutional. First, the Court must determine whether a policy serves a "compelling governmental interest," a high standard. The goal of the policy must be especially important and supported by sufficient evidence to meet the first part of the test. In reviewing the University of Michigan's admissions policies, the Court ruled that diversity is a compelling interest and resolved a disagreement among the lower federal courts about whether race is a permissible factor in admissions decisions.

The Supreme Court had last ruled on affirmative action in the higher-education context in *Regents of the University of California v. Bakke* (1978). Although Justice Powell in *Bakke* stated that diversity was a compelling interest, there had been a debate for 25 years regarding whether the majority of the Court adopted his view. The Court's opinions in *Grutter* and *Gratz* clarify that diversity is a compelling interest in the context of higher education. The Court noted the substantial benefits of admitting a diverse student body, including cross-racial understanding, breaking down racial stereotypes, enlightening classroom discussions, better learning outcomes, and enabling all students to understand persons of different races.

Narrowly Tailored Policy

The second prong of the strict scrutiny test requires a policy to be "narrowly tailored" to satisfy the compelling governmental interest. The purpose of the narrow-tailoring test is to make certain that the means chosen "fit" the compelling goal so closely that there is little or no possibility that the motive for the classification was racial prejudice or stereotype. According to the Court, in order for a race-conscious admissions policy to be narrowly tailored, it cannot use a quota system. A racial quota, declared the Court, insulates a group of applicants with certain ethnic or racial characteristics from competition with other applicants. The Court also pointed out that a quota reserves a certain fixed number of opportunities exclusively for certain minority groups and that this is unconstitutional.

The undergraduate policy, the subject of *Gratz,* failed to satisfy the narrowly tailored part of the strict scrutiny test because the Court reasoned that the University of Michigan did not provide a sufficiently individualized consideration of candidates' overall qualifications in seeking to promote diversity. The undergraduate policy was based on a 150-point scale. Up to 110 points could be awarded based on so-called academic factors, including grades, test scores, quality of high school, and strength of high school curriculum. Up to 40 points could be awarded based on "soft" factors, including 10 points for in-state students, 4 points for children of alumni, and 20 points for athletes. The subject of *Gratz* was the 20 points automatically awarded to applicants from underrepresented racial and ethnic minorities (African American, Native American, and Hispanic). The Court did not think that awarding 20 points to every underrepresented minority, without considering background, experience, or other individual qualities, provided meaningful individualized review of applicants. To the Court, this lack of individualized review meant that the policy was not narrowly tailored to meet the goal of diversity.

The Court also recognized that the OUA policy included a process for flagging underrepresented minorities' applications and individually reviewing the applications. Even so, the Court maintained that flagging was an exception and that the majority of students were admitted based solely on the 150-point index scale. Arguably more important to the Court was the fact that flagging occurred only after the applicant had already been awarded the 20-point diversity bonus. Therefore, the majority of the Court struck down the OUA policy because it lacked sufficient individualized review.

It is important to note that in *Grutter* and *Gratz,* the Supreme Court ruled that diversity is a compelling interest in higher education and therefore race may be considered, along with other diversity factors, in the

admissions process. Taken together, the Court's opinions in the *Grutter* and *Gratz* cases reinforce the importance of using flexible, individualized review when considering race as a factor in the admissions process.

Karen Miksch

See also Affirmative Action; *DeFunis v. Odegaard;* Equal Protection Analysis; *Grutter v. Bollinger*

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Gratz v. Bollinger, 539 U.S. 244 (2003).
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Green v. County School Board of New Kent County

At issue in *Green v. County School Board of New Kent County* (1968) was whether a school board's adoption of a "freedom of choice" plan for the purpose of desegregating a school system constituted adequate compliance with its responsibility to achieve a unitary racially nondiscriminatory school system, in accordance with *Brown v. Board of Education of Topeka I* (1954). The U.S. Supreme Court reasoned that when the board relied on a freedom-of-choice plan to effectuate the conversion of a segregated school system to a nonracial system, it was not objectionable. However, if there were other more reasonably available ways promising speedier and more effective conversion to a nonracial system, the Court declared that a freedom-of-choice plan would be unacceptable.

Facts of the Case

In *Brown I* (1954), the Supreme Court held that in public education, the doctrine of "separate but equal" had no place. Segregated educational facilities were found to be inherently unequal. In *Brown II* (1955), the Court gave lower courts the authority to fashion remedies connected with *Brown* to promote desegregation "with all deliberate speed." In doing so, the Court allowed lower courts to settle individual complaints on a case-by-case basis and to maintain jurisdiction in disputes while school boards made efforts toward compliance with *Brown.*

At the time of *Green,* the commonwealth of Virginia had statutory and constitutional provisions mandating racial segregation in public schools in an effort to resist complying with *Brown.* New Kent County, Virginia, had a school system of only two schools. One school was a combined elementary and high school for White students, while the other was a combined elementary and high school for Black students.

Eleven years after *Brown,* the New Kent County School Board adopted a freedom-of-choice plan for desegregating the schools. Under the plan, each pupil, except those entering first and eighth grades, were given the opportunity to annually choose between the two schools. Students who did not make a choice were assigned to the schools they had previously attended. Under this plan, first and eighth graders were required to choose schools affirmatively.

The Court's Ruling

In *Green,* the Supreme Court measured the effectiveness of the New Kent County School Board's freedom-of-choice plan in achieving a racially nondiscriminatory school system as required under *Brown.* The Supreme Court held that these statutes and constitutional provisions violated the Constitution in *Davis v. County School Board of Prince Edward County,* which was one of the four cases that was joined to become *Brown I.* More specifically, the Court held that the separate "White" and "Negro" school system in New Kent County was precisely the pattern of segregation that *Brown I* and *II* found unconstitutional. The Court pointed out that New Kent County's dual system, having two separate, segregated schools, extended not just to the composition of student bodies at the two schools, but to every facet of school operations, including faculty, staff, transportation, extracurricular activities, and facilities.

The Court charged federal trial courts to address what had become known as the "*Green* factors": segregation related to the physical condition of the school plant, the school transportation system, personnel, attendance areas, and admission to the public schools on a nonracial basis. The Court further ordered the revision of local laws and regulations in Virginia in order to resolve these problems.

The Supreme Court found that opening the doors of the former "White" school to Negro children and the doors of the "Negro" school to White children merely began the inquiry as to whether the New Kent County school board took adequate steps to abolish its dual, segregated system. *Brown II* called for a dismantling of well-entrenched dual systems, charging school boards with the affirmative duty to take whatever steps might be necessary to convert a racially discriminatory system to one that was nondiscriminatory and constitutional.

The Court decided that the adoption of a freedom-of-choice plan in New Kent County was an intolerable delay. Further, the Court explained that the plan failed to provide meaningful change. The Court found that the burden was on the school board to come forward with a plan that realistically promised to work. The Court held that the freedom-of-choice plan, while not unconstitutional, was not an end in itself. The Court added that the freedom-of-choice plan was unconstitutional when it failed to result in a racially nondiscriminatory, unitary school system. The Court thus ordered the school board in New Kent County to formulate a new plan and to consider other efforts, such as zoning, which held greater promise of converting not merely to a system without "White" schools and "Negro" schools, but to a system of just schools.

Green continues to guide school boards to consider various factors when addressing issues related to desegregation. These factors include desegregation not only of students but also of staff, transportation, administration, and school buildings' physical plants. Today, the *Green* factors are still relevant for school boards when evaluating whether they continue to comply with *Brown I* and *Brown II*.

Vivian Hopp Gordon

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; School Boards

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Green v. County School Board of New Kent County (Excerpts)

In Green v. County School Board of New Kent County, Virginia, *the Supreme Court identified the features necessary to determine whether school systems had achieved unitary (or desegregated) status: faculty, staff, students, transportation, extracurricular activities and facilities.*

Supreme Court of the United States

GREEN

v.

COUNTY SCHOOL BOARD OF NEW KENT COUNTY, VIRGINIA

391 U.S. 430

Argued April 3, 1968.

Decided May 27, 1968.

Mr. Justice BRENNAN delivered the opinion of the Court.

The question for decision is whether, under all the circumstances here, respondent School Board's adoption of a 'freedom-of-choice' plan which allows a pupil to choose his own public school constitutes adequate compliance with the Board's responsibility 'to achieve a system of determining admission to the public schools on a non-racial basis. . . .'

Petitioners brought this action in March 1965 seeking injunctive relief against respondent's continued maintenance of an alleged racially segregated school system. New Kent County is a rural county in Eastern Virginia. About one-half of its population of some 4,500 are Negroes. There is no residential segregation in the county; persons of both races reside throughout. The school system has only two schools, the New Kent school on the east side of the county and the George W. Watkins school on the west side. In a memorandum filed May 17, 1966, the District Court found that the 'school system serves approximately 1,300 pupils, of which 740 are Negro and 550 are White. The School Board operates one white combined elementary and high school (New Kent), and one Negro combined elementary and

high school (George W. Watkins). There are no attendance zones. Each school serves the entire county.' The record indicates that 21 school buses—11 serving the Watkins school and 10 serving the New Kent school—travel overlapping routes throughout the county to transport pupils to and from the two schools.

The segregated system was initially established and maintained under the compulsion of Virginia constitutional and statutory provisions mandating racial segregation in public education. These provisions were held to violate the Federal Constitution in *Davis v. County School Board of Prince Edward County,* decided with *Brown v. Board of Education of Topeka (Brown I)*. The respondent School Board continued the segregated operation of the system after the *Brown* decisions, presumably on the authority of several statutes enacted by Virginia in resistance to those decisions. Some of these statutes were held to be unconstitutional on their face or as applied. One statute, the Pupil Placement Act, not repealed until 1966, divested local boards of authority to assign children to particular schools and placed that authority in a State Pupil Placement Board. Under that Act children were each year automatically reassigned to the school previously attended unless upon their application the State Board assigned them to another school; students seeking enrollment for the first time were also assigned at the discretion of the State Board. To September 1964, no Negro pupil had applied for admission to the New Kent school under this statute and no white pupil had applied for admission to the Watkins school.

The School Board initially sought dismissal of this suit on the ground that petitioners had failed to apply to the State Board for assignment to New Kent school. However on August 2, 1965, five months after the suit was brought, respondent School Board, in order to remain eligible for federal financial aid, adopted a 'freedom-of-choice' plan for desegregating the schools. Under that plan, each pupil, except those entering the first and eighth grades, may annually choose between the New Kent and Watkins schools and pupils not making a choice are assigned to the school previously attended; first and eighth grade pupils must affirmatively choose a school. After the plan was filed the District Court denied petitioners' prayer for an injunction and granted respondent leave to submit an amendment to the plan with respect to employment and assignment of teachers and staff on a racially nondiscriminatory basis. The amendment was duly filed and on June 28, 1966, the District Court approved the 'freedom-of-choice' plan as so amended. The Court of Appeals for the Fourth Circuit, en banc, affirmed the District Court's approval of the 'freedom-of-choice' provisions of the plan but remanded the case to the District Court for entry of an order regarding faculty 'which is much more specific and more comprehensive' and which would incorporate in addition to a 'minimal, objective time table' some of the faculty provisions of the decree entered by the Court of Appeals for the Fifth Circuit in *United States v. Jefferson County Board of Education,* aff'd en banc. . . .

The pattern of separate 'white' and 'Negro' schools in the New Kent County school system established under compulsion of state laws is precisely the pattern of segregation to which *Brown I* and *Brown II* were particularly addressed, and which *Brown I* declared unconstitutionally denied Negro school children equal protection of the laws. Racial identification of the system's schools was complete, extending not just to the composition of student bodies at the two schools but to every facet of school operations—faculty, staff, transportation, extracurricular activities and facilities. In short, the State, acting through the local school board and school officials, organized and operated a dual system, part 'white' and part 'Negro.'

It was such dual systems that 14 years ago *Brown I* held unconstitutional and a year later *Brown II* held must be abolished; school boards operating such school systems were required by *Brown II* 'to effectuate a transition to a racially nondiscriminatory school system.' It is of course true that for the time immediately after *Brown II* the concern was with making an initial break in a long-established pattern of excluding Negro children from schools attended by white children. The principal focus was on obtaining for those Negro children courageous enough to break with tradition a place in the 'white' schools. Under *Brown II* that immediate goal was only the first step, however. The transition to a unitary, nonracial system of public education was and is the ultimate end to be brought about; it was because of the 'complexities arising from the transition to a system of public education freed of racial discrimination' that we provided for 'all deliberate speed' in the implementation of the principles of *Brown I.* Thus we recognized the task would necessarily involve solution of 'varied local school problems.' In referring to the 'personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis,' we also noted that '(t)o effectuate this interest may call for elimination of a variety of obstacles in making the transition. . . .' Yet we

emphasized that the constitutional rights of Negro children required school officials to bear the burden of establishing that additional time to carry out the ruling in an effective manner 'is necessary in the public interest and is consistent with good faith compliance at the earliest practicable date.' We charged the district courts in their review of particular situations to 'consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems. They will also consider the adequacy of any plans the defendants may propose to meet these problems and to effectuate a transition to a racially nondiscriminatory school system.'

It is against this background that 13 years after *Brown II* commanded the abolition of dual systems we must measure the effectiveness of respondent School Board's 'freedom-of-choice' plan to achieve that end. The School Board contends that it has fully discharged its obligation by adopting a plan by which every student, regardless of race, may 'freely' choose the school he will attend. The Board attempts to cast the issue in its broadest form by arguing that its 'freedom-of-choice' plan may be faulted only by reading the Fourteenth Amendment as universally requiring 'compulsory integration,' a reading it insists the wording of the Amendment will not support. But that argument ignores the thrust of *Brown II.* In the light of the command of that case, what is involved here is the question whether the Board has achieved the 'racially nondiscriminatory school system' *Brown II* held must be effectuated in order to remedy the established unconstitutional deficiencies of its segregated system. In the context of the state-imposed segregated pattern of long standing, the fact that in 1965 the Board opened the doors of the former 'white' school to Negro children and of the 'Negro' school to white children merely begins, not ends, our inquiry whether the Board has taken steps adequate to abolish its dual, segregated system. *Brown II* was a call for the dismantling of well-entrenched dual systems tempered by an awareness that complex and multifaceted problems would arise which would require time and flexibility for a successful resolution. School boards such as the respondent then operating state-compelled dual systems were nevertheless clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch. The constitutional rights of Negro school children articulated in *Brown I* permit no less than this; and it was to this end that *Brown II* commanded school boards to bend their efforts.

In determining whether respondent School Board met that command by adopting its 'freedom-of-choice' plan, it is relevant that this first step did not come until some 11 years after *Brown I* was decided and 10 years after *Brown II* directed the making of a 'prompt and reasonable start.' This deliberate perpetuation of the unconstitutional dual system can only have compounded the harm of such a system. Such delays are no longer tolerable, for 'the governing constitutional principles no longer bear the imprint of newly enunciated doctrine.' Moreover, a plan that at this late date fails to provide meaningful assurance of prompt and effective disestablishment of a dual system is also intolerable. 'The time for mere "deliberate speed" has run out,' 'the context in which we must interpret and apply this language (of *Brown II*) to plans for desegregation has been significantly altered.' The burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.

The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should

retain jurisdiction until it is clear that state-imposed segregation has been completely removed.

We do not hold that 'freedom of choice' can have no place in such a plan. We do not hold that a 'freedom-of-choice' plan might of itself be unconstitutional, although that argument has been urged upon us. Rather, all we decide today is that in desegregating a dual system a plan utilizing 'freedom of choice' is not an end in itself. . . . 'Freedom of choice' is not a sacred talisman; it is only a means to a constitutionally required end—the abolition of the system of segregation and its effects. If the means prove effective, it is acceptable, but if it fails to undo segregation, other means must be used to achieve this end. The school officials have the continuing duty to take whatever action may be necessary to create a 'unitary, nonracial system.'

. . . . [T]he general experience under 'freedom of choice' to date has been such as to indicate its ineffectiveness as a tool of desegregation. . . . there may well be instances in which it can serve as an effective device. Where it offers real promise of aiding a desegregation program to effectuate conversion of a state-imposed dual system to a unitary, non-racial system there might be no objection to allowing such a device to prove itself in operation. On the other hand, if there are reasonably available other ways, such for illustration as zoning, promising speedier and more effective conversion to a unitary, nonracial school system, 'freedom of choice' must be held unacceptable.

The New Kent School Board's 'freedom-of-choice' plan cannot be accepted as a sufficient step to 'effectuate a transition' to a unitary system. In three years of operation not a single white child has chosen to attend Watkins school and although 115 Negro children enrolled in New Kent school in 1967 (up from 35 in 1965 and 111 in 1966) 85% of the Negro children in the system still attend the all-Negro Watkins school. In other words, the school system remains a dual system. Rather than further the dismantling of the dual system, the plan has operated simply to burden children and their parents with a responsibility which *Brown II* placed squarely on the School Board. The Board must be required to formulate a new plan and, in light of other courses which appear open to the Board, such as zoning, fashion steps which promise realistically to convert promptly to a system without a 'white' school and a 'Negro' school, but just schools.

Petitioners have also suggested that the Board could consolidate the two schools, one site (e.g., Watkins) serving grades 1–7 and the other (e.g., New Kent) serving grades 8–12, this being the grade division respondent makes between elementary and secondary levels. Petitioners contend this would result in a more efficient system by eliminating costly duplication in this relatively small district while at the same time achieving immediate dismantling of the dual system. These are two suggestions the District Court should take into account upon remand, along with any other proposed alternatives and in light of considerations respecting other aspects of the school system such as the matter of faculty and staff desegregation remanded to the court by the Court of Appeals.

The judgment of the Court of Appeals is vacated insofar as it affirmed the District Court and the case is remanded to the District Court for further proceedings consistent with this opinion.

It is so ordered.

Citation: *Green v. County School Board of New Kent County,* 391 U.S. 430 (1968).

Grievance

The grievance process is one method of resolving disputes between workers and their employers, usually in the context of a collective bargaining agreement. This entry describes the background of grievances and how they typically work.

Background

Currently, more than 40 states have enacted legislation guaranteeing public employees, including teachers and other school staff, the right to engage in collective bargaining. These collective bargaining laws allow public school teachers the right to organize and join employee labor organizations. Statutes in states that have passed public employee collective bargaining legislation discuss in great detail the legal rights and responsibilities of school board members and school employees, including rules for the formation of bargaining units, description of mandatory and prohibited subjects of bargaining, and procedures for alternate dispute resolution. However, other states require school boards simply to "meet and confer"

with bargaining units, with no formal legal obligation to act. Moreover, three states outlaw bargaining altogether. While state labor laws involving the rights of school employees to collectively bargain vary by state, typical collective bargaining statutes include provisions dealing with a duty to negotiate in good faith, appeals procedures, and provisions detailing the ability of teachers to strike.

When collective bargaining agreements are developed between teachers and school boards, there is always the possibility that the parties will disagree over how to interpret specific contractual provisions. Insofar as the pursuit of litigation in labor disputes has numerous drawbacks, including expense and time, the use of grievance procedures is actively encouraged as an effective alternative dispute resolution technique to settle labor-related disputes in the arena of public education.

In the American legal system, there is a strong inclination to settle labor-related disputes through formal appeals, or grievance processes. Historically, there is favoritism in the American legal system to settling labor disputes through alternative dispute resolution, such as grievance arbitration in which disputing parties agree to be legally bound by the decision of a third party as an alternative to judicial review. Three famous U.S. Supreme Court cases, *United Steelworkers of America v. American Manufacturing Company* (1960), *United Steelworkers of America v. Warrior & Gulf Navigation Company* (1960), and *United Steelworkers of America v. Enterprise Wheel & Car Corporation* (1960), collectively demonstrate the legal connection between federal labor law and state collective bargaining statutes.

How Grievances Work

The majority of states that currently have collective bargaining between teachers and their school boards permit and even mandate the use of grievance procedures when disputes arise over contractual agreements. When contractual negotiations are not effective, several alternative methods to litigation may be used to facilitate a resolution of the various parties' disagreements. Some of the typical mechanisms of alternative dispute resolution found in grievance procedures include mediation, fact-finding, and binding-interest arbitration.

Mediation involves the use of a neutral, third-party mediator. Typically, an individual mediator is selected by a state labor relations board or by the mutual agreement of school boards and the bargaining units for school employees. While the legal authority of mediators is limited, some states require that the parties exhaust mediation dispute resolution efforts before they can either proceed to fact-finding or terminate the bargaining process. Mediation can be either voluntary or required by law.

Fact-finding, or advisory arbitration, involves the use of a neutral, third-party intermediary, the fact finder. As with mediation, a fact finder is usually chosen by the state labor relations board or by the mutual agreement of school boards and the bargaining units representing school employees. A fact finder can conduct hearings and collect evidence from the parties involved in the collective bargaining agreement as well as outside sources. Although a fact-finder's recommendations are nonbinding on the parties, the fact-finder's report is available to the public, and some cases provide an impetus to resolve disputes. As with mediation, fact-finding may be either voluntary or required by state statute.

An arbitrator is selected either by state labor relations boards or by mutual agreement of school boards and bargaining units representing school employees. In contrast to the alternative dispute resolution techniques of mediation or fact-finding, an arbitrator's decision is binding on all parties in a collective bargaining agreement. Some of the common contractual disputes handled under arbitration include issues such as a reduction of a teacher's salary, conflicts involving teacher evaluations, labor definitions of what constitutes a normal workweek for teachers, and termination of teachers' paid extracurricular activities. While disagreements arise over whether specific labor issues are subject to arbitration, no current state allows the arbitration of prohibited subjects of bargaining.

If school boards and unions ultimately fail to reach consensus on a new collective bargaining agreement before the previous one expires, most states require that the terms and conditions of the old collective bargaining agreements be maintained. Courts in many states, for example, have ruled that this applies to the continued payment of employees' annual salary increments.

Moreover, if school boards and unions have exhausted all alternative dispute resolution procedures, many states permit the boards to implement their last best offers as unilateral contract, or obligations are imposed only on one party on acceptance by performance of a condition. Courts have held that school boards may not terminate negotiations or refuse to bargain in good faith simply to implement a unilateral contract.

Kevin P. Brady

See also Arbitration; Collective Bargaining; Impasse in Bargaining; Mediation; Unions

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Griffin v. County School Board of Prince Edward County

Brown v. Board of Education of Topeka, decided by the U.S. Supreme Court in 1954, triggered years of continued litigation related to the issue of desegregation of public schools throughout the United States. *Griffin v. County School Board of Prince Edward County* (1964), a case decided 10 years after *Brown,* reflects the nature of some of this litigation, particularly cases involving a number of states that sought alternative educational methods to avoid compliance with *Brown.* At issue in *Griffin* was whether states that close their public schools and use public funds to support private, segregated schools are acting constitutionally and consistently with the *Brown* decision. The Supreme Court forcefully rejected this strategy.

Facts of the Case

In *Brown* (1954), the Supreme Court held that in the field of public education, the doctrine of "separate but equal" has no place. According to the Court, segregated educational facilities are inherently unequal. In a companion case, often referred to as *Brown II* (1955), the Court recognized that consideration should be given to lower courts to fashion remedies connected with *Brown* that would promote desegregation "with all deliberate speed." The purpose of this ruling was to allow lower courts to settle individual complaints on a case-by-case basis and maintain jurisdiction while school districts made efforts toward compliance with *Brown.*

Unfortunately, during the years immediately after *Brown,* many school boards experimented with various devices to avoid desegregation. In Prince Edward County, Virginia, one of the most blatant efforts at avoiding desegregation occurred: The county closed all the public schools. Families were directed to send their children to private schools that were segregated, and state and local funding was provided to these private schools. Later, a state appellate court struck this legislation down as unconstitutional.

As a result, in 1959, the state legislature turned to a freedom-of-choice program. The Fourth Circuit ordered officials in Prince Edward County to stop discriminatory practices and directed the school board to take immediate steps toward admitting students to the White high school without regard to race and also to have local educational officials make admission plans for students to attend elementary schools without regard to race.

In response, the county supervisors resolved they would not operate public schools where White and colored children were taught together. Therefore, they refused to levy school taxes for the year. The county's public schools did not reopen and remained closed until 1964, when *Griffin* was decided. A private group

formed to operate private schools for White children in the county, while Black families continued the legal battle for desegregation of public schools.

Black children were without formal education from 1959 to 1963, when some classes were held for Black and White children in county school buildings. At that time, the public schools in Prince Edward County were closed, while public schools in all other counties of Virginia were being maintained. A federal trial court found that the Black students were denied equal protection guaranteed by the Fourteenth Amendment, but the Supreme Court of Appeals of Virginia upheld the statute closing Prince Edward County's public schools.

The Court's Ruling

The Supreme Court reviewed the decision by the Supreme Court of Appeals of Virginia, holding that the law unquestionably treated schoolchildren of Prince Edward County differently than the way it treated schoolchildren of other Virginia counties. Under the statute, due to the closing of all public schools, children in Prince Edward County had to attend private schools or none at all. The Supreme Court reasoned that the closing of the public schools weighed more heavily on Black children, since the White children could attend accredited private schools, while Black children had to either attend temporary schools or not attend school. Further, the Court pointed out that all the private schools were racially segregated but received state and county financial support.

The Supreme Court maintained that while the Commonwealth of Virginia had wide discretion in deciding whether or when laws operate statewide, the record in Prince Edward County demonstrated that public schools were closed and private schools were operated in their place, with state and county funding, for only one reason: to ensure that White and Black children in the county would not go to the same school. The Court explained that the closing of the Prince Edward County schools denied Black students equal protection of the law.

Giving voice to its frustration, the Court added that the time for desegregating "with all deliberate speed," consistent with *Brown,* had run out and that there was no justification for denying the children their constitutional rights to an education equal to that afforded by the public schools in other parts of Virginia. The Court concluded that a decree should be issued guaranteeing students in Prince Edward County the kind of education that was available in all state public schools.

Griffin is noteworthy as an example of the challenges brought by schools in states and counties that resisted compliance with *Brown.* Prince Edward County chose to close down its entire public school system and fund private schools rather than integrate its public school system. *Griffin* represents a series of cases decided by the Supreme Court in which states, in an effort to avoid compliance with *Brown,* created various methods for addressing desegregation that ultimately resulted in constitutional challenges. Over time, with the advent of cases such as *Griffin,* schools throughout the United States have done much to comply with *Brown* and address the serious concerns of racial discrimination in public education.

Vivian Hopp Gordon

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; School Boards

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

Griggs v. Duke Power Company

In *Griggs v. Duke Power Company* (1971), the U.S. Supreme Court first articulated how to review cases of disparate-impact discrimination under Title VII of the Civil Rights Act of 1964. In its unanimous opinion, the Court held that an employment practice violates Title VII if it operates to exclude or discriminate against employees or job seekers on grounds of race, color, national origin, religion, or sex and the policies are unrelated to job performance.

Facts of the Case

Willie Griggs represented a class of African American employees who challenged the Duke Power Company's requirements of a high school diploma and an intelligence test as prerequisites for obtaining a job. Griggs was able to prove that both requirements operated to disqualify minority applicants at a higher rate than those who were White and that neither requirement was related to successful job performance. However, Griggs was unable to show a discriminatory purpose, and the Power Company argued that this was required in order to prove it had discriminated.

After a federal trial court in North Carolina dismissed Griggs's complaint, the Supreme Court reversed in his behalf. The Court disagreed with the Duke Power Company, ruling instead that Griggs had proven a case of disparate-impact discrimination.

Most Title VII cases that are brought in the educational context allege intentional discrimination, using the framework the Court provided in *McDonnell Douglas Corporation v. Green* (1973). At the same time, since *Griggs* stands for the proposition that Title VII prohibits disparate impact, there have been a number of successful disparate-impact cases dealing with job and promotion requirements. Disparate impact occurs when employer policies that are neutral on their face, such as graduation requirements, are shown to disadvantage members of a particular protected group.

The Court's Ruling

In *Griggs,* the Supreme Court found that when challenging a "facially neutral" employment policy or requirement, a plaintiff must establish a prima facie case. *Prima facie* means that a court will presume that a discrimination claim is true unless disproved by contrary evidence. A job seeker or employee can establish a prima facie case by demonstrating that an employer's policies excluded persons in a protected group more often than it did others. This is commonly proven by a statistical demonstration of a disparity that is not likely to have occurred by chance. If the job seeker or employee succeeds in showing a disparate impact, the burden shifts to the employer to prove by a preponderance of the evidence that the challenged policy or test was a job-related, business necessity.

In *Watson v. Fort Worth Bank and Trust* (1988), the Supreme Court added an additional element for job seekers and employees to prove a case of disparate-impact discrimination. The Fort Worth Bank was able to prove that the disparate impact was justified by a business necessity. The Court determined that plaintiffs will still prevail if they can demonstrate that there are other policies that discriminate less yet still meet the employer's business needs. Accordingly, if an employer is able to prove a job-related business necessity, the burden of proof returns to the plaintiff to show that an alternative policy would have served the employer's business needs without the same discriminatory effect.

The Civil Rights Act of 1991 clarified that the courts should continue to use the standards laid out in *Griggs* and *Watson.* Once job seekers or employees establish that there is a disparate impact, the burden of proof shifts to employers on the ground that they, not the employees, are in the best position to know why a practice is necessary. Moreover, in justifying a practice that has a disparate impact, employers must show that employment practices are job related for the positions in question and consistent with business necessity.

Title VII does create an affirmative defense for employers: the bona fide occupational qualification (BFOQ). Although similar to a business necessity, as discussed above, the BFOQ defense permits intentional discrimination on the grounds of religion or sex, but not race, in very limited cases. In certain circumstances in which religion or sex is a bona fide occupational qualification reasonably necessary to the normal operation of an enterprise, an employer can require a particular religious membership or gender as a job qualification. In general, the courts view the BFOQ defense as a narrow exception to the general prohibition against discrimination.

Karen Miksch

See also Disparate Impact; *McDonnell Douglas Corporation v. Green;* Tenure; Title VII

Legal Citations

Griggs v. Duke Power Company, 401 U.S. 424 (1971).
McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.
Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988).

Grove City College v. Bell

In *Grove City College v. Bell* (1984), the U.S. Supreme Court held that Title IX of the Education Amendments of 1972 applies to all private colleges whose students receive federal assistance, even if institutions do not directly receive such aid from the federal government. As such, the Court upheld the ruling of Third Circuit that decided that the Department of Health, Education and Welfare (HEW) could terminate federally sponsored Basic Educational Opportunity Grants (BEOG) that students received at the college if officials did not sign a form known as an "assurance of compliance" with Title IX.

Facts of the Case

Grove City College is one of the most distinctive institutions of higher education in the United States. Since its founding in 1876 as a coeducational college, the college has prided itself on operation without the assistance of state or federal funds. This choice was based on a passionate desire to preserve full institutional control over the liberal arts college. The institution's intensely independent streak led to the litigation in *Grove City.*

When Charles MacKenzie, president of Grove City College, received the Title IX compliance request from the federal government, he responded that the institution was not discriminating against women insofar as it had been coeducational throughout its existence. Rather, he asserted that the college intended to remain completely independent of government intervention and control. To this end, MacKenzie viewed agreeing to sign the form as ensnaring the college in a federal bureaucracy in which it had no interest in participating. Further, officials at the college were worried that agreeing to the federal requirements would have led their academic community away from its religious focus to a more secular focus.

Government officials determined that since administrators at Grove City College failed to comply with Title IX, it was necessary to begin administrative procedure to stop students from receiving BEOGs. An administrative judge found that HEW had a sufficient basis on which to stop awarding BEOGs to students at the College. The college and a number of students filed suit in a federal trial court in Pennsylvania that indicated that the HEW could not terminate the BEOGs. However, the Third Circuit reversed in favor of HEW.

The Court's Ruling

On further review, the Supreme Court affirmed the order of the Third Circuit but limited the extension of Title IX to the financial assistance program of the college rather than across-campus. For this reason, Justices Brennan and Marshall dissented from Justice White's majority opinion. The dissenters observed that the protection of Title IX should have extended institution-wide. Yet the Court was of the opinion that receiving federal financial assistance required formal acceptance of Title IX. Further, the Court pointed out that this requirement did not violate the First Amendment rights of the College or its students, because the receipt of these funds was voluntary and officials could have ended their involvement in the program at any time.

After the Supreme Court rendered its judgment in *Grove City,* officials took the exit option that the Court had identified. Officials at the College opted to forgo federal funds by not signing the Title IX compliance form and by developing private sources of financial aid for students to replace the lost money. In the interim, the college sought to further bolster its independence from federal governmental support in any form by not admitting students who planned to use federal funds and by electing not to participate in federal loan programs. At the same time, the college does promote the use of state grants and scholarships as long as they are not backed up by federal funds.

Congress and President Reagan essentially overruled *Grove City* with the enactment of the Civil Rights Restoration Act of 1988. Pursuant to this statute, in an attempt to ensure compliance with Title IX and selected other federal laws, such as Section

504 of the Rehabilitation Act of 1973, if one part of an institution receives federal aid, then the entire enterprise must comply with federal law.

Aaron Cooley

See also Rehabilitation Act of 1973, Section 504; Title IX and Athletics; U.S. Department of Education

Further Readings

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Legal Citations

Civil Rights Restoration Act of 1988, 20 U.S.C. § 1687.

Grove City College v. Bell, 465 U.S. 555 (1984).

Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Grutter v. Bollinger

In *Grutter v. Bollinger* (2003), the U.S. Supreme Court addressed the question of whether race could be considered in university admissions policies. The Court found that diversity is a compelling university interest and that University of Michigan Law School policy, which considered race as part of an individualized assessment of applicants, was constitutional.

Facts of the Case

Grutter began in December 1997, when Barbara Grutter and other rejected applicants filed suit challenging the use of race by the University of Michigan Law School in its admissions program. In her class action suit, Grutter argued that the law school's race-conscious admissions plan amounted to racial or ethnic discrimination under the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964, because it favored Native American, African American, Mexican American, and mainland Puerto Rican applicants.

According to Title VI, citizens cannot be subject to discrimination in programs receiving federal financial assistance on the grounds of color, race, or national origin. The Equal Protection Clause ensures that the government provides the equal protection of the laws to its citizens. In response to Grutter's claim, the law school argued that in order to demonstrate a commitment to diversity, it sought to enroll a "critical mass" of minority applicants. In so doing, the law school used race as one of many unquantified factors that could enhance an applicant's chances of admission.

When universities consider race and ethnicity in admissions plans to increase student body diversity, courts must apply a two-part test. A court must first examine whether promoting diversity in higher education is a compelling state interest. More specifically, a court must be satisfied that the goal of an admissions plan is compelling or extremely important. Second, a court must explore whether the means chosen to obtain a diverse student body through a race-conscious admissions program are "narrowly tailored." In so doing, admissions programs must be flexible in considering several elements of diversity for each applicant. In other words, race-conscious admissions plans may not utilize quotas, but may rely on race as a "plus factor." To be constitutional, racial classifications must satisfy both parts of the test.

When a federal trial court in Michigan considered the effect of race as a factor in admissions in *Grutter,* it learned that a significantly higher percentage of minority applicants with lower test scores and lower GPAs were admitted than were nonminority applicants with similar scores. The court decided that diversity was not a compelling state interest, pointing out that that the admissions policy was unconstitutional because it violated Title VI of the Civil Rights Act of 1964. The court noted that even if it had found that diversity was a compelling state interest, the law school's program was not narrowly tailored.

On further review, the Sixth Circuit reversed and vacated the injunction that had prohibited the University of Michigan Law School from using race in its admissions process. The court maintained that constitutional language can support colleges and graduate

schools that are seeking a meaningful number of minority students as long as they avoid quota systems. This judgment directly contradicted earlier race-conscious admission cases decided in the Fifth and Eleventh Circuits. The Supreme Court granted certiorari in *Grutter v. Bollinger* in order to resolve the fate of race-conscious university admissions programs. The Supreme Court also granted certiorari to *Gratz v. Bollinger* (2003), another University of Michigan case focused on a race-conscious admissions program at the undergraduate level.

The Court's Ruling

The Supreme Court, in a 5-to-4 decision, upheld the law school's admissions program. The Court reversed the part of the lower-court's judgment that enjoined the university from considering the race of the applicant. In its rationale, the majority determined that the state has a substantial interest in the consideration of race and ethnicity in admissions programs if such programs are properly devised.

After the Court indicated that diversity was a compelling governmental interest, it addressed whether the law school's program was narrowly tailored. The Court was of the opinion that narrow tailoring does not require officials to attempt every conceivable race-neutral policy before adopting affirmative action programs. Rejecting the race-neutral percentage plan arguments, the Court asserted that such plans would be difficult to implement at the graduate school level. The Court affirmed its rejection of percentage plans because such approaches do not permit university officials to conduct individualized assessments of applicants on various qualities valued by universities. The Court was thus convinced that the law school's policy was narrowly tailored because its affirmative action program carefully ensured that several factors that may contribute to student body diversity were meaningfully considered.

The University of Michigan Law School admissions policy did not set a quota. Instead, the Court acknowledged that university officials used individualized review in a flexible way to admit a critical mass of underrepresented students. The Court contrasted the law school's process of reading each application to evaluate whether applicants would contribute to diversity with the undergraduate process that awarded points based on membership in a particular racial group. The Court was of the opinion that race may be used in the process as long as an admissions program remains flexible, like the law school's, so that all applicants are evaluated regarding their unique contributions to diversity.

As a result of *Grutter,* race may be considered in university admissions programs. *Grutter* may also have implications for K–12 admissions programs and for employment decisions because it offers strong language in support of the consideration of race in other contexts. To illustrate, it is arguable that student body diversity may also be considered a compelling state interest at the K–12 level. In *Parents Involved in Community Schools v. Seattle School District* (2007), the Supreme Court struck down race-based admissions programs from Seattle and Louisville. The Court explained that the programs were unacceptable because school officials not only failed to demonstrate that the use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity but also failed to consider alternative approaches adequately.

As policy, race-conscious plans have been extremely controversial. Some observers believe that such plans equate to reverse discrimination: that by giving admissions preference to members of the minority group, universities are, in fact, discriminating against Caucasian males. Others argue that race-conscious plans are at their core meant to prevent new discrimination or to eliminate the negative effects of past or ongoing discrimination. The debate over race-conscious admissions will certainly continue for years to come.

Suzanne E. Eckes

See also Affirmative Action; *DeFunis v. Odegaard;* Equal Protection Analysis; Fourteenth Amendment; *Gratz v. Bollinger; Parents Involved in Community Schools v. Seattle School District; Regents of the University of California v. Bakke*

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Grutter v. Bollinger, 137 F. Supp.2d 821 (E.D. Mich. 2001); 288 F.3d 732 (6th Cir. 2002); 539 U.S. 306 (2003).
Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005), *cert. granted,* 126 S. Ct. 2351 (2006), *rev'd,* 127 S. Ct. 2738 (2007).

Gun-Free Schools Act

Concerned with a growing trend toward violence involving students, the U.S. Congress created legislation to address school safety issues: the Gun-Free School Zones Act of 1990 and the Gun-Free Schools Act of 1994. Congress enacted the 1990 act in response to the growing epidemic of weapons at or near schools. The 1990 act, part of Title XVII of the Crime Control Act of 1990, had the support of the National Education Association, the American Association of School Administrators, the National School Boards Association, and the American Academy of Pediatrics. The act, which became effective December 3, 1990, made it illegal to possess knowingly a firearm "in a place that the individual knows, or has reasonable cause to believe, is a school zone." The law provided a maximum penalty of 5 years of imprisonment.

Plaintiffs challenged the constitutionality of the 1990 act in both the Fifth and the Ninth Circuits. The suits asserted that the 1990 act was unconstitutional because it went beyond the enumerated powers granted the Congress under Article I, Section 8 of the U.S. Constitution. The question for both the Fifth and the Ninth Circuits was whether the regulation of interstate possession of firearms in school zones was within the commerce power of the U.S. government.

In *United States v. Lopez* (1993), the Fifth Circuit held that insofar as the 1990 act was not a regulation of interstate commerce and violated the Tenth Amendment, it was unconstitutional. In *United States v. Edwards* (1993), the Ninth Circuit refused to follow the Fifth Circuit's lead. The Ninth Circuit concluded that since the regulation of firearms affected interstate commerce, it was within the congressional power granted by the Commerce Clause.

In light of the split in the federal appellate courts, the matter went to the Supreme Court for resolution. In *United States v. Lopez* (1995), the Supreme Court, in a 5-to-4 judgment, ruled that Congress had exceeded its authority in adopting the 1990 act. Consequently, Congress went back to work and revised the act.

Pursuant to the 1994 version of the Gun-Free School Zones Act, all states receiving federal funds must have laws in effect requiring local educational agencies to expel for at least 1 year any students determined to have brought weapons to school. In addition, as a condition of receipt of federal funds, the law requires local educational agencies to develop policies that require the referral of students who bring firearms or weapons to school to criminal justice or juvenile delinquency systems. The 1-year expulsion provision is mandatory, except that the chief administering officer of each local education agency may modify it on a case-by-case basis. The 1994 act makes no mention or provision for procedural due process other than for students covered by the Individuals with Disability Education Act (IDEA).

Courts have routinely agreed that the Gun-Free Schools Act does not prevent the expulsion of students with disabilities without adherence to the procedural safeguards in the IDEA. However, the IDEA does permit educators to place students in alternative placements for up to 45 days if they bring firearms or weapons to schools. Thus, compliance with the Gun-Free Schools Act, IDEA, and other related statutes requires that discipline of disabled students be determined on a case-by-case basis and in a manner similar to cases that do not involve firearms.

Once it has been established that a student with a disability has brought a weapon or firearm to school, the IDEA requires a determination by a group of persons knowledgeable as to whether this action was a manifestation of the child's disability. The IDEA allows a student to be expelled only if the group determines that the bringing of a firearm to school was not a manifestation of the student's disability and after applicable procedural safeguards have been followed and documented.

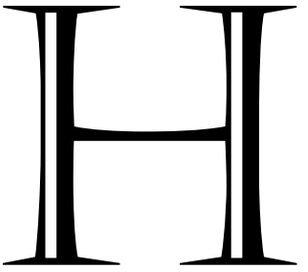
Jon E. Anderson

See also Manifestation Determination; *United States v. Lopez*

Legal Citations

Gun-Free School Zones Act of 1990, 18 U.S.C. §§ 921 *et seq.*
Gun-Free Schools Act of 1994, 20 U.S.C. §§ 7151 *et seq*.
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

United States v. Edwards, 13 F.3d 291 (9th Cir. 1993), *cert. granted, vacated,* 514 U.S. 1093 (1995).
United States v. Lopez, 2. F.3d 1342 (5th Cir. 1993), 514 U.S. 549 (1995).



Harrah Independent School District v. Martin

Many professions require their members to obtain continuing education credits as a means of staying current and up-to-date with new techniques and research within their fields. Moreover, state educational policies often require teachers and administrators to earn staff development hours or credits annually to retain their certification for employment. To this end, states typically permit local boards of education to determine specific guidelines and programs for acquiring the continuing education credits. In *Harrah Independent School District v. Martin* (1979), the Supreme Court judged the reasonableness of public school professional development policies as well as teacher dismissal of those who fail to meet the district requirements.

Facts of the Case

Mary Jane Martin, hired by the Harrah (Oklahoma) Independent School District in 1969, refused to comply with the school board's continuing education policy to obtain 5 hours of college credit every 3 years. From 1972 to 1974, Martin forfeited salary increases as an alternative to acquiring the additional college credits. After Martin's contract was renewed for the 1973–1974 school term, the Oklahoma Legislature mandated salary increases for teachers regardless of the continuing education requirements. Not able to withhold salary increases as a penalty, the school board then required the teacher to obtain the 5 hours of college credits by April 10, 1974, a 7-month period, or her contract would not be renewed, for noncompliance with the continuing education requirement. Martin did not earn the required professional development credits, and the school board chose not to renew her contract for the following term.

Oklahoma statutes at that time required renewal of a tenured contract unless the teacher was guilty of willful neglect of duty, among other grounds. Since the teacher did not comply with the continuing education requirements, the school board voted not to renew her contract based on willful neglect of duty. The respondent alleged she was denied equal protection and deprived of protected liberty and property interests without due process, all in violation of the Fourteenth Amendment of the U.S. Constitution. The school district prevailed in federal district court, but the Tenth Circuit Court reversed in favor of the teacher.

The Court's Ruling

The Supreme Court reviewed Martin's claims of violation of her due process and equal protection rights. The Court easily found that Martin had received procedural due process since she had exercised her right under state law and had a hearing while represented by an attorney. To have prevailed on her substantive due process claim alleging denial of liberty and property interests, the Court explained that Martin had to prove that the board action was arbitrary and that there was no rational relationship between the board's

action and its interest in providing well-trained teachers. The Court found that the board's decision not to renew the contract, but only prospectively, was reasonable once the Oklahoma Legislature removed the penalty of salary increase denial.

Consistent with previous rulings, the Court rejected Martin's equal protection claim. The Court found that the sanction of not renewing Martin's contract was rationally related to the board's objective of enforcing the continuing education requirement. The Court was satisfied that the board's enforcement of its policy was consistent, not selective. Further, the Court recognized that school officials obviously have a legitimate interest in teacher qualifications. The Court thus concluded that school boards can easily justify continuing education requirements to ensure that teachers stay current with the latest research and techniques in education.

Martin provides considerable guidance for school boards as they develop personnel policies and regulations. In light of *Martin,* board policies must be reasonable, and educators must have procedural and substantive safeguards against arbitrary dismissal and nonrenewal. *Martin* also upholds the power of school officials to require professional educators to continue their education as a reasonable exercise of board authority to meet the objective of providing well-trained teachers for the students. As such, *Martin* reaffirms the status of public school educators as career professionals whose training never ends during their working lifetimes. While guidelines may vary, continuing education credits are a common, and lawful, requirement among states and school districts to assist teachers in becoming highly qualified.

Marilyn Denison

See also Due Process; Due Process Rights: Teacher Dismissal; Equal Protection Analysis; Fourteenth Amendment; Teacher Rights

Legal Citations

Harrah Independent School District v. Martin, 440 U.S. 194 (1979).
Kelley v. Johnson, 425 U.S. 238 (1976).
Oklahoma Statute, tit. 70, § 6–101.22 (2006).

Harris v. Forklift Systems

When do abusive comments in the workplace constitute sexual harassment? This was the question that the U.S. Supreme Court confronted in *Harris v. Forklift Systems* (1993). In *Harris,* the Supreme Court decided that plaintiffs in Title VII workplace harassment suits need not prove psychological injury. On the other hand, the Court acknowledged that merely offensive jokes or comments are unlikely to be grounds for sexual harassment suits.

The Court's ruling in *Harris,* even though it arose in the context of a private sector labor dispute, provides guidance about when employers, including school boards, can be liable for violating Title VII of the Civil Rights Act of 1964. Title VII makes it an unlawful employment practice to discriminate on the basis of sex, race, religion or natural origin.

Harris began when Teresa Harris, rental manager for the Forklift Systems Equipment Company, charged Charles Hardy, the company president, with creating a sexually hostile work environment. Specifically, Harris alleged that Hardy's abusive, vulgar, and offensive sexual comments constituted sexual discrimination that violated Title VII. The Supreme Court agreed.

Writing on behalf of the Court, Justice Sandra Day O'Connor noted that the Title VII prohibition against workplace discrimination is not limited to economic discrimination, but includes discriminatory ridicule or insult that creates a hostile work environment. According to the Court, hostile environment violations require both an objective and subjective dimension. First, Justice O'Connor explained, the conduct must be severe or pervasive enough to create an objectively hostile or abusive work environment. Second, Justice O'Connor pointed out that a victim must subjectively perceive the environment to be abusive.

Insofar as *Harris* does not provide a mathematically precise test, it is unclear exactly how school officials or juries can evaluate whether an environment is hostile or abusive enough to violate Title VII. The answer Justice O'Connor specified is that they must look at all the circumstances. As part of her analysis, she suggested four circumstances to look at in addition to psychological harm: (1) the frequency of the

conduct, (2) its severity, (3) whether it was physically threatening or was merely an offensive comment, and (4) whether it unreasonably interfered with an employee's work performance.

The judgment stands for the proposition that unusually sensitive women or men cannot win such suits simply by proving that certain comments caused them to feel that the environment was hostile and abusive. While Justice O'Connor's rationale on behalf of the Court pointed out that a subjective feeling that the workplace is hostile is necessary but not sufficient, plaintiffs also must prove that "reasonable persons" would find the environment "objectively" abusive. Finally, *Harris* instructs judges and juries to consider all the circumstances in determining whether the conduct is severe and pervasive enough to create a hostile work environment in violation of Title VII.

David Schimmel

See also *Davis v. Monroe County Board of Education; Franklin v. Gwinnett County Public Schools; Gebser v. Lago Vista Independent School Board;* Hostile Work Environment; Sexual Harassment

Legal Citations

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
Gebser v. Lago Vista Independent School Board, 524 U.S. 274 (1998).
Harris v. Forklift Systems, 510 U.S. 17 (1993).
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Hazelwood School District v. Kuhlmeier

Hazelwood School District v. Kuhlmeier (1988) is the third of a trilogy of cases involving the free speech rights of students, along with *Tinker v. Des Moines Independent Community School District* (1969) and *Bethel School District No. 403 v. Fraser* (1986). The legal issue in Hazelwood was whether a principal's exercise of editorial control over the contents of a high school newspaper that was produced as part of a school's curriculum violated the First Amendment rights of students. The Supreme Court said that school officials could exercise such control if their actions were motivated by reasonable pedagogical concerns.

Facts of the Case

In *Hazelwood,* the students who were enrolled in a journalism class at Hazelwood East High School were required to write and edit a newspaper, *The Spectrum,* as part of the curriculum. Pursuant to school policy, the journalism teacher submitted page proofs to the principal for approval prior to publication. The principal objected to some of the material included in two of the articles, one about teenage pregnancy and one about divorce. Believing there was insufficient time for students to make the necessary editorial changes prior to the publication deadline, the principal directed the journalism teacher to delete the pages containing the questionable material.

The journalism students filed suit, alleging that the principal's actions violated their First Amendment rights. After a federal trial court in Missouri refused to enjoin school officials from prohibiting the publication of the articles, the Eighth Circuit reversed in favor of the students. On further review, the U.S. Supreme Court upheld the actions of school officials.

The Court's Ruling

At the heart of its rationale in its landmark opinion in *Hazelwood,* the Supreme Court ruled that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns" (*Hazelwood,* p. 273). Relying on its earlier judgment in *Tinker,* the Court reasoned that although "students do not shed their constitutional rights at the schoolhouse gates" (*Hazelwood,* p. 267, citing *Tinker* at p. 506), educators are not required to tolerate student speech that is contrary to a school's educational goals and mission.

The Court also solidified the classification of school-sponsored newspapers as limited open forums,

as opposed to open or public open forums, meaning that school officials could exercise greater control over their content. *Hazelwood* thus illustrates the Court's commitment to granting educators broad discretion to regulate student expression in school-sponsored activities that are inconsistent with a school's educational objectives. Moreover, *Hazelwood* supports historical trends in which courts have given immense deference to the discretion of school officials who are presumed experts in educational matters.

Hazelwood is best known for clarifying the standard that school personnel are required to meet before limiting students' freedom of expression in secondary schools. Prior to *Hazelwood,* courts broadly interpreted the First Amendment rights of high school students in relation to freedom of expression. During the pre-*Hazelwood* era, lower courts utilized *Tinker* as a legal framework in determining the extent of students' First Amendment rights in public schools. Applying *Tinker,* these courts generally recognized school-sponsored newspapers as public forums that were subject to First Amendment protection. Put another way, prior to *Hazelwood,* school officials were permitted to restrict student expression only in circumstances in which they were able to prove that a substantial disruption of school activities was imminent unless they limited student expression. In the years prior to *Hazelwood,* many educators adamantly opposed the prevailing judicial interpretation that school-sponsored newspapers should have been classified as public forums. These officials contended that school-sponsored newspapers did not qualify as forums for public expression because they were part of educational curricula that should have been subject to their control.

Even as *Hazelwood* has served as a guiding principle for the application of First Amendment freedom-of-expression rights in America's public schools, it has yielded some unexpected outcomes. Insofar as *Hazelwood* delineated only the limits of student First Amendment protections, a variety of states took the opportunity to develop laws granting high school students broader First Amendment protection following *Hazelwood.* Colorado and Massachusetts, for example, enacted laws explicitly identifying what categories of student expression school officials were free to restrict.

Further, California law permits educators to restrict student expression only if they can demonstrate that such speech is obscene, libelous, or will substantially disrupt the educational environment. Accordingly, while *Hazelwood* allows educators to limit freedom of expression for reasonable educational purposes, state laws designed to increase students' First Amendment rights allow restrictions only if the speech falls into one of the proscribed categories.

As the educational milieu continues to address a morass of legal issues regarding the First Amendment rights of students, *Hazelwood's* utility will become more apparent. The emergence of state laws granting students greater First Amendment protection in lieu of *Hazelwood* and emerging controversies indicate that, as it is doing in *Frederick v. Morse* (2006a, 2000b), the Supreme Court will revisit the issue of student freedom of expression to provide greater clarity regarding the constitutional framework for balancing student free speech rights and the educational goals of schools.

Laura R. McNeal

See also *Bethel School District No. 403 v. Fraser;* First Amendment: Speech in Schools; *Tinker v. Des Moines Independent Community School District*

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Legal Citations

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).

Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006a), *cert. granted,* 127 S. Ct. 722 (2006b).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Hazelwood School District v. Kuhlmeier (Excerpts)

In Hazelwood School District v. Kuhlmeier, *the Supreme Court upheld the right of educators to exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.*

Supreme Court of the United States
HAZELWOOD SCHOOL DISTRICT
v.
KUHLMEIER
484 U.S. 260
Argued Oct. 13, 1987.
Decided Jan. 13, 1988.

Justice WHITE delivered the opinion of the Court.

This case concerns the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum.

I

Petitioners are the Hazelwood School District in St. Louis County, Missouri; various school officials; Robert Eugene Reynolds, the principal of Hazelwood East High School; and Howard Emerson, a teacher in the school district. Respondents are three former Hazelwood East students who were staff members of Spectrum, the school newspaper. They contend that school officials violated their First Amendment rights by deleting two pages of articles from the May 13, 1983, issue of Spectrum.

Spectrum was written and edited by the Journalism II class at Hazelwood East. The newspaper was published every three weeks or so during the 1982–1983 school year. More than 4,500 copies of the newspaper were distributed during that year to students, school personnel, and members of the community.

The Board of Education allocated funds from its annual budget for the printing of Spectrum. These funds were supplemented by proceeds from sales of the newspaper. The printing expenses during the 1982–1983 school year totaled $4,668.50; revenue from sales was $1,166.84. The other costs associated with the newspaper—such as supplies, textbooks, and a portion of the journalism teacher's salary—were borne entirely by the Board.

The Journalism II course was taught by Robert Stergos for most of the 1982–1983 academic year. Stergos left Hazelwood East to take a job in private industry on April 29, 1983, when the May 13 edition of Spectrum was nearing completion, and petitioner Emerson took his place as newspaper adviser for the remaining weeks of the term.

The practice at Hazelwood East during the spring 1983 semester was for the journalism teacher to submit page proofs of each Spectrum issue to Principal Reynolds for his review prior to publication. On May 10, Emerson delivered the proofs of the May 13 edition to Reynolds, who objected to two of the articles scheduled to appear in that edition. One of the stories described three Hazelwood East students' experiences with pregnancy; the other discussed the impact of divorce on students at the school.

Reynolds was concerned that, although the pregnancy story used false names "to keep the identity of these girls a secret," the pregnant students still might be identifiable from the text. He also believed that the article's references to sexual activity and birth control were inappropriate for some of the younger students at the school. In addition, Reynolds was concerned that a student identified by name in the divorce story had complained that her father "wasn't spending enough time with my mom, my sister and I" prior to the divorce, "was always out of town on business or out late playing cards with the guys," and "always argued about everything" with her mother. Reynolds believed that the student's parents should have been given an opportunity to respond to these remarks or to consent to their publication. He was unaware that Emerson had deleted the student's name from the final version of the article.

Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent. He concluded that his only options under the circumstances were to publish a four-page newspaper instead of the planned six-page newspaper, eliminating the two pages on which the offending stories appeared, or to publish no newspaper at all. Accordingly, he directed Emerson to withhold from publication the two pages containing the stories on pregnancy and divorce. He informed his superiors of the decision, and they concurred.

Respondents subsequently commenced this action in the United States District Court for the Eastern District of Missouri seeking a declaration that their First Amendment rights had been violated, injunctive relief, and monetary damages. After a bench trial, the District Court denied an injunction, holding that no First Amendment violation had occurred.

The District Court concluded that school officials may impose restraints on students' speech in activities that are "'an integral part of the school's educational function' "-including the publication of a school-sponsored newspaper by a journalism class—so long as their decision has "'a substantial and reasonable basis.' . . ."

The Court of Appeals for the Eighth Circuit reversed. The court held at the outset that Spectrum was not only "a part of the school adopted curriculum," but also a public forum, because the newspaper was "intended to be and operated as a conduit for student viewpoint." The court then concluded that Spectrum's status as a public forum precluded school officials from censoring its contents except when "'necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.'"

. . . .

We granted certiorari and we now reverse.

II

Students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." They cannot be punished merely for expressing their personal views on the school premises—whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours"—unless school authorities have reason to believe that such expression will "substantially interfere with the work of the school or impinge upon the rights of other students."

We have nonetheless recognized that the First Amendment rights of students in the public schools "are not automatically coextensive with the rights of adults in other settings" and must be "applied in light of the special characteristics of the school environment." A school need not tolerate student speech that is inconsistent with its "basic educational mission," even though the government could not censor similar speech outside the school. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was "sexually explicit" but not legally obscene at an official school assembly, because the school was entitled to "disassociate itself" from the speech in a manner that would demonstrate to others that such vulgarity is "wholly inconsistent with the 'fundamental values' of public school education." We thus recognized that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board," rather than with the federal courts. It is in this context that respondents' First Amendment claims must be considered.

A

We deal first with the question whether Spectrum may appropriately be characterized as a forum for public expression. The public schools do not possess all of the attributes of streets, parks, and other traditional public forums that "time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." Hence, school facilities may be deemed to be public forums only if school authorities have "by policy or by practice" opened those facilities "for indiscriminate use by the general public," or by some segment of the public, such as student organizations. If the facilities have instead been reserved for other intended purposes, "communicative or otherwise," then no public forum has been created, and school officials may impose reasonable restrictions on the speech of students, teachers, and other members of the school community. "The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse."

The policy of school officials toward Spectrum . . . provided that "[s]chool sponsored publications are developed within the adopted curriculum and its educational implications in regular classroom activities." The Hazelwood East Curriculum Guide described the Journalism II course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." The lessons that were to be learned from the Journalism II course, according to the Curriculum Guide, included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." Journalism II was taught by a faculty member during regular class hours. Students received grades and academic credit for their performance in the course.

School officials did not deviate in practice from their policy that production of Spectrum was to be part of the educational curriculum and a "regular classroom activit[y]." The District Court found that Robert Stergos, the journalism teacher during most of the 1982–1983 school year, "both had the authority to exercise and in fact exercised a great deal of control over *Spectrum.*" For example, Stergos selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company. Many of these decisions were made without consultation with the Journalism II students. . . . These factual findings are amply supported by the record, and were not rejected as clearly erroneous by the Court of Appeals.

The evidence relied upon by the Court of Appeals in finding Spectrum to be a public forum is equivocal at best. For example, Board Policy 348.51, which stated in part that "[s]chool sponsored student publications will not restrict free expression or diverse viewpoints within the rules of responsible journalism," also stated that such publications were "developed within the adopted curriculum and its educational implications." One might reasonably infer from the full text of Policy 348.51 that school officials retained ultimate control over what constituted "responsible journalism" in a school-sponsored newspaper. Although the Statement of Policy published in the September 14, 1982, issue of Spectrum declared that "*Spectrum,* as a student-press publication, accepts all rights implied by the First Amendment," this statement, understood in the context of the paper's role in the school's curriculum, suggests at most that the administration will not interfere with the students' exercise of those First Amendment rights that attend the publication of a school-sponsored newspaper. It does not reflect an intent to expand those rights by converting a curricular newspaper into a public forum. Finally, that students were permitted to exercise some authority over the contents of Spectrum was fully consistent with the Curriculum Guide objective of teaching the Journalism II students "leadership responsibilities as issue and page editors." A decision to teach leadership skills in the context of a classroom activity hardly implies a decision to relinquish school control over that activity. . . . Accordingly, school officials were entitled to regulate the contents of Spectrum in any reasonable manner. It is this standard, rather than our decision in *Tinker,* that governs this case.

B

The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may in its capacity as publisher of a school newspaper or producer of a school play "disassociate itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices—standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world—and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the

authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order" or to associate the school with any position other than neutrality on matters of political controversy. Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

Accordingly, we conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges. It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so "directly and sharply implicate[d]," as to require judicial intervention to protect students' constitutional rights.

III

We also conclude that Principal Reynolds acted reasonably in requiring the deletion from the May 13 issue of Spectrum of the pregnancy article, the divorce article, and the remaining articles that were to appear on the same pages of the newspaper.

The initial paragraph of the pregnancy article declared that "[a]ll names have been changed to keep the identity of these girls a secret." The principal concluded that the students' anonymity was not adequately protected, however, given the other identifying information in the article and the small number of pregnant students at the school. Indeed, a teacher at the school credibly testified that she could positively identify at least one of the girls and possibly all three. It is likely that many students at Hazelwood East would have been at least as successful in identifying the girls. Reynolds therefore could reasonably have feared that the article violated whatever pledge of anonymity had been given to the pregnant students. In addition, he could reasonably have been concerned that the article was not sufficiently sensitive to the privacy interests of the students' boyfriends and parents, who were discussed in the article but who were given no opportunity to consent to its publication or to offer a response. The article did not contain graphic accounts of sexual activity. The girls did comment in the article, however, concerning their sexual histories and their use or nonuse of birth control. It was not unreasonable for the principal to have concluded that such frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.

The student who was quoted by name in the version of the divorce article seen by Principal Reynolds made comments sharply critical of her father. The principal could reasonably have concluded that an individual publicly identified as an inattentive parent—indeed, as one who chose "playing cards with the guys" over home and family—was entitled to an opportunity to defend himself as a matter of journalistic fairness. These concerns were shared by both of Spectrum's faculty advisers for the 1982–1983 school year, who testified that they would not have allowed the article to be printed without deletion of the student's name.

Principal Reynolds testified credibly at trial that, at the time that he reviewed the proofs of the May 13 issue during an extended telephone conversation with Emerson, he believed that there was no time to make any changes in the articles, and that the newspaper had to be printed immediately or not at all. It is true that Reynolds did not verify whether the necessary modifications could still have been made in the articles, and that Emerson did not volunteer the information that printing could be delayed until the changes were made. We nonetheless agree with the District Court that the decision to excise the two pages containing the problematic articles was reasonable given the particular circumstances of this case. These circumstances included the very recent replacement of Stergos by Emerson, who may not have been entirely familiar with Spectrum editorial and production procedures, and the pressure felt by Reynolds to make an immediate decision so that students would not be deprived of the newspaper altogether.

In sum, we cannot reject as unreasonable Principal Reynolds' conclusion that neither the pregnancy article

nor the divorce article was suitable for publication in Spectrum. Reynolds could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community" that includes adolescent subjects and readers. Finally, we conclude that the principal's decision to delete two pages of Spectrum, rather than to delete only the offending articles or to require that they be modified, was reasonable under the circumstances as he understood them. Accordingly, no violation of First Amendment rights occurred.

The judgment of the Court of Appeals for the Eighth Circuit is therefore

Reversed.

Citation: *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988).

Hazelwood School District v. United States

Hazelwood School District v. United States (1977) involved a dispute over inequitable hiring practices involving African American teachers. In *Hazelwood,* the U.S. Supreme Court held that in order to determine whether a school board and educational officials engaged in a discriminatory pattern or practice of underemploying African American teachers, the judiciary had to undertake a comparison between the percentage of African American teachers in the district and the percentage of African American teachers in the labor market of the surrounding area.

Facts of the Case

Hazelwood began when the U.S. government filed suit against the Hazelwood School District, in St. Louis County, Missouri, and various educational officials, alleging that they had violated Title VII of the Civil Rights Act of 1964 and the Fourteenth Amendment's dictate that public employers not engage in purposeful racial discrimination. Title VII prohibits governmental and other employers from engaging in workplace discrimination based on race, color, religion, gender, or national origin.

At issue in *Hazelwood* was whether the board and school officials discriminated against African American applicants in their hiring practices. In response to these inequities, the federal government sought an injunction demanding that the board stop its discriminatory practices, that the board and its officials take steps to hire more African Americans, and that the board offer positions and back pay to the African American victims who had been discriminated against by the past employment practices.

A federal trial court in Missouri dismissed in favor of the board in asserting that since the government failed to established the necessary "pattern or practice" of racial discrimination, there was no violation of Title VII present. Yet the Eighth Circuit reversed and remanded in finding that the trial court relied on the incorrect comparison between African American teachers and African American students in the district. Instead, the appellate panel pointed out that the trial court should have relied on a comparison between the number of African American teachers that the board employed and the total accounting of African American teachers in the labor market of the surrounding area.

To this end, the court maintained that the relevant labor market should have included both St. Louis County and the city of St. Louis. Using this definition, the court observed that the total population of African American teachers in the labor market was 15.4%. Insofar as this percentage was considerably different from the actual percentage of African American teachers that the board had hired, which ranged from 1.4% to 1.8%, the court decided that the board had engaged in a pattern or practice of racial discrimination. In other words, the court was satisfied that the government presented enough evidence,

based on the statistical disparity and past hiring practices, that the board had violated Title VII.

The Court's Ruling

Disagreeing with the calculation that the government used to illustrate its underemployment of African American teachers, the school board appealed to the Supreme Court. Specifically, the board argued that the government's statistical evidence was unfairly skewed because it included data from the city of St. Louis, which set a goal of maintaining a 50% ratio of African American teachers.

On further review, the Supreme Court affirmed that the Eighth Circuit correctly compared the number of African American employees in the school district with the number in the surrounding labor market. At the same time, though, the Court was of the opinion that the Eighth Circuit incorrectly calculated the statistical data because it did not take into account the data that were available once the board was subject to Title VII, namely after March 24, 1972.

Put another way, the Court reasoned that in order for the board to have been liable for having violated Title VII, the pattern or practice of discrimination must have occurred after it was subject to the statute. Accordingly, the Court remanded *Hazelwood* for a consideration of how the relevant labor market of African American teachers should have been calculated and whether there was a pattern or practice of employment discrimination after March 24, 1972. In its rationale, the Justices instructed the trial court to use data based on the time frame between 1972 and 1974, which showed that 3.7% of the teachers hired in the school system had been African Americans.

Justice Brennan concurred in reiterating the significance of how the statistical data were calculated. However, Justice Stevens dissented on the basis that the government had presented substantial evidence to conclude that the board had engaged in a pattern or practice of racial discrimination. Accordingly, he would have affirmed the judgment of the Eighth Circuit.

Janet R. Rumple

See also Civil Rights Act of 1964; Title VII

Legal Citations

Hazelwood School District v. United States, 433 U.S. 299 (1977).
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Hazing

Hazing has been an integral part of student life on college and university campuses for more than 100 years in the United States. Hazing practices are most prevalent in membership rituals for collegiate fraternal organizations and intercollegiate sports. Although, historically, hazing incidents were confined to institutions of higher learning, this phenomenon has also permeated secondary schools. This entry discusses the increase in hazing practices and summarizes related laws and court rulings.

The Growth of the Practice

In recent years, reports of hazing practices in secondary schools have risen to alarming levels. According to experts, 1.5 million high school students are victims of hazing each year in the United States. Not surprisingly, the heightened presence of hazing in secondary schools is of great concern to many parents and educators. Insofar as secondary school students are within the developmental stages of adolescence, they are more vulnerable to peer pressure, thereby making them highly susceptible to becoming victims of hazing. *Hazing,* which may be defined as "any activity expected of someone that joins a group, which humiliates, degrades, abuses, or endangers its victims," varies in scope from minor initiation rites such as washing a car to potentially dangerous activities such as binge drinking. Hazing practices in secondary schools mirror those in collegiate environments by requiring students to participate in specified activities as a prerequisite for membership or peer acceptance into various student groups and athletic teams.

The unsettled legal landscape regarding school hazing has contributed to a growing consensus among policymakers, educators, and parents calling for the creation of a federal antihazing statute. There is currently no uniform federal law that addresses hazing

practices in K–12 settings. Accordingly, school administrators and hazing victims must rely on state antihazing laws to address hazing incidents. The application of state antihazing laws in K–12 settings is often problematic, for a variety of reasons.

State Laws

First, not all 50 states have enacted antihazing legislation. It is difficult to assert hazing liability claims in states that do not have antihazing statutes, because victims are forced to seek relief under tort or constitutional law, which are often inadequate venues for successful claims. Presently, more than 40 states have adopted antihazing statutes, with Alaska, Montana, South Dakota, Hawaii, New Mexico, and Wyoming being the exceptions. States with criminal antihazing statutes typically classify hazing as a criminal misdemeanor offense and impose a penalty ranging from 10 to 365 days of jail time and fines between $10 and $10,000.

Some states, such as Alabama, South Carolina, and Texas, have criminal antihazing laws that impute criminal liability to school personnel who observe but fail to report hazing incidents. In *McMillan v. Broward County School Board* (2003), an appellate court in Florida ruled that a school board lacked the authority to discipline a high school baseball coach for misconduct and immorality as a result of a hazing incident that occurred on a school trip because there was no evidence that he knew or should have known that it occurred.

Hazing statutes in some states mandate not only that school personnel report known incidents of hazing but also that they implement proactive measures in their schools to prevent hazing. Statutory requirements that increase the role and responsibilities of school personnel in hazing prevention suggest a shift in the educational milieu toward increased school staff accountability for hazing in these states.

Another variance among state antihazing statutes is that some statutes apply exclusively to college students, as opposed to students attending secondary schools. Prosecutors are typically reluctant to pursue hazing charges against students in states in which there is no specific law forbidding such activities. Further, state antihazing laws vary in relation to whether hazing victims may pursue criminal penalties, as opposed to civil liability. Last, many states have different definitions regarding what constitutes hazing for liability purposes. Some recognize physical harm only, while others recognize mental aspects.

Common Defenses

Legal defenses to hazing also vary among states. Common defenses for hazing that are borrowed from tort law are assumption of risk, consent, and sovereign immunity. Currently, only a small number of states permit the assumption of risk defense in hazing cases. The doctrine of assumption of risk is predicated on the notion that plaintiffs may not recover for their injuries when they had knowledge of the dangerous condition and voluntarily exposed themselves to the danger. In relation to consent as a defense to hazing, the majority of states clearly articulate in their antihazing statutes that the use of consent, whether implied or express, to participate in the hazing ritual may not be used as a defense for the accused.

Sovereign immunity, another affirmative defense to hazing, shields government employees such as school personnel from liability for actions that they take in the course of their official duties. Some states restrict the use of sovereign immunity as a defense in situations in which an employee acted recklessly or with malice.

In the years to come, it is likely that stakeholders in education will continue to face endemic challenges as they struggle to dismantle the hazing epidemic that is infiltrating America's schools. The lack of policy development around this issue, coupled with the wide range of disparities among state laws, makes deterring hazing practices in secondary schools a formidable task for many school administrators. As the severity and frequency of hazing incidents continues to rise in secondary schools, it is likely that a uniform federal antihazing law will emerge. Until then, school administrators must rely on the legal parameters within their individual states as a framework for addressing and deterring hazing practices within their schools.

Laura R. McNeal

See also Bullying; Negligence

Further Readings

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Hearing Officer

Hearing officer is the generic term given to individuals who preside over administrative hearings. A hearing officer may also be called an "administrative law judge" in some jurisdictions. In short, a hearing officer is expected to be an impartial third party to a dispute, someone who considers both sides and then renders a decision. Typically, a hearing officer has the authority to administer oaths, take testimony, consider evidence, and make findings of fact and law. While somewhat similar to a judge in that a decision is rendered, a hearing officer considers complaints made relative to some source of administrative law—that is, statutes, regulations, or policy.

In school law, such hearings may consider disputes related to a number of legal issues including, but not limited to, special education law, discrimination law, employment law, student records, and student discipline. The source of law guiding such a dispute may have its home in federal law, state law, or local policy. In addition to specifying that a hearing be available, the particular source of law may also dictate the minimum qualifications a hearing officer must hold.

At the federal level, a number of statutes require school boards to establish complaint procedures whereby aggrieved parties may challenge the actions of school authorities. Those procedures frequently require hearings as part of the dispute process. In such instances, a hearing officer is called on to adjudicate disputes. For example, a parent or adult student who wishes to challenge information in a student file may request a hearing if school officials refuse to remove it from the record. Pursuant to the Family Educational Rights and Privacy Act (FERPA), the hearing must be conducted by someone with no "direct interest in the outcome of the hearing." Both parties are then bound by the hearing officer's decision. Complainants must also be afforded the opportunity for a hearing before an impartial third party under Section 504 of the Rehabilitation Act, Title VI of the Civil Rights Act, Title VII of the Civil Rights Act, Title IX of Education Amendments of 1972, the Americans with Disabilities Act, and the Individuals with Disabilities Education Act.

Of all these federal provisions, none is more explicit about the role and requirements of the hearing officer than the Individuals with Disabilities Education Act (IDEA). IDEA requires that a hearing officer be someone who understands the IDEA, its regulations, and any complementary state laws; has the knowledge and ability to conduct a hearing according to standard legal practice; and has the ability to write a decision that comports with the law and standard practice. In addition, a hearing officer should not have any personal or professional conflicts of interest related to the dispute and may not be employed by either the state educational agency or the local school district. While the IDEA does not specify that a hearing officer must be an attorney, some states add this requirement. Other IDEA provisions specify how hearings are to be conducted, what the decision must address, and the timeline by which disputes should be settled.

State law, too, may specify that some disputes be resolved after proceedings before a hearing officer. For example, state law may allow a teacher whose license to teach has been denied or revoked to challenge the action by means of a formal hearing, presided over by an appointed hearing officer. Likewise, state law may create a hearing procedure for students to challenge a local school district's decision to suspend or expel.

Finally, local school authorities may create procedures that employ a hearing officer to settle disputes. For example, they may agree to be bound by a provision of an employee union contract that specifies that

if the two parties cannot agree about the meaning of a particular contractual provision, a hearing officer will be appointed to settle the matter.

In some instances, the law may require that a complainant first exhaust administrative remedies before seeking redress in a court of law. For example, parents who have a complaint under the IDEA must first have the dispute heard by a hearing officer prior to filing any civil action. In contrast, a person who has a complaint under Section 504 of the Rehabilitation Act may either request a hearing or file a complaint in civil court.

The IDEA also illustrates another principle related to the work of hearing officers and whether their decisions may be appealed. The IDEA explicitly provides that any party who disagrees with the order of a hearing officer may appeal to either a federal or state court. Other sources of law may make a decision of the hearing officer final unless an aggrieved party can demonstrate "clear error" or the deprivation of an explicit constitutional or statutory right.

In all instances, a hearing officer's work relates to the principle of due process. Due process is a legal principle that has its home in the Fourteenth Amendment. Due process requires that governmental decisions are made in a just and equitable manner. A hearing officer, as an impartial party to a dispute, is to weigh facts and evidence in order to ensure that no individual or group is deprived of rights they hold as a result of administrative law.

Julie F. Mead

See also Americans with Disabilities Act; Due Process; Due Process Hearing; Due Process Rights: Teacher Dismissal; Family Educational Rights and Privacy Act; Rehabilitation Act of 1973, Section 504; Title VII; Title IX and Sexual Harassment

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Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).

Hearsay

Hearsay testimony is secondhand evidence; in hearsay, witnesses talk not about what they know personally, but about what they have been told by other persons. For instance, if a defendant is charged with uttering certain words, witnesses are permitted to testify that they heard the defendant speak the words. Subject to the many exceptions to the rule, witnesses may not pass on information of which they are personally unaware.

As it is applied to schools, there are times when educators may overhear statements and charges being made by students, colleagues, or others. School personnel and administrators may also learn that students or groups of students have made threats against classmates or school personnel. In such cases, educators must exercise discretion while rendering sound and legally defensible judgments that affect the students under their care. Further, on rare occasions, students and school personnel may engage in criminal activity, such as murder, sexual improprieties, arson, burglary, or robbery, that may warrant having school officials being called to testify in court.

Insofar as education is a function of state governments, school personnel must be aware and knowledgeable of the law of hearsay and how it impacts public and private school systems. This entry provides a brief introduction.

The Rule

The Hearsay Rule defines hearsay and provides for numerous exceptions and exemptions that exceed the scope of the rule itself. Since its definition varies across jurisdictions, most evidentiary codes defining hearsay adopt verbatim the rule as described in the Federal Rules of Evidence Rule 801. Historically, the

rule against hearsay prohibits the use of a person's statement unless the individual making the statement is brought to court to testify under oath, where he or she may be cross-examined. According to Hearsay Rule 802, hearsay is inadmissible except as provided by rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

The rules about hearsay are derived from the Sixth Amendment, which defines the rights of accused in criminal prosecutions:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The right to be "confronted with the witnesses against him" was made applicable to the states via the Fourteenth Amendment in *Pointer v. Texas* (1965). Pursuant to this case, the defense, under the Sixth Amendment, must have an opportunity to confront and cross-examine witnesses. The Confrontation Clause relates to the common-law rule that prevents the admission of hearsay; in other words, testimony by one witness as to the statements and observations of another person is generally inadmissible but for the many exceptions to the rule. The rationale behind this rule is that defendants have no opportunity to challenge the credibility of and cross-examine the person actually making the statements against them. The Confrontation Clause defines the right of a defendant to confront the witnesses against him or her. Witnesses who give formal statements, depositions, or affidavits are conscious that they are bearing witness and that their words will impact further legal proceedings.

Exceptions to the Rule

Certain exceptions to the Hearsay Rule are permitted. For instance, admissions by defendants are admissible, as are dying declarations and exceptions for business records. However, the Supreme Court has held that the Hearsay Rule is not exactly the same as the Confrontation Clause. Hearsay may be admitted although it is not covered by one of the long-recognized exceptions. In other words, prior testimony may sometimes be admitted if the witness is unavailable. In *Crawford v. Washington* (2004), the Supreme Court increased the scope of the Confrontation Clause in trials. Justice Antonin Scalia's opinion made any testimonial out-of-court statements inadmissible if the defendant did not have the opportunity to cross-examine the accuser.

The law of evidence governs the use of testimony and legal exhibits or other documentary material which is admissible in resolving a dispute. School personnel have a responsibility when it comes to reported and overheard conversations. Knowledge of hearsay statutes will enable educators to perform their respective duties efficiently and effectively within the boundaries of constitutional, statutory, and case law.

Doris G. Johnson

See also Deposition

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Highly Qualified Teachers

The term *highly qualified teacher* comes from the Elementary and Secondary Education Act, now known as the No Child Left Behind Act (NCLB) (2002). As of the end of the 2006–2007 academic year, all public school teachers who provide direct instruction to students in core academic subjects must

be "highly qualified." The requirements apply differently to teachers at charter and private schools.

What the Law Requires

To be considered highly qualified under the NCLB, public school teachers who directly teach students in core subjects must meet the following requirements: hold at least a bachelor's degree from an accredited institution of higher education, have full state teaching certification through either a traditional or alternative route, and demonstrate subject matter competence in each of the academic subjects taught. Under NCLB, charter school teachers do not have to meet the full state certification requirement. NCLB does not apply to private schools.

The core academic subjects under the NCLB are English, reading or language arts, mathematics, science, foreign languages, civics and government, economics, arts, history, and geography. If public school teachers do not teach one of these core academic subjects, the requirements do not apply. Core academic subjects do not include physical education, computer science, and vocational education.

In addition, the "highly qualified" requirements generally do not apply to public school special education teachers, as they generally provide consultations to teachers and additional supports to students and do not directly instruct students as their primary teachers in a core academic subject. Under the Individuals with Disabilities Education Improvement law (2004), special education teachers must hold at least a bachelor's degree from an accredited institution of higher education and state certification in special education. If public school special education teachers teach one or more core subjects directly to students, they must meet the highly qualified teacher requirements for each core subject taught.

How to demonstrate subject matter competence differs depending on whether teachers are new or veterans and whether they teach at the elementary or middle and high school levels. Newly hired teachers at the elementary level must pass state tests covering subject matter knowledge and teaching skills in reading, writing, mathematics, and other areas of a core elementary school curriculum. Newly hired teachers at the middle and high school levels must do one of the following: pass a state test in the academic subject matter area; complete an academic major, course work equivalent to a major, or a graduate degree in the academic subject area; or have advanced certification, like National Board Certification, in the academic subject area.

Veteran teachers must demonstrate subject matter competence by either meeting the new teacher requirements or the state's Highly Objective Uniform State Standards of Evaluation (HOUSSE) plan. Under NCLB, HOUSSE plans are an alternative method to new teacher requirements for demonstrating subject area competence through an evaluation of teachers' performances and professional development during their careers. NCLB requires state HOUSSE plan evaluations to meet seven criteria:

1. Be set to determine both grade-appropriate academic subject matter knowledge and teaching skills
2. Be aligned with student academic achievement standards and developed in consultation with core curriculum content specialists, teachers, and principals
3. Provide objective information about the teacher's level of core content knowledge in the academic subject matter areas taught
4. Be applied uniformly to all teachers in the same grade and academic subject matter area
5. Take into consideration, but not as the primary evidence, the teacher's years of experience teaching the academic subject
6. Be made available to public, upon request
7. Be designed to perhaps involve multiple, objective measures of teacher competency

Examples of evidence used by states in their HOUSSE plans include administrator observations, examination of the teacher's curriculum and lesson plans, years of teaching experience, being a peer mentor, teaching university courses, and receiving a teaching award.

Implementation Issues

Many school systems with shortages of people meeting the highly qualified teacher standards prior to the

passage of NCLB have still not been able to hire such individuals for every classroom. This has been especially true in science classrooms across the country, in which the general shortage of teachers means they often teach additional classes outside their field of study; in rural districts, in which low student enrollments mean that teachers teach subjects in multiple disciplines; and in poor, urban districts, in which low salaries and stressful working conditions make it difficult to attract teachers.

For the first two problems, the Department of Education has eased the requirements. The department allows states to permit science teachers to demonstrate that they are highly qualified in the "broad field" of science, rather than in each subject they teach. For teachers in specially designated rural districts, the department allows them 3 additional years to meet the requirements, as long as they are already highly qualified in at least one subject area.

The Department of Education has not provided additional flexibility related to the teacher requirements for urban schools. To overcome ongoing teacher shortages, some urban districts are recruiting interns through alternative certification programs, such as Teach for America, wherein individuals teach K–12 classes while taking pedagogy courses. As a result, these districts have teachers who meet the requirements but lack prior teaching experience and have little training in teaching methods. These outcomes appear to violate the stated purpose of the highly qualified teacher requirement: that is, to provide students with the best teachers possible, especially poor and minority students, because teachers are the key to student academic achievement.

Eric M. Haas

See also Charter Schools; No Child Left Behind Act; Nonpublic Schools; Rural Education

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High School Athletic Associations

State high school athletic associations are in most instances nonprofit organizations that act as governing bodies of athletic programs for junior and senior high schools. As part of this role, they are responsible for arranging high school competitions and establishing policies and practices for athletic directors, coaches, and student athletes. This entry provides an overview of such groups and the issues they face.

What Associations Do

High school athletic associations are governed by boards of directors and executive committees that include building principals, district superintendents, athletic directors, and officials. High school athletic associations often provide regulatory oversight for and sanction interschool sporting events among member schools and sustain communications to encourage good relationships among members. At the same time, they may set qualifications and eligibility standards for young athletes, their coaches, and officials and protect participants from exploitation. They also may cooperate with other agencies involved in ensuring the health and educational well-being of high school students. Their overall goal is to improve the quality of school sports programs and their administration.

Membership in these associations is made up of accredited public and private schools. Nationally, most high school athletic associations offer school level membership; in some cases and similar to the NCAA, state athletic organizations offer different categories of membership. For example, Michigan's Interscholastic Athletic Association offers four types of membership: active membership, associate membership, honorary membership, and life membership.

In some states, a more broadly focused state-level organization acts as a point of contact and regulatory body for the multiple athletic and academic associations in the state, while also sponsoring individual policy and rules committees focused on each of the sanctioned sports and academic competitions. Two examples of this are found in Missouri and Maine. In Missouri, the Missouri State High School Activities Association (MSHSAA) offers information and links for the various state-level coaches and directors associations, the National Federation of State High School Associations (NFHS), and other state and related associations, as well as hosting standing advisory committees for the various sanctioned sports, academic competitions, and state-level initiatives. In Maine, the Maine Principals Association (MPA) offers general information about school athletic activities through one of two distinct divisions. The interscholastic division focuses on sports, music, science, and speech and debate competitions, while the professional division focuses on educational leadership for school principals, curriculum directors, supervision and evaluation, and the professional development of school leaders.

National High School Associations

In many cases, state high school athletic organizations are able to join national organizations focused broadly on high school activities. One example is the National Federation of State High School Associations (NFHS). Membership in the NFHS includes the 50 state high school athletic/activity associations, plus the District of Columbia. The NFHS also provides affiliate athletic/activity memberships for individuals—for example, coaches associations or speech and debate associations. The NFHS provides leadership for the administration of education-based interscholastic activities. According to its Web site and printed materials, the NFHS is recognized as a national authority in the areas of interscholastic activity programs and on the development and interpretation of competition rules for interscholastic activity programs. The NFHS also publishes rules for boys' and girls' competition in 16 sports and administers fine arts programs in speech, theater, debate, and music.

National- and state-level high school athletic associations are an important influence in shaping secondary athletics. These may suggest rules and policies to cover everything from athletic eligibility to drug testing, athletic injury, and officiating. A look at three recent issues helps to describe the authority of the high school athletic associations.

Academic Eligibility. In 1906, the National Collegiate Athletic Association (NCAA) began requiring incoming college students to meet eligibility requirements to compete as freshman athletes. Although the specifics have changed, the primary goal of these requirements is to ensure that student athletes are academically prepared to achieve an appropriate balance between college course work and athletic competition. Recently, the NCAA made efforts to include the National Association of Secondary School Principals (NASSP) and the NFHS in revising the initial eligibility process. Some of the changes in policies and procedures now permit high school principals to identify courses that meet the NCAA's core curriculum. Previously, these decisions were made by college academic committees. This change also takes into account "nontraditional" instructional methods such as courses taught over the Internet, independent study, distance learning, and correspondence courses. These revisions provide more latitude in selecting courses that demonstrate students' abilities to succeed academically during their first year in higher education. The collaboration between the NCAA, NAASP, and NFHS has strengthened the understanding of the changing high school curriculum, collegiate expectations, and the commonly approved standards required of students to compete in collegiate athletics during their initial year in college.

Title IX. In 1975, Congress approved Title IX Educational Amendments of 1972 in the area of athletics. High schools and colleges were given 3 years and elementary schools 1 year to comply. In 1976, the NCAA challenged the legality of Title IX, and 2 years later, the Department of Health, Education and Welfare issued a formal policy on Title IX and intercollegiate athletics for notice and comment. High schools and colleges were given until July 21, 1978, to have policies

and practices in place that complied with Title IX athletic requirements.

Fundamentally, Title IX requires educational institutions to ensure that policies, practices, and programs do not discriminate against anyone based on sex. Young men and women are expected to receive fair and equal treatment in all arenas of public schooling: educational programs and activities, course offerings and access, sexual harassment, and athletics.

Americans with Disabilities Act. The Americans with Disabilities Act (ADA) has greatly influenced access to athletic facilities. However, Title II of the ADA, based on Section 504 of the Rehabilitation Act of 1973, has been the subject of litigation in several states (e.g., New York, Missouri, Michigan, and West Virginia). The object of this litigation was not only to permit more than access to arenas but also to throw open the doors to athletic participation. Scholars reviewing the implications for high school athletics conclude that the courts have interpreted Section 504 to allow handicapped individuals to participate fully in activities without "paternalistic authorities" deciding that certain events may be too risky. This dynamic resulted from the Supreme Court's interpretation of "reasonable accommodation" in *Alexander v. Choate* (1985), in which the Court attempted to balance the statutory rights of the disabled with the legitimate interests of institutions to preserve the integrity of programs.

Age Requirements

One of the significant factors resulting in lawsuits is the ability of state high school athletic associations to use the age of student athletes as a requirement to participate in high school sports. Even so, courts are split on whether waiving an age requirement is a reasonable accommodation. The ability and reach of the courts to review actions of voluntary associations, like state athletic associations, is somewhat limited, while in most cases, the judiciary defers to the judgments of athletic associations regarding matters of eligibility, except when their actions are found to be fraudulent, arbitrary, or capricious.

George J. Petersen

See also Americans with Disabilities Act; Rehabilitation Act of 1973, Section 504; Title IX and Athletics

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High-Stakes Testing

See Testing, High-Stakes

HIV/AIDS

See Rights of Students and School Personnel With HIV/AIDS

HOBSON V. HANSEN

A trial court's ruling in *Hobson v. Hansen* (1967) raised legal questions about ability grouping but failed to stop the practice in its tracks. Civil rights activist Julius Hobson filed a class action lawsuit in federal trial court against the Board of Education of the District of Columbia and its superintendent, Carl Hansen. The suit alleged that low-income and Black students were denied equal educational opportunity as a result of the district's discriminatory practices. Included among the challenged practices was the institution of a rigid system that assigned students to three or four homogeneous ability groups, or tracks.

Once assigned, students had virtually no opportunity to switch tracks. Students in the lowest tracks received a substantially different and lesser education geared toward attaining lower-paying, blue-collar jobs, while honors track students prepared for college. Low-income and Black students were disproportionately represented in the lowest track. Students were tracked on the basis of the results of a single measure: a standardized aptitude test administered in early elementary school.

Circuit Judge Skelly Wright found that the tests were not actually measuring ability because they were biased in such a way that poor, Black children would inevitably earn lower scores and, as a result, lower track placements. Thus, children were being assigned to tracks based not on ability, but on status. Wright concluded that this was discriminatory under the Due Process Clause of the Fifth Amendment, because the lower-track classes provided less educational opportunity.

Such clear-cut legal victories for opponents of tracking have since been rare. One reason is that neither *Hobson v. Hansen* nor any other tracking challenge has ever made it to the Supreme Court. Another reason is that the plaintiffs in *Hobson v. Hansen* showed that tracking was discriminatory in effect but not necessarily in intent.

Nine years later, in *Washington v. Davis* (1976), the Supreme Court found that the plaintiffs in such cases must prove intent. This is difficult because despite decades of social science research demonstrating that tracking harms low- and middle-ability students without significantly boosting the achievement of those in higher tracks, ability grouping has great commonsense appeal. Opponents of tracking may honestly believe that they are providing a more equitable education by catering to each student's individual needs.

Hansen himself stated that the objectives behind tracking were "the realization of the doctrine of equality of education" and "the attainment of quality education." Proving intent is made all the more difficult today because tests are less biased and tracking policies are less rigid. Rare is the district that employs a single test result to group students by ability. Today's schools generally consider a variety of factors, including grades, teacher recommendations, and student/parent preferences. Although research shows this still results in minority overrepresentation in lower tracks, the multitude of criteria muddies the waters, making it even more difficult to demonstrate intent.

Tracking continues to face legal challenges. In *People Who Care v. Rockford Board of Education School District* (1994), a federal trial court in Illinois found that tracking was intentionally used to segregate students by race. More common are challenges in which discriminatory intent is easier to prove because the district is already under a desegregation order (e.g., *McNeal v. Tate County School District,* 1975, and *Diaz v. San Jose Unified School District,* 1985). A final avenue that does not require proof of intent is for the U.S. Office for Civil Rights to seek termination of federal funds under Title VI of the Civil Rights Act of 1964.

Starting in the 1980s, research including Jeannie Oakes's 1985 landmark indictment of ability grouping, *Keeping Track,* helped inspire a voluntary detracking movement that was not mandated by the courts. It is still unclear whether the resulting heterogeneous classes produce better results. Early studies found little difference between achievement levels in tracked and untracked classes. More recent research indicates that all students benefit when schools provide a challenging curriculum in heterogeneously grouped classes with extra support, such as tutoring for struggling students.

The majority of secondary schools in this country continue to track. Poor and minority students still disproportionately receive the diminished educational

opportunities available in lower tracks. Hobson might have prevailed in court, but Hansen's vision remains firmly entrenched.

R. Holly Yettick

See also Ability Grouping

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Homeless Students, Rights of

Estimates suggest that as many as 760,000 Americans are homeless on any given night and up to 2 million experience homelessness each year, among them many children in need of an education. Prior to 1987, there was no federal law or policy addressing the education of homeless children. In 1987, the U.S. Congress took steps to address the issue through the enactment of legislation commonly known as the Stewart B. McKinney Homeless Assistance Act. The law was later renamed as the McKinney-Vento Homeless Assistance Act (hereinafter "McKinney-Vento Act"). The McKinney-Vento Act was reauthorized as part of the No Child Left Behind Act of 2001.

The McKinney-Vento Act provides that students who find themselves in homeless situations not be excluded from school. The Act defines "Homeless children and youth" as individuals who lack a fixed, regular, and adequate nighttime residence, including children and youth who share housing with others due to economic reasons, are living in an emergency or transitional shelter, are abandoned or awaiting foster care, have a primary nighttime residence not designated for or ordinarily used for sleeping, or are living in parks or the like. "Homeless children and youth" also includes migratory children as defined by the Elementary and Secondary Education Act of 1985. Determinations as to homelessness are made on an individual case-by-case basis.

The McKinney-Vento Act requires that all homeless youth have access to a free and appropriate education. The law requires each state to ensure that each homeless child has equal access to the same free appropriate public education that is provided to other children. The act also directs states to revise laws, regulations, practices, and policies to ensure that barriers to enrollment, attendance, or success of homeless children are removed. The McKinney-Vento Act further provides that homelessness alone is not a sufficient reason to separate students from the mainstream school environment. The act mandates that homeless children have access to the education and services they need to equip them with an opportunity to meet the same academic standards to which all students are held.

Under the McKinney-Vento Act, state agencies must appoint a coordinator of education for homeless children. Moreover, each state is required to adopt a plan to provide for the education of homeless children and youth within that state. State plans must be submitted to the U.S. Department of Education. These plans must include assurance that local school districts will comply with the act. The state plans must include descriptions of how their homeless children will be given a chance to meet the same state academic achievement standards as nonhomeless children and how the state educational agency will identify homeless children and help them with their special needs. It must also include programs available for school personnel to heighten their awareness of the needs of homeless children, including runaways; procedures to

ensure that homeless children meeting eligibility criteria will be eligible for federal, state, and local food programs; and procedures that ensure homeless children will have equal access to the same educational programs as other children.

In addition, plans must include access to preschool programs, as well as before- and after-school programs, along with assurances that issues such as transportation needs and enrollment delays caused by lack of immunizations, residency, lack of proper documentation, and guardianship are properly addressed. Further, the plans must demonstrate that state and local agencies will remove barriers to enrollment and assurances that homeless students will neither be isolated nor stigmatized.

The McKinney-Vento Act, like many pieces of federal legislation, allocates money to states to distribute in competitive, discretionary grants for programs designed to meet the needs of homeless children. State educational agencies have considerable discretion in awarding grants to local school districts. Grants may be used for the following purposes in regard to the education of homeless students: tutoring and instruction; evaluation of students; professional development activities; referral services for medical, dental, or other health needs; transportation needs; early childhood education; before- or after-school and summer programs; school record tracking; parental training; coordination of services between school and social service agencies; provision of pupil services and referrals to such services; domestic violence prevention; adaptation of physical space and the purchase of school supplies; and emergency or extraordinary assistance.

Local agencies wishing to compete for grant funds must agree to admit homeless children immediately and must appoint a liaison whose job is to identify and assist homeless students and their parents and families in accessing educational services.

The McKinney-Vento Act does not provide direct penalties to states and/or local school agencies that violate the act. The regulation of public education is not done at the federal level, but at the state level. Consequently, as with most federal educational initiatives, the federal government authority to regulate is limited to the withholding of grant funds for states that fail to comply.

Many states have taken steps to comply with the McKinney-Vento Act. The typical state law mirrors the definition of "homeless children and youth" provided in the act. State laws must be consulted in addition to the requirements of the act.

Jon E. Anderson

See also No Child Left Behind Act

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Homeschooling

Homeschooling is the broad term used for describing the education of school-aged persons at home rather than in the public or private education systems. The United States is unique in that its public education system attempts to educate all children; all states mandate compulsory attendance in one form or another for individuals who are of school age. While the vast majority of students attend public schools, other opportunities, such as accredited or nonaccredited private schools (whether religiously affiliated or nonfaith based), charter schools, and home schools, offer a number of alternatives to public education.

Homeschooling has seen a significant amount of growth over the past two decades, and its popularity continues to rise.

Homeschooling is a legally viable option in all states and can be used to satisfy compulsory attendance laws. Still, the home school experience can be different in each state. Some states do not require a check of academic progress, while others may require the parent to have certification as a teacher and submit annual reports of child progress. Requirements regarding time spent by children in the home school environment each day and the academic subjects to be covered in a home school also vary widely across states. Thus, the home school experience is one that currently offers a great deal of independence and variability throughout the United States.

This entry offers a general description and discussion of the state regulations applying to homeschooling.

Description

A *home school* is defined as any learning situation in which a parent or guardian assumes direct responsibility for a child's education. While those who homeschool have enjoyed increased media exposure and attention, the practice is not a new or revolutionary method. Some families and groups do not want the outside world to influence their children in any way contrary to their beliefs. However, possible influence contrary to family or group belief systems is not the only reason families opt to homeschool their children. For some families, the choice has to do with the rise of drug use, gang activity, and violence on school campuses. For still others, there seems to be a growing dissatisfaction with schools and their results as measured by achievement tests. Some oppose standardized testing in any form; others oppose what they see as a lack of success on standardized tests.

For reasons as varied as how to approach curriculum to the teaching of belief systems, homeschooling is growing and affecting American school society. Some estimates of the growth of children who are homeschooled indicate that nationwide, the number approaches 2% of the student population. The National Center for Educational Statistics (NCES) estimated that the number falls between 709,000 and 992,000, although some sources say the number is as high as 1,700,000 students. One of the main difficulties of studying home school populations is that since there is no definitive method for obtaining the exact number of children who are homeschooled, sampling methods are difficult to utilize or validate.

As the number of homeschooled children increases, two primary theoretical perspectives are used to explain the phenomenon. The first is an academic, pedagogical perspective that explains homeschooling as an approach that requires the education to be suitable for the individual child, rather than the child having to be suitable for the education system. Students who have special needs would especially benefit from homeschooling, according to this philosophy. Pedagogues believe that public schools are unable to effectively offer instruction to students and neglect to provide a learner-centered environment. The second philosophy behind homeschooling is ideological, meaning that the instruction and curriculum used for home school education is based on certain morals and principles, usually of a particular religious orientation.

What the Law Says

The U.S. Constitution does not address public education. Thus, this important area falls under the Tenth Amendment to the Constitution, which specifies that all rights and duties not explicitly named in the Constitution are the responsibility of the individual states. While all states regulate public education, the level of legislative involvement and scrutiny over homeschooling varies widely. Some states require only that families choosing to homeschool their children notify local education agencies or school board officials of their intent to do so. More than half of the states require parents to provide some form of assessment of student learning and academic achievement. Some states, although few, impose specific testing and educational requirements on parents. Other states offer high school diplomas for students who are homeschooled even though they do not recognize them for college entrance.

States classify homeschooling under a variety of educational headings, according to research by Dare in 2001. Fourteen states treated homeschooling with the same regulations as private or church schools. In some states, homeschooling was merely a part of private

education, and in other states, it was considered as a separate category. The states varied as to whether the private schools were highly regulated or loosely regulated. Thirty-one states had home school statutes designed for fulfilling the compulsory attendance laws. These states also ranged from loosely to highly regulated based on the records parents were required to keep. Six states provided for students who were homeschooled by offering multiple options of how to meet the compulsory attendance laws. In essence, there seemed to be no trends regarding homeschooling by region of the country.

The lack of discernable trends in states by regions has not done anything to prevent the number of homeschooled children from growing. An increasing home school population should help stimulate even more growth as more pressure is brought upon states for further deregulation.

State laws fall into a varied continuum of regulations for homeschooled students. Generally, most jurisdictions require parents to at least file a notification of their intent to homeschool their children before doing so. Exceptions exist, for example, in New Jersey, Idaho, Illinois, Indiana, Iowa, Oklahoma, and Texas; these states do not require any notification. State laws differ sharply in homeschooling regulations. Other states require student progress evaluations, most often chosen by the family, to be submitted by the parent. States can even require a submission of a curricular plan or satisfactory progress on a state-based assessment. Other states require nothing.

It is also up to state prerogatives as to how to handle the academic entry of previously homeschooled children into public schools. The grade levels assigned by home schools is often ignored as a measure for placing students in public schools; rather, school officials typically require children to undergo some sort of achievement-based test at an appropriate grade level. Insofar as there is no standardized method for identifying homeschooled students, studies involving the effectiveness or even accurate numbers of homeschooling are problematic.

In most states, homeschooled students do not have the privilege of participating in extracurricular activities that are sponsored by public schools. This includes most sports and fine arts programs, including theater, choir, dance, band, and other non–core curriculum areas.

One concern about homeschooling from the viewpoint of educators in public schools is that many places have no one assigned to work with home school families. Research reveals that while 91% of administrators reported having homeschooled students within their districts, more than two thirds reported that no one was assigned to work with families or students. Many administrators are also not current on legal policies concerning homeschooling. This can be troubling given that most state laws place homeschooling under indirect supervision of the local district. Some states, and thus local districts, do not really monitor the homeschooling group at all. Texas, for example, does not monitor any aspect of homeschooling at the state or local level.

Federal Issues

The increase in students who choose homeschooling and the ramifications of this practice create the need for understanding this movement in terms of law. Historically, the key legal issue most often cited in home school conflict with public education has been compulsory attendance. In fact, the homeschooling movement has had its greatest difficulty with compulsory attendance laws. State compulsory attendance laws require that children be in school; as a result, many states have maintained that homeschooling is in violation of the law. Parents have challenged the assertion that they can have no control over their children's education, based on the First and Fourteenth Amendments.

The U.S. Supreme Court found that compulsory school requirements conflicted with constitutional rights in *Wisconsin v. Yoder* (1972). In *Yoder,* the Court ruled that families with religious or educational concerns, in this case the Amish, had the right to offer an alternative education to protect their beliefs. Even so, most courts reject attempts by homeschooling advocates to rely on *Yoder,* noting that the Amish have employed the practice of educating their children at home, or in the community after eighth grade, for hundreds of years, while wide-scale homeschooling is a relatively new phenomenon. Judicial unwillingness to allow advocates to rely on *Yoder* aside, all states currently allow for homeschooling by requiring children ranging in ages from 5 to 16 attend either public or approved nonpublic schools, including home schools.

Another area of increasing legal activity relates to federal guidelines under the No Child Left Behind Act of 2001 (NCLB). The NCLB has placed many requirements concerning children and literacy. As a result, a number of state-level responses could increase the age range impacted by compulsory attendance laws; state legislators have also in some cases suggested that nonpublic school children take state-mandated accountability tests as a response to NCLB.

Stacey L. Edmonson

See also Compulsory Attendance; *Wisconsin v. Yoder*

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Honig v. Doe

At issue in *Honig v. Doe* (1988), the U.S. Supreme Court's first and only case on the topic, were the acceptable limits of disciplining students with disabilities under the (then) Education of the Handicapped Act (EHA), now the Individuals with Disabilities in Education Act (IDEA). In its analysis, the Court addressed three issues. First, the Court agreed that the case was moot for one of the two student plaintiffs because he was no longer eligible under the IDEA. Second, the Court refused to create a dangerousness exception in the IDEA, affirming that its "stay-put" provisions prohibit school officials from unilaterally excluding students with disabilities from school for dangerous or disruptive actions that are manifestations of their disabilities while review proceedings are under way; as modified, the IDEA now includes provisions addressing so-called manifestation determinations. Third, an equally divided Court affirmed that the state official must provide services directly to students with disabilities when local boards fail to do so.

Facts of the Case

"John Doe" was an emotionally disturbed student who had difficulty controlling his impulses and anger. In November 1980, at the age of 17, Doe explosively responded to the taunts of a peer by choking the student and then kicking out a school window as he was escorted to the principal's office. Doe was suspended for 5 days. On the fifth day of Doe's suspension, the San Francisco Unified School District (SFUSD) Student Placement Committee notified his mother that it was recommending his expulsion and that his suspension would continue indefinitely until the expulsion proceedings were complete.

Doe, who qualified for special educational services under the IDEA, filed suit against the SFUSD and the California Superintendent of Public Instruction, alleging that their disciplinary actions violated the "stay-put" provision of the (then) EHA. Under the IDEA "stay-put" provisions, children with disabilities must remain in their existing educational placements pending the completion of any review proceedings unless parents and state or local educational officials agree otherwise. Doe alleged that the pending expulsion proceedings triggered the "stay-put" provision and that educators violated his rights in suspending him indefinitely. As such, a federal trial court granted Doe's request for a preliminary injunction ordering school officials to return him to his existing educational placement pending a review of his individualized educational program (IEP).

"Jack Smith" was also an emotionally disturbed, IDEA-eligible student in the SFUSD. Smith typically reacted to stress by becoming verbally hostile and aggressive. When he was in middle school, his disruptive behavior escalated; Smith acted out by stealing, extorting money from other students, and making sexual comments to female classmates. In November 1980, Smith was suspended for 5 days for his lewd comments. As with Doe, the SFUSD Student Placement Committee recommended Smith's expulsion, scheduled an expulsion hearing, and extended the suspension indefinitely until a final disposition of the matter. Having learned of Doe's case, Smith protested the school's actions and eventually intervened in Doe's suit.

After granting Doe's preliminary injunction, the trial court entered a permanent injunction barring officials of the SFUSD from suspending any students with disabilities from school for more than 5 days when their misconduct was disability related or from making any other changes of placement, pending completion of any review proceedings, without parental consent. Further, the court barred the state from approving any unilateral placements, ordered the state to provide services directly to eligible students if the local educational agency failed to do so, and ordered the state either to create a system for monitoring compliance with the IDEA or to enact guidelines for responding to disability-related misconduct. On appeal, the Ninth Circuit affirmed these orders with slight modifications.

The Court's Ruling

The California Superintendent of Public Instruction, Bill Honig, sought review by the Supreme Court, claiming that the Ninth Circuit neglected to consider the decisions of other circuits that acknowledged a "dangerousness exception" to the "stay-put" provision. In addition, he charged that the trial court's order directing the state to provide direct services when local educational agencies failed to do so imposed an onerous burden on the state.

On further review, the Supreme Court affirmed the earlier judgments except to the extent that the Ninth Circuit suggested that suspensions in excess of 10 days did not constitute changes in placements. Turning to the first of the three issues, the Court began by deciding that the case was moot with regard to Doe because he passed the IDEA's eligibility age of 21. However, since Smith still was eligible under the IDEA, the Court reviewed the rest of the claim.

At the heart of the case, and in response to Honig's concerns, the Supreme Court expressly refused to create a "dangerousness exception" to the "stay-put" provision. Reviewing the IDEA's legislative purpose, the Court found that it is "clear . . . that [in enacting the IDEA] Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school" (*Honig,* p. 323, emphasis in original). At the same time, the Court pointed out that educators were not left hamstrung when dealing with potentially dangerous students. For instance, the Court noted that educators may use any of a variety of procedures when responding to dangerous students, such as study carrels, time-outs, detention, restriction of privileges, or suspensions for up to 10 days. The Court indicated that 10-day suspensions are designed to serve as follows:

> A "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the ten-day respite gives school officials an opportunity to invoke the aid of the courts . . . to grant any appropriate relief. (p. 327)

Recognizing that the IDEA's legislative history suggested that Congress sought to prohibit the unilateral exclusion of disabled children by *schools* and not *courts,* the Supreme Court reasoned that the "stay-put" provision does not limit the authority of courts to award appropriate relief to either a parent or the local educational agency. Rather, the Court asserted that the "stay-put" provision created a presumption in favor of leaving children in their existing educational placements unless educators could prove that they were likely to harm themselves or others.

The Court thus concluded this part of its opinion by explaining that school officials are entitled to seek injunctive relief to exclude students from school when the interests of maintaining safe learning environments for all outweighs the dangerous child's right to receive a free and appropriate public education.

As to the third issue, an equally divided Supreme Court affirmed that the state must provide services directly to students with disabilities when local boards fail to make them available.

Amy M. Steketee

See also Disabled Persons, Rights of; Free Appropriate Public Education; Individualized Educational Program (IEP); Manifestation Determination; Stay-Put Provision

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Honig v. Doe (Excerpts)

Honig v. Doe *stands out as the Supreme Court's only case involving disciplining of students with disabilities for misbehavior that is related to their disabilities.*

Supreme Court of the United States

Bill HONIG, California Superintendent of Public Instruction, Petitioner

v.

John DOE and Jack Smith.

484 U.S. 305

Argued Nov. 9, 1987.

Decided Jan. 20, 1988.

Justice BRENNAN delivered the opinion of the Court.

As a condition of federal financial assistance, the Education of the Handicapped Act requires States to ensure a "free appropriate public education" for all disabled children within their jurisdictions. In aid of this goal, the Act establishes a comprehensive system of procedural safeguards designed to ensure parental participation in decisions concerning the education of their disabled children and to provide administrative and judicial review of any decisions with which those parents disagree. Among these safeguards is the so-called "stay-put" provision, which directs that a disabled child "shall remain in [his or her] then current educational placement" pending completion of any review proceedings, unless the parents and state or local educational agencies otherwise agree. Today we must decide whether, in the face of this statutory proscription, state or local school authorities may nevertheless unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities. In addition, we are called upon to decide whether a district court may, in the exercise of its equitable powers, order a State to provide educational services directly to a disabled child when the local agency fails to do so.

I

In the Education of the Handicapped Act (EHA or the Act), Congress sought "to assure that all handicapped children have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, [and] to assure that the rights of handicapped children and their parents or guardians are protected." . . . Among the most poorly served of disabled students were emotionally disturbed children: Congressional statistics revealed that for the school year immediately preceding passage of the

Act, the educational needs of 82 percent of all children with emotional disabilities went unmet.

Although these educational failings resulted in part from funding constraints, Congress recognized that the problem reflected more than a lack of financial resources at the state and local levels. Two federal-court decisions, which the Senate Report characterized as "landmark," demonstrated that many disabled children were excluded pursuant to state statutes or local rules and policies, typically without any consultation with, or even notice to, their parents. Indeed, by the time of the EHA's enactment, parents had brought legal challenges to similar exclusionary practices in 27 other States.

In responding to these problems, Congress did not content itself with passage of a simple funding statute. Rather, the EHA confers upon disabled students an enforceable substantive right to public education in participating States and conditions federal financial assistance upon a State's compliance with the substantive and procedural goals of the Act. . . .

The primary vehicle for implementing these congressional goals is the "individualized educational program" (IEP), which the EHA mandates for each disabled child. . . .

. . . .

. . . . The "stay-put" provision at issue in this case governs the placement of a child while. . . review procedures run their course. It directs that: "During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . ."

The present dispute grows out of the efforts of certain officials of the San Francisco Unified School District (SFUSD) to expel two emotionally disturbed children from school indefinitely for violent and disruptive conduct related to their disabilities. In November 1980, respondent John Doe assaulted another student at the Louise Lombard School, a developmental center for disabled children. Doe's April 1980 IEP identified him as a socially and physically awkward 17-year-old who experienced considerable difficulty controlling his impulses and anger. Among the goals set out in his IEP was "[i]mprovement in [his] ability to relate to [his] peers [and to] cope with frustrating situations without resorting to aggressive acts." Frustrating situations, however, were an unfortunately prominent feature of Doe's school career: physical abnormalities, speech difficulties, and poor grooming habits had made him the target of teasing and ridicule as early as the first grade; his 1980 IEP reflected his continuing difficulties with peers, noting that his social skills had deteriorated and that he could tolerate only minor frustration before exploding.

On November 6, 1980, Doe responded to the taunts of a fellow student in precisely the explosive manner anticipated by his IEP: he choked the student with sufficient force to leave abrasions on the child's neck, and kicked out a school window while being escorted to the principal's office afterwards. Doe admitted his misconduct and the school subsequently suspended him for five days. Thereafter, his principal referred the matter to the SFUSD Student Placement Committee (SPC or Committee) with the recommendation that Doe be expelled. On the day the suspension was to end, the SPC notified Doe's mother that it was proposing to exclude her child permanently from SFUSD and was therefore extending his suspension until such time as the expulsion proceedings were completed. The Committee further advised her that she was entitled to attend the November 25 hearing at which it planned to discuss the proposed expulsion.

After unsuccessfully protesting these actions by letter, Doe brought this suit against a host of local school officials and the State Superintendent of Public Instructions. Alleging that the suspension and proposed expulsion violated the EHA, he sought a temporary restraining order canceling the SPC hearing and requiring school officials to convene an IEP meeting. The District Judge granted the requested injunctive relief and further ordered defendants to provide home tutoring for Doe on an interim basis; shortly thereafter, she issued a preliminary injunction directing defendants to return Doe to his then current educational placement at Louise Lombard School pending completion of the IEP review process. Doe reentered school on December 15, 5 1/2 weeks, and 24 school-days, after his initial suspension.

Respondent Jack Smith was identified as an emotionally disturbed child by the time he entered the second grade in 1976. School records prepared that year indicated that he was unable "to control verbal or physical outburst[s]" and exhibited a "[s]evere disturbance in relationships with peers and adults." Further evaluations subsequently revealed that he had been physically and emotionally abused as an infant and young child and that, despite above average intelligence, he experienced academic and social difficulties as a result of extreme hyperactivity and low self-esteem. Of particular concern was Smith's propensity for verbal hostility; one evaluator noted that the child reacted to stress by "attempt [ing] to

cover his feelings of low self worth through aggressive behavior[,] . . . primarily verbal provocations."

Based on these evaluations, SFUSD placed Smith in a learning center for emotionally disturbed children. His grandparents, however, believed that his needs would be better served in the public school setting and, in September 1979, the school district acceded to their requests and enrolled him at A.P. Giannini Middle School. His February 1980 IEP recommended placement in a Learning Disability Group, stressing the need for close supervision and a highly structured environment. Like earlier evaluations, the February 1980 IEP noted that Smith was easily distracted, impulsive, and anxious; it therefore proposed a half-day schedule and suggested that the placement be undertaken on a trial basis.

At the beginning of the next school year, Smith was assigned to a full-day program; almost immediately thereafter he began misbehaving. School officials met twice with his grandparents in October 1980 to discuss returning him to a half-day program; although the grandparents agreed to the reduction, they apparently were never apprised of their right to challenge the decision through EHA procedures. The school officials also warned them that if the child continued his disruptive behavior—which included stealing, extorting money from fellow students, and making sexual comments to female classmates—they would seek to expel him. On November 14, they made good on this threat, suspending Smith for five days after he made further lewd comments. His principal referred the matter to the SPC, which recommended exclusion from SFUSD. As it did in John Doe's case, the Committee scheduled a hearing and extended the suspension indefinitely pending a final disposition in the matter. On November 28, Smith's counsel protested these actions on grounds essentially identical to those raised by Doe, and the SPC agreed to cancel the hearing and to return Smith to a half-day program at A.P. Giannini or to provide home tutoring. Smith's grandparents chose the latter option and the school began home instruction on December 10; on January 6, 1981, an IEP team convened to discuss alternative placements.

After learning of Doe's action, Smith sought and obtained leave to intervene in the suit. The District Court subsequently entered summary judgment in favor of respondents on their EHA claims and issued a permanent injunction. In a series of decisions, the District Judge found that the proposed expulsions and indefinite suspensions of respondents for conduct attributable to their disabilities deprived them of their congressionally mandated right to a free appropriate public education, as well as their right to have that education provided in accordance with the procedures set out in the EHA. The District Judge therefore permanently enjoined the school district from taking any disciplinary action other than a 2- or 5-day suspension against any disabled child for disability-related misconduct, or from effecting any other change in the educational placement of any such child without parental consent pending completion of any EHA proceedings. In addition, the judge barred the State from authorizing unilateral placement changes and directed it to establish an EHA compliance-monitoring system or, alternatively, to enact guidelines governing local school responses to disability-related misconduct. Finally, the judge ordered the State to provide services directly to disabled children when, in any individual case, the State determined that the local educational agency was unable or unwilling to do so.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the orders with slight modifications. Agreeing with the District Court that an indefinite suspension in aid of expulsion constitutes a prohibited "change in placement" under § 1415(e)(3), the Court of Appeals held that the stay-put provision admitted of no "dangerousness" exception and that the statute therefore rendered invalid those provisions of the California Education Code permitting the indefinite suspension or expulsion of disabled children for misconduct arising out of their disabilities. The court concluded, however, that fixed suspensions of up to 30 schooldays did not fall within the reach of § 1415(e)(3), and therefore upheld recent amendments to the state Education Code authorizing such suspensions. Lastly, the court affirmed that portion of the injunction requiring the State to provide services directly to a disabled child when the local educational agency fails to do so.

Petitioner Bill Honig, California Superintendent of Public Instruction, sought review in this Court, claiming that the Court of Appeals' construction of the stay-put provision conflicted with that of several other Courts of Appeals which had recognized a dangerousness exception and that the direct services ruling placed an intolerable burden on the State. We granted certiorari to resolve these questions and now affirm.

II

At the outset, we address the suggestion, raised for the first time during oral argument, that this case is moot.

Under Article III of the Constitution this Court may only adjudicate actual, ongoing controversies. That the dispute between the parties was very much alive when suit was filed, or at the time the Court of Appeals rendered its judgment, cannot substitute for the actual case or controversy that an exercise of this Court's jurisdiction requires. In the present case, we have jurisdiction if there is a reasonable likelihood that respondents will again suffer the deprivation of EHA-mandated rights that gave rise to this suit. We believe that, at least with respect to respondent Smith, such a possibility does in fact exist and that the case therefore remains justiciable.

Respondent John Doe is now 24 years old and, accordingly, is no longer entitled to the protections and benefits of the EHA, which limits eligibility to disabled children between the ages of 3 and 21. It is clear, therefore, that whatever rights to state educational services he may yet have as a ward of the State, the Act would not govern the State's provision of those services, and thus the case is moot as to him. Respondent Jack Smith, however, is currently 20 and has not yet completed high school. Although at present he is not faced with any proposed expulsion or suspension proceedings, and indeed no longer even resides within the SFUSD, he remains a resident of California and is entitled to a "free appropriate public education" within that State. His claims under the EHA, therefore, are not moot if the conduct he originally complained of is "'capable of repetition, yet evading review.'" Given Smith's continued eligibility for educational services under the EHA, the nature of his disability, and petitioner's insistence that all local school districts retain residual authority to exclude disabled children for dangerous conduct, we have little difficulty concluding that there is a "reasonable expectation" that Smith would once again be subjected to a unilateral "change in placement" for conduct growing out of his disabilities were it not for the statewide injunctive relief issued below.

Our cases reveal that, for purposes of assessing the likelihood that state authorities will reinflict a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury. No such reluctance, however, is warranted here. It is respondent Smith's very inability to conform his conduct to socially acceptable norms that renders him "handicapped" within the meaning of the EHA. As noted above, the record is replete with evidence that Smith is unable to govern his aggressive, impulsive behavior—indeed, his notice of suspension acknowledged that "Jack's actions seem beyond his control." In the absence of any suggestion that respondent has overcome his earlier difficulties, it is certainly reasonable to expect, based on his prior history of behavioral problems, that he will again engage in classroom misconduct. Nor is it reasonable to suppose that Smith's future educational placement will so perfectly suit his emotional and academic needs that further disruptions on his part are improbable. . . . Overarching these statutory obligations, moreover, is the inescapable fact that the preparation of an IEP, like any other effort at predicting human behavior, is an inexact science at best. Given the unique circumstances and context of this case, therefore, we think it reasonable to expect that respondent will again engage in the type of misconduct that precipitated this suit.

We think it equally probable that, should he do so, respondent will again be subjected to the same unilateral school action for which he initially sought relief. In this regard, it matters not that Smith no longer resides within the SFUSD. While the actions of SFUSD officials first gave rise to this litigation, the District Judge expressly found that the lack of a state policy governing local school responses to disability-related misconduct had led to, and would continue to result in, EHA violations, and she therefore enjoined the state defendant from authorizing, among other things, unilateral placement changes. She of course also issued injunctions directed at the local defendants, but they did not seek review of those orders in this Court. Only petitioner, the State Superintendent of Public Instruction, has invoked our jurisdiction, and he now urges us to hold that local school districts retain unilateral authority under the EHA to suspend or otherwise remove disabled children for dangerous conduct. Given these representations, we have every reason to believe that were it not for the injunction barring petitioner from authorizing such unilateral action, respondent would be faced with a real and substantial threat of such action in any California school district in which he enrolled. Certainly, if the SFUSD's past practice of unilateral exclusions was at odds with state policy and the practice of local school districts generally, petitioner would not now stand before us seeking to defend the right of all local school districts to engage in such aberrant behavior.

We have previously noted that administrative and judicial review under the EHA is often "ponderous," and this case, which has taken seven years to reach us, amply confirms that observation. For obvious reasons, the misconduct of an emotionally disturbed or otherwise disabled

child who has not yet reached adolescence typically will not pose such a serious threat to the well-being of other students that school officials can only ensure classroom safety by excluding the child. Yet, the adolescent student improperly disciplined for misconduct that does pose such a threat will often be finished with school or otherwise ineligible for EHA protections by the time review can be had in this Court. Because we believe that respondent Smith has demonstrated both "a sufficient likelihood that he will again be wronged in a similar way," and that any resulting claim he may have for relief will surely evade our review, we turn to the merits of his case.

III

The language of § 1415(e)(3) is unequivocal. It states plainly that during the pendency of any proceedings initiated under the Act, unless the state or local educational agency and the parents or guardian of a disabled child otherwise agree, "the child shall remain in the then current educational placement." Faced with this clear directive, petitioner asks us to read a "dangerousness" exception into the stay-put provision on the basis of either of two essentially inconsistent assumptions: first, that Congress thought the residual authority of school officials to exclude dangerous students from the classroom too obvious for comment; or second, that Congress inadvertently failed to provide such authority and this Court must therefore remedy the oversight. Because we cannot accept either premise, we decline petitioner's invitation to rewrite the statute.

Petitioner's arguments proceed, he suggests, from a simple, commonsense proposition: Congress could not have intended the stay-put provision to be read literally, for such a construction leads to the clearly unintended, and untenable, result that school districts must return violent or dangerous students to school while the often lengthy EHA proceedings run their course. We think it clear, however, that Congress very much meant to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school. In so doing, Congress did not leave school administrators powerless to deal with dangerous students; it did, however, deny school officials their former right to "self-help," and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts.

As noted above, Congress passed the EHA after finding that school systems across the country had excluded one out of every eight disabled children from classes. In drafting the law, Congress was largely guided by the recent decisions in *Mills v. Board of Education of District of Columbia* and *PARC* [*Pennsylvania Association for Retarded Children v. Commonwealth*], both of which involved the exclusion of hard-to-handle disabled students. . . .

Congress attacked such exclusionary practices in a variety of ways. . . . Conspicuously absent from § 1415(e)(3), however, is any emergency exception for dangerous students. This absence is all the more telling in light of the injunctive decree issued in *PARC,* which permitted school officials unilaterally to remove students in "'extraordinary circumstances.'" Given the lack of any similar exception in *Mills,* and the close attention Congress devoted to these "landmark" decisions, we can only conclude that the omission was intentional; we are therefore not at liberty to engraft onto the statute an exception Congress chose not to create.

Our conclusion that § 1415(e)(3) means what it says does not leave educators hamstrung. The Department of Education has observed that, "[w]hile the [child's] placement may not be changed [during any complaint proceeding], this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others." Such procedures may include the use of study carrels, timeouts, detention, or the restriction of privileges. More drastically, where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 schooldays. This authority, which respondent in no way disputes, not only ensures that school administrators can protect the safety of others by promptly removing the most dangerous of students, it also provides a "cooling down" period during which officials can initiate IEP review and seek to persuade the child's parents to agree to an interim placement. And in those cases in which the parents of a truly dangerous child adamantly refuse to permit any change in placement, the 10-day respite gives school officials an opportunity to invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief.

Petitioner contends, however, that the availability of judicial relief is more illusory than real, because a party seeking review under § 1415(e)(2) must exhaust time-consuming administrative remedies, and because under the Court of Appeals' construction courts are as bound by the stay-put provision's "automatic injunction" as are

schools. It is true that judicial review is normally not available under § 1415(e)(2) until all administrative proceedings are completed, but as we have previously noted, parents may bypass the administrative process where exhaustion would be futile or inadequate. While many of the EHA's procedural safeguards protect the rights of parents and children, schools can and do seek redress through the administrative review process, and we have no reason to believe that Congress meant to require schools alone to exhaust in all cases, no matter how exigent the circumstances. The burden in such cases, of course, rests with the school to demonstrate the futility or inadequacy of administrative review, but nothing in § 1415(e)(2) suggests that schools are completely barred from attempting to make such a showing. Nor do we think that § 1415(e)(3) operates to limit the equitable powers of district courts such that they cannot, in appropriate cases, temporarily enjoin a dangerous disabled child from attending school. As the EHA's legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by schools, not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent school officials from removing a child from the regular public school classroom over the parents' objection pending completion of the review proceedings." The stay-put provision in no way purports to limit or pre-empt the authority conferred on courts by § 1415(e)(2); indeed, it says nothing whatever about judicial power.

In short, then, we believe that school officials are entitled to seek injunctive relief under § 1415(e)(2) in appropriate cases. In any such action, § 1415(e)(3) effectively creates a presumption in favor of the child's current educational placement which school officials can overcome only by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. In the present case, we are satisfied that the District Court, in enjoining the state and local defendants from indefinitely suspending respondent or otherwise unilaterally altering his then current placement, properly balanced respondent's interest in receiving a free appropriate public education in accordance with the procedures and requirements of the EHA against the interests of the state and local school officials in maintaining a safe learning environment for all their students.

IV

We believe the courts below properly construed and applied § 1415(e)(3), except insofar as the Court of Appeals held that a suspension in excess of 10 schooldays does not constitute a "change in placement." We therefore affirm the Court of Appeals' judgment on this issue as modified herein. Because we are equally divided on the question whether a court may order a State to provide services directly to a disabled child where the local agency has failed to do so, we affirm the Court of Appeals' judgment on this issue as well.

Affirmed.

Citation: *Honig v. Doe,* 484 U.S. 305 (1988).

Hortonville Joint School District No. 1 v. Hortonville Education Association

In *Hortonville Joint School District No. 1 v. Hortonville Education Association* (1976), teachers sued their school board, alleging that it violated their due process rights when it fired them for striking in direct violation of Wisconsin state law. The U.S. Supreme Court described the issue as whether the Due Process Clause of the Fourteenth Amendment provided teachers with the right to have their dismissals reviewed by a body other than the school board. The Court held that the teachers were not entitled to an independent review of their dismissals. In its analysis, the Court indicated that the board's actions satisfied the requirements of due process in part because the state legislature granted it broad rights to make policy decisions and manage the district's affairs, including its sole authority to hire and dismiss teachers.

Facts of the Case

On March 18, 1974, following months of unsuccessful negotiations for a successor collective bargaining agreement, the Hortonville Education Association, a teachers union, went on strike in direct violation of state law. On March 20, the Hortonville Joint School

District's superintendent of schools sent a letter requesting the striking teachers to return to work. Three days later, the superintendent sent another letter, which informed the striking teachers that state law prohibited all public employees from striking and invited them to return to work. Despite their knowledge that participating in the strike was an illegal activity and grounds for dismissal, no teachers returned to work. The board then initiated disciplinary proceedings against the teachers, sending each one a notice of individual hearing times.

At the disciplinary hearing, the teachers, represented by counsel, informed the school board that they preferred to be treated as a group. The teachers argued that since they had a property right in their employment with the school board, it entitled them to review by an impartial decision maker and that the adversarial relationship between the parties caused by the strike rendered the board an improper tribunal. The board rejected the teachers' arguments and dismissed the teachers.

The teachers sued the board for violating their due process rights for the same reasons they raised at their disciplinary hearing. A state trial court rejected the teachers' arguments and upheld the board's action. However, the Supreme Court of Wisconsin reversed in favor of the teachers, declaring that due process required that an impartial decision maker review the teachers' dismissals and that the board's interest in the outcome of the contract negotiations provided evidence sufficient to show that it was incapable of impartiality. The U.S. Supreme Court agreed to hear an appeal insofar as the Supreme Court of Wisconsin relied on federal constitutional law in resolving the issue.

The Court's Ruling

At the outset of its analysis, the U.S. Supreme Court was of the opinion that Wisconsin's high court had erred when it crafted its own remedy, on the basis that the existing statutory remedy inadequately satisfied due process requirements. The Court maintained that the Due Process Clause did not guarantee the teachers an independent review of the termination of their employment. In fact, the Court acknowledged that the state legislature granted local boards and their officials broad power to direct school policy while managing district affairs. The Court thus explained that board power included the sole authority to hire and dismiss teachers and direct policy over this aspect of labor relations.

The Court reiterated the fact that board officials had warned the teachers about the consequences of their continued violation of the state law, repeatedly offered to continue their employment subject to ending the strike, and ultimately reached the decision to terminate the teachers' employment based on their continued violation of state law. As such, the Court reasoned that the board did not have a personal or financial interest in the dismissal of the teachers, but rather was fulfilling its statutory obligation to manage and direct the district's affairs. If anything, the Court asserted, ending the strike and resuming instruction was in the best interest of the district and its students. The Court concluded that the dismissal of teachers, who admittedly violated state law, fell within the board's policy-making role as envisioned by the state legislature.

Hortonville remains an important case in education law insofar as the Supreme Court recognized the broad rights of school boards. In so doing, the Court ruled that decision makers such as school boards are not unconstitutionally impartial simply by knowing facts that they obtained through the fulfillment of their statutory duties.

Kathryn Ahlgren

See also Due Process Rights: Teacher Dismissal; Fourteenth Amendment; Teacher Rights; Unions

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Board of Regents v. Roth, 408 U.S. 564 (1972).
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Morrisey v. Brewer, 408 U.S. 471 (1971).

Hostile Work Environment

Sexual harassment is unwelcome conduct of a sexual nature, prohibited by Title VII of the Civil Rights Act of 1964, as it applies to employees, and Title IX of the

Educational Amendments of 1972, as it applies to students. When harassing conduct is sufficiently severe or pervasive so as to impair the educational or employment benefits offered by educational institutions, it can be classified as *hostile environment sexual harassment.* A hostile environment may be created by sexually related pictures, jokes, e-mails, or other inappropriate behavior. Typically, a onetime occurrence of the conduct is not sufficient to create a hostile environment. Unlike quid pro quo harassment, a power relationship need not exist in order to create a hostile environment.

What the Law Requires

Hostile environment harassment can be created by males or females and perpetrated on individuals of the opposite or same sex (*Oncale v. Sundowner Offshore Services,* 1998). Males who engage in repeated instances of "flirting" behavior that is unwelcome may be creating a hostile work environment based on sex. Likewise, a male who is heckled by a female superior or colleague may allege hostile environment sexual harassment.

Unfortunately, there are no "bright line" rules regarding hostile environment sexual harassment. Yet members of a protected class, whether male or female, who allege sexual harassment typically must show, first, that they were subjected to unwelcome sexual advances or conduct; second, that they were harassed because of their sex and the harassment was sufficiently severe or pervasive to create an intimidating, hostile, or offensive workplace; and, third, that they were subjected to behavior so severe that a reasonable person would have found the behavior to be hostile or abusive.

For the purposes of hostile environment sexual harassment, "unwelcomeness" is an ill-defined concept. Even if individuals do not immediately complain of the conduct, this does not mean that the conduct was not unwelcome. Also, for a hostile environment to exist, the conduct must be pervasive, severe, or objectively offensive. The victim of hostile environment sexual harassment is often required to show more than a single incident of harassment in order to prove that it is pervasive. For example, trivial sexual flirtation of a few instances may not be sufficiently persistent to claim harassment. However, at least one court has ruled that a single slap on the buttocks was sufficiently pervasive so as to be considered harassment.

Factors relevant to hostile environment harassment include the degree to which the conduct affected an individual's work or educational performance; the type, frequency, and duration of the conduct; the identity of and relationship between the alleged harasser and the subject or subjects of the harassment; the number of individuals involved; the age and sex of the alleged harasser and the subject or subjects of the harassment; the location of the incidents and context in which they occurred; and other incidents at the workplace or school.

When evaluating whether a reasonable person would consider behavior to be hostile or abusive, the Supreme Court in *Harris v. Forklift Systems* (1993) rejected the argument that employees must demonstrate that they were subjected to tangible injuries. The courts may look at the conduct to determine whether it is frequent or severe, it is physical (as opposed to insignificant offensive statements), or it materially interferes with the victim's performance. Further, reasonableness may be examined in light of the evidence that a victim's performance or grades suffered because of the harassment, as in *Davis v. Monroe County Board of Education* (1999), or if an employee felt compelled to quit work due to the harassment.

Enforcement and Liability

Under Title VII, private and public institutions with 15 or more employees may be liable for acts of supervisors and employees who sexually harass others. Title VII is enforced by the Equal Employment Opportunity Commission (EEOC). Title IX of the Education Amendments of 1972 is an educational statute that prohibits disparate treatment of individuals in educational institutions on the basis of sex.

Employee-to-employee sexual harassment is addressed by Title VII, while Title IX covers employee-to-student and student-to-student sexual harassment. Under Title IX, private and public institutions receiving federal funds may be liable for the sexual harassment of students or employees. Title IX is

enforced by the Office for Civil Rights in the U.S. Department of Education. As opposed to their action in cases of quid pro quo sexual harassment, the courts are reluctant to impose strict liability on employers for the actions of their employees. However, when employers act with deliberate indifference to the plight of victims, the courts have rendered them liable for the actions of their employees.

School Board Actions

Prevention is the best tool to eliminate claims of sexual harassment. Still, school officials can take steps to reduce or prevent the occurrence of sexually harassing behavior by establishing sexual harassment policies. Employees should be notified and trained on the content and intent of the policies. Appropriately devised policies include a commitment to eradicate and prevent sexual harassment, a definition of hostile environment sexual harassment, an explanation of penalties for sexually harassing conduct, an outline of the grievance procedures, contact persons for consultation, and an expressed commitment to keep all complaints and personnel actions confidential.

Further, once school officials are made aware of sexually harassing behavior, it is incumbent upon them to act and not be deliberately indifferent to the plight of victims. Officials may be judged as being deliberately indifferent if they, or one who possesses the authority to address harassing behavior, have actual knowledge of the wrongdoing and consciously disregard the behavior.

Training is crucial to identifying signs of sexual harassment. First, training should occur on sexual harassment complaint procedures. Included in the training should be procedures on how and with whom to file a formal complaint and how to respond appropriately to formal complaints.

Second, since most problems of sexual harassment do not follow formal complaint processes, all employees should be trained to identify potentially harassing behaviors. Regarding employee behavior that might lead to harassment charges, some behavior is fairly obvious, such as making suggestive comments, giving personal gifts, and sending intimate letters or cards. Some behavior that is not as obvious includes flirting; lingering too long in a hug; engaging in playful exchanges; and leering, such as "elevator eyes," staring at an individual with the eyes moving up and down the person's body.

Mark Littleton

See also *Davis v. Monroe County Board of Education;* Sexual Harassment, Peer-to-Peer; Sexual Harassment, Quid Pro Quo; Sexual Harassment of Students by Teachers

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Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

Title IX of the Education Amendments of 1972, 20 U.S.C. §1681.

Illinois ex rel. McCollum v. Board of Education

At issue in *Illinois ex rel. McCollum v. Board of Education* (1948) was the constitutionality of released time for religious instruction in public schools. *McCollum* dealt with the power of a state to utilize its tax-supported public school system for religious instruction. The Court found that this usage violated the Establishment Clause not only because the school property was used for religious classes but also because school officials and the clergy teachers had a close working relationship. The role of religion in public schools is a subject of continued debate with advocates and opponents. *McCollum* is important because it helped to set guidelines for permissible and acceptable parameters for the role of religion in public schools.

Facts of the Case

In 1940, members of different religious faiths formed the Champaign (Illinois) Council on Religious Education, a voluntary association, to provide religious instruction at no cost to the school district. The school superintendent approved and supervised the religious instructors. Parents were given consent cards to sign permitting their child to take religious instruction in their public schools. Classes were taught by Catholic priests, Protestant teachers, and Jewish rabbis in public schools during regular school time. The classes were one day a week, 30 minutes for lower grades and 45 minutes for upper grades. Attendance slips were given the religious instructors and absences were reported to the secular teachers in their regular classrooms.

McCollum, a resident, atheist, taxpayer, and parent of a child in the school system, claimed that her child, although not compelled to attend religious instruction classes, was embarrassed and humiliated as a result of their taking place. McCollum sued claiming that the released time program violated the Establishment Clause of the First and Fourteenth Amendments. More specifically, she believed that certain Protestant groups had an overshadowing advantage in propagation of their faiths over other Protestant sects. The plaintiff also noted that the religious program led to subtle pressures to force students to participate, and the school superintendent had the power to determine which religious faiths could participate in the program, because the state required compulsory attendance in public schools.

The Supreme Court of Illinois upheld religious instruction on the ground that state law granted the local board of education authority to establish such a program. The court was also satisfied that the Protestant, Catholic, and Jewish clergy were given comparable classrooms and treated alike. Moreover, there were two teachers of the Protestant faith; one was a Presbyterian, and the other was affiliated with a Christian church, worked in a Methodist church, taught at a Presbyterian church, and was married to a Lutheran.

The Court's Ruling

On review, the Supreme Court noted that because Thomas Jefferson was concerned about dogmatism and authoritarianism in public schools, he supported a wall of separation between church and state. The Supreme Court thus found that the First Amendment erected a wall between church and state that must be kept high and impregnable. Accordingly, the Court found the released time for religious instruction program was unconstitutional based on the First and Fourteenth amendments.

Previously, in *Everson v. Board of Education of Ewing Township* (1947) the Court had ruled that the First Amendment's purpose was not to cut off religious institutions from all benefits but to be neutral toward religion. The Court added that neither a state nor the federal government may set up churches or pass laws that aid one religion, all religions, or support one religion over another.

Courts have generally agreed that released time for religious instruction is permissible as long as programs do not occur on public school grounds. In fact, throughout American educational history, educators have relied on various alternatives to infuse schools with religion. Further, based on the increasing number of different belief systems and faiths, the nation has supported secular school systems. Not surprisingly, then, over the years, the courts have created a substantial body of case law to address issues of the role and place of religion in public schools. Pursuant to these cases, school boards must allow the use of facilities on a religiously neutral basis wherever open forums exist or are created under the federal Equal Access Act.

Many states have provisions for released time for religious instruction as long as parents approve of the participation of their children and the classes take place off of public school property; the Supreme Court upheld such an arrangement in New York City four years after *McCollum* in *Zorach v. Clauson* (1952). Of course, parents must furnish written statements attesting that their children are free to attend religious instruction on the designated days. Finally, each public school board reserves the right to refuse a student released time if grades are not sufficient for grade advancement or graduation.

James Van Patten

See also *Everson v. Board of Education of Ewing Township;* Jefferson, Thomas; Prayer in Public Schools; Religious Activities in Public Schools; Released Time; *Zorach v. Clauson*

Legal Citations

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).

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Zorach v. Clauson, 343 U.S. 306 (1952).

Illinois ex rel. McCollum v. Board of Education (Excerpts)

Illinois ex rel. McCollum v. Board of Education *is the Supreme Court's first ever case involving a religious practice in public schools. The Court invalidated a program that allowed members of various religious groups to enter schools to provide religious instruction on the basis that doing so violated the Establishment Clause.*

Supreme Court of the United States

PEOPLE OF STATE OF ILLINOIS
ex rel. McCOLLUM

v.

BOARD OF EDUCATION OF SCHOOL DIST. NO. 71, CHAMPAIGN COUNTY, ILL.

333 U.S. 203

Argued Dec. 8, 1947.

Decided March 8, 1948.

Mr. Justice BLACK delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum, began this action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. Illinois has a compulsory education law which, with exceptions, requires parents to send their children, aged seven to sixteen, to its tax-supported public schools where the children are to remain in attendance during the hours when the schools are regularly in session. Parents who violate this law commit a misdemeanor punishable by fine unless the children attend private or parochial schools which meet educational standards fixed by the State. District boards of education are given general supervisory powers over the use of the public school buildings within the school districts.

Appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to 'adopt and enforce rules and regulations prohibiting all instruction in and teaching of all religious education in all public schools in Champaign District Number 71, . . . and in all public school houses and buildings in said district when occupied by public schools.'

The board first moved to dismiss the petition on the ground that under Illinois law appellant had no standing to maintain the action. This motion was denied. An answer was then filed, which admitted that regular weekly religious instruction was given during school hours to those pupils whose parents consented and that those pupils were released temporarily from their regular secular classes for the limited purpose of attending the religious classes. The answer denied that this coordinated program of religious instructions violated the State or Federal Constitution. Much evidence was heard, findings of fact were made, after which the petition for mandamus was denied on the ground that the school's religious instruction program violated neither the federal nor state constitutional provisions invoked by the appellant. On appeal the State Supreme Court affirmed. Appellant appealed to this Court . . . and we noted probable jurisdiction.

The appellee presses a motion to dismiss the appeal on several grounds, the first of which is that the judgment of the State Supreme Court does not draw in question the 'validity of a statute of any State.' . . . This contention rests on the admitted fact that the challenged program of religious instruction was not expressly authorized by statute. But the State Supreme Court has sustained the validity of the program on the ground that the Illinois statutes granted the board authority to establish such a program. This holding is sufficient to show that the validity of an Illinois statute was drawn in question within the meaning of [federal law]. A second ground for the motion to dismiss is that the appellant lacks standing to maintain the action, a ground which is also without merit. A third ground for the motion is that the appellant failed properly to present in the State Supreme Court her challenge that the state program violated the Federal Constitution. But in view of the express rulings of both state courts on this question, the argument cannot be successfully maintained. The motion to dismiss the appeal is denied.

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute. In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although

for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education.* There we said: 'Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force or influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups, and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between Church and State.' The majority in the Everson case, and the minority as shown by quotations from the dissenting views in our notes 6 and 7, agreed that the First Amendment's language, properly interpreted, had erected a wall of separation between Church and State. They disagreed as to the facts shown by the record and as to the proper application of the First Amendment's language to those facts.

Recognizing that the Illinois program is barred by the First and Fourteenth Amendments if we adhere to the views expressed both by the majority and the minority in the Everson case, counsel for the respondents challenge those views as dicta and urge that we reconsider and repudiate them. They argue that historically the First Amendment was intended to forbid only government preference of one religion over another, not an impartial governmental assistance of all religions. In addition they ask that we distinguish or overrule our holding in the Everson case that the Fourteenth Amendment made the 'establishment of religion' clause of the First Amendment applicable as a prohibition against the States. After giving full consideration to the arguments presented we are unable to accept either of these contentions.

To hold that a state cannot consistently with the First and Fourteenth Amendments utilize its public school system to aid any or all religious faiths or sects in the dissemination of their doctrines and ideals does not, as counsel urge, manifest a governmental hostility to religion or religious teachings. A manifestation of such hostility would be at war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion. For the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere. Or, as we said in the Everson case, the First Amendment had erected a wall between Church and State which must be kept high and impregnable.

Here not only are the state's taxsupported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Citation: *Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois,* 333 U.S. 203 (1948).

Immunity

Immunity, an affirmative defense to tort claims against governmental entities, is generally identified as being one of three types: sovereign, qualified, or absolute. This entry examines how those kinds of immunity are applied in educational settings and how immunity may be lost or waived.

Types of Immunity

Sovereign, or governmental, immunity is rooted in the concept in English common law that the king can do no wrong. This notion can be interpreted variously that the sovereign cannot be liable in his own court; that because the king embodies the law, he cannot be brought to court without his consent; or, that because the king, as the patriarchal monarch charged with looking out for the best interests of his subjects, would not harm his subjects, it would be inconsistent with this philosophy for the sovereign to sustain claims against itself.

The ancient concept of sovereign immunity continues in its application in more recent times to federal and state governments in the United States as sovereign entities. School boards, as agencies of state government, share in the state's sovereign immunity. An argument for sovereign immunity inuring to school boards is that public funds should be spent on educational purposes and not diverted to satisfy tort claims of individual private plaintiffs. Another justification for immunity is based on the principle that because school boards lack the authority to commit tortuous acts, such acts must have been committed by officials who lacked the legal agency to commit wrongs. A final rationale for boards sharing in a state's sovereign immunity is grounded in the separation of powers doctrine (*Yanero v. Davis,* 2001).

An additional expression of sovereign immunity occurs through application of the Eleventh Amendment, which removes federal court jurisdiction over suits that citizens of other states or countries bring against states. If school boards are considered "arms of the state," then they retain sovereign immunity from suit in federal courts.

Qualified, or conditional, immunity is an affirmative defense to tort claims that is available for school officials who perform discretionary functions. As an extension of sovereign immunity, qualified immunity protects officials who act clearly within the scope of their duties (*Wood v. Strickland,* 1975). School officials and employees retain their qualified immunity against Section 1983 claims when their conduct does not violate clearly established statutory or constitutional rights of which reasonable persons would have known (*Lowe v. Letsinger,* 1985).

Absolute immunity affords a complete defense to tort claims. State legislators (*Tenney v. Brandhove,* 1951), prosecutors (*Imbler v. Pachtman,* 1976), and judges (*C.M. Clark Insurance Agency v. Reed,* 1975) have absolute immunity. Members of Congress have immunity in speeches, opinion, debates, voting, written reports, presenting resolutions, and generally all legislative functions (U.S. Constitution, Article. I, Section 6, Clause 1; *United States v. Ballin,* 1892). Legislatures may also provide absolute immunity by statute in specified circumstances, such as where the state of Alabama declared that school board officials are absolutely immune from civil and criminal liability for actions authorized under a statute permitting the use of corporal punishment (Alabama, 2001).

Loss or Waiver

State agencies, including schools and universities, historically have enjoyed immunity from tort claims. Even so, courts recognize situations in which immunity can be lost. A distinction can be made based on the functions that government officials perform. If functions are governmental and part of the purpose for which entities exist, then officials retain their immunity. However, if the functions are considered proprietary or commercial, or if they can be performed by private corporations, officials can lose their immunity. While classroom activities are clearly governmental functions, because actions such as leasing facilities (*Sawaya v. Tucson High School District,* 1955) or conducting summer recreation programs (*Morris v. School District of Township of Mount Lebanon,* 1958) may be considered proprietary, boards and their officials can lose their

immunity. This governmental-proprietary distinction sometimes appears to be a matter of courts making ad hoc distinctions between the two classifications.

Immunity may also be lost depending on the policy role that governmental entities and their agents perform. Discretionary acts retain qualified immunity, while ministerial acts are not immune. Discretionary acts are those in which officials exercise judgment or discretion, free from that of others. Ministerial acts leave nothing to discretion and are illustrated by cases such as *Leake v. Murphy* (2005), where educators neglected to follow a state law requiring them to have a school safety plan in place, and by *Haney v. Bradley County Board of Education* (2005), where school employees failed to follow board policy on school check-out procedures. (In both cases, the school employees lost their immunity).

Another way of losing immunity is under the nuisance doctrine. A nuisance involves any use of property that is dangerous or offensive or that obstructs its comfortable and reasonable use. If school officials create or allow unsafe, dangerous, or offensive conditions to exist that are likely to injure or cause discomfort to individuals who come onto school property or adjoining properties, then their immunity may be waived. Early examples of the application of nuisance doctrine included situations where officials allowed sewage to discharge into a nearby stream (*Watson v. Town of New Milford,* 1900), where educators allowed a balance beam to become slippery (*Bush v. Norwalk,* 1937), and where school personnel allowed snow and ice to accumulate and fall from a school roof on to a neighbor's property (*Ferris v. Board of Education of Detroit,* 1899).

Immunity can also be waived by judicial actions or legislative enactments, if school boards elect to purchase liability insurance. The theory behind this exception is that the decision to purchase insurance is a signal of intent to waive immunity. The application of this exception to sovereign immunity is uneven. Some states have found that absent legislative authority, a purchase of insurance does not waive immunity, because it cannot be created with insurance if it did not exist without insurance (*Barr v. Bernhard,* 1978). Other states have adopted the position that a waiver of immunity is effective up to the limits of liability in purchased insurance policies (*Linhart v. Lawson,* 2001).

Some state courts have abrogated sovereign immunity, and with it, qualified immunity. After the state legislature in Illinois initially abrogated immunity, in 1989 it subsequently had a change of heart and reinstated it, a reaction that is not unusual. According to Keeton (1984), most states have provided consent for themselves and their agencies to have at least some liability for torts. Other states have abolished sovereign immunity by legislative action. Still, it is more common for legislatures to moderate immunity, rather than abolish it completely. Legislatures moderate sovereign immunity by enacting safe-place laws or save-harmless statutes. Safe-place laws place duties on state agencies to construct or maintain facilities in a safe manner such that their failure to do so can result in legal action due to the unsafe conditions. Save-harmless statutes allow agencies to indemnify all damages and costs arising from the negligent acts of employees who are acting in the discharge of their duties. Finally, save-harmless statutes are related to the doctrine of *respondeat superior,* acknowledging that employers are responsible for the acts of their agents.

David L. Dagley

See also Negligence

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Impasse in Bargaining

During the collective bargaining process, when parties fail to reach agreements about the terms and conditions of employment, either side can typically make it known that they have reached an impasse, signaling that they are unable to resolve their differences on their own. When collective bargaining negotiations reach an impasse, there are three primary methods used to facilitate the resolution of disagreements. These formal methods of dispute negotiation include mediation, fact-finding, and arbitration. All three methods of dispute negotiation, described in this entry, are typically mandated by state statute.

Mediation

The formal grievance resolution process of mediation involves the use of neutral third-party mediators who work closely with the parties in order to facilitate an agreement. Individual mediators are usually chosen either by state labor relations boards or through the mutual agreement of local school boards and the bargaining representatives of their employees. Mediators' recommendations are ordinarily not disclosed to the public. While the legal authority of mediators is limited, a number of states require that the parties must exhaust formal mediation efforts before they may proceed to fact-finding, arbitration, or the termination of bargaining altogether.

Fact-Finding

The second method of dispute resolution adopted when an impasse in bargaining has occurred is fact-finding or advisory arbitration. Fact-finding requires the use of a neutral, third-party intermediary called the fact finder. Similar to mediators, fact finders are chosen by either state labor relations boards or through the mutual agreement of the parties to the bargaining agreement. Fact finders are legally empowered to conduct hearings and collect evidence from all parties associated with the bargaining agreement as well as any other, relevant outside sources. While the recommendations put forth by fact finders are not legally binding on the parties to the agreement, their reports are usually made available to the public and in some cases act as a catalyst for the resolution of a dispute.

Arbitration

The third method of dispute resolution when an impasse arises in bargaining is arbitration. In the United States, there is a strong inclination within the legal community to use arbitration as an effective means of setting labor related disputes. This public policy of favoring arbitration was developed in a set of three famous U.S. Supreme Court labor cases: *United Steelworkers of America v. American Manufacturing Company* (1960), *United Steelworkers of America v. Warrior and Gulf Navigation Company* (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Company* (1960). These three Court cases have been collectively referred to as the steelworkers' trilogy, demonstrating the legal connection between federal labor law and state collective bargaining law. As with mediation and fact-finding, arbitrators are selected by either state labor relations boards or through the mutual agreement of the parties to the dispute. However, unlike mediators or fact-finders, arbitrators' decisions are legally binding on all parties to the agreement.

If school boards and the bargaining representatives of their employees ultimately fail to reach agreements after exhausting the dispute negotiation remedies of mediation, fact-finding, and arbitration, most states require that they maintain the terms and conditions of the prior collective bargaining agreement. Additionally, if school boards and unions have

exhausted all the methods of dispute negotiation, many states allow school boards the opportunity to implement their last best offer as a unilateral contract.

Kevin P. Brady

See also Arbitration; Collective Bargaining; Contracts; Unions

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United Steelworkers of America v. Enterprise Wheel & Car Corporation, 363 U.S. 593 (1960).

United Steelworkers of America v. Warrior & Gulf Navigation Company, 363 U.S. 574 (1960).

Inclusion

Inclusion refers to the practice whereby students with disabilities are enrolled in general education classes and receive any needed special education services within that setting. Inclusion can be full or partial. In a full inclusion situation, students receive all educational services within the general education classroom, including their special education and related services, so that they are not removed from that environment. In a partial inclusion situation, students are removed from general education only when it is necessary so that they can receive needed special education services. This entry describes the background of inclusion and looks at pertinent judicial decisions.

Background

The terms *least restrictive environment, inclusion,* and *mainstreaming* are often confused but are distinct. The difference between inclusion and mainstreaming is one of degree and philosophy. Mainstreaming refers to the practice of placing special education students in general education classes for a portion of the school day. Thus, when students are mainstreamed, their home base is the special education setting, and they are placed in general education to the maximum extent appropriate. On the other hand, in an inclusionary setting, the home base would be the general education classroom, and students would be removed only to the extent necessary to provide needed services. Least restrictive environment (LRE), on the other hand, is the legal term used in the Individuals with Disabilities Education Act (IDEA). The IDEA does not require inclusion in all cases, but it does mandate that all children with disabilities are to be educated in settings that are the least restrictive possible and that removal from general education is to occur only when absolutely necessary.

Insofar as many of the IDEA's provisions are based on the concept that students with disabilities may be removed from the general education environment only to the extent necessary to provide needed special education services, one task for school administrators is to ascertain whether required services warrant removal from the general education environment or whether they can be provided in less restrictive settings. In the early days of the IDEA, most courts reviewing LRE issues determined that inclusion was not required for all students with disabilities but had to be provided, where appropriate, to the maximum extent feasible. Even so, in acknowledging the social benefits of inclusion, most courts felt that students should not be placed in general education solely for the sake of inclusion.

Related Court Cases

In balancing the need for specialized services against the LRE provision of the IDEA, a majority of early courts tipped the scales in favor of specialized services. In the late 1980s and early 1990s, the LRE provision of the IDEA began to play a more prominent role in litigation over the proper placement for students with disabilities. Several courts departed from previous case law and began to tip the scales in favor of inclusive programming for students with severe disabilities.

In one case involving the placement of a student with Down syndrome, the federal trial court in New Jersey wrote that school boards have an affirmative obligation to consider placing students with disabilities in general education classrooms with the use of supplementary aids and services before exploring other alternatives (*Oberti v. Board of Education of the Borough of Clementon School District,* 1992, 1993). The court clearly stated that in order to meet the IDEA's goals, school boards must maximize opportunities for inclusion. The court added that the preference for placements in the LRE can only be rebutted when school officials can show that students' disabilities are so severe that they will receive little or no benefit from inclusion in regular classrooms, that they are so disruptive that the education of other students is impaired, or that the cost of providing supplementary services will have a negative effect on the provision of services to other children.

Further, the court suggested that school boards need to supplement and realign their resources to move beyond the systems, structures, and practices that tend to unnecessarily segregate students with disabilities. Finally, the court emphatically said that inclusion was a right, not a privilege for the select few. The Third Circuit affirmed, essentially adopting the trial court's rationale, but it added that that the courts should consider the benefits that students with disabilities will receive in general education classrooms as opposed to segregated settings along with the possible negative effects that their inclusion could have on the education of other children. The appeals court agreed that a fundamental value of the right of a student with disabilities to an education is to associate with peers who do not have disabilities.

In another significant LRE decision, the Ninth Circuit combined elements of several other court decisions to provide an overall summary of a school board's obligations regarding inclusion (*Sacramento City Unified School District, Board of Education v. Rachel H.,* 1994). The Ninth Circuit confirmed that school officials must consider the following four factors when determining the LREs for students: (1) the educational benefits of placement in a regular classroom, (2) the nonacademic benefits of such a placement, (3) the effect a student would have on the teacher and other students in the class, and (4) the costs of inclusion.

As several courts have acknowledged, placement in an inclusionary setting is not always feasible. For example, in applying its own test, the Ninth Circuit affirmed that school officials could transfer a student with serious behavioral problems to an off-campus alternative program (*Clyde K. v. Puyallup School District,* 1994). The court approved the recommended transfer after discovering that the student's disruptive behavior prevented him from learning in a general education setting and that he was receiving minimal nonacademic benefits from inclusion. The court was further persuaded by evidence that the student's presence had a negative effect on the staff and other children in the general education setting. In later cases in which it approved segregated placements, the Ninth Circuit acknowledged that inclusion that results in total failure is inappropriate (*Capistrano Unified School District v. Wartenberg,* 1995) and that some students may not derive any benefit from inclusion until they develop other skills (*Poolaw v. Bishop,* 1995).

Allan G. Osborne, Jr.

See also Least Restrictive Environment

Legal Citations

Capistrano Unified School District v. Wartenberg, 59 F.3d 884 (9th Cir. 1995).

Clyde K. v. Puyallup School District, 35 F.3d 1396 (9th Cir. 1994).

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Oberti v. Board of Education of the Borough of Clementon School District, 789 F. Supp. 1322 (D.N.J. 1992), 801 F. Supp. 1393 (D.N.J. 1992), *aff'd,* 995 F.2d 1204 1009 (3d Cir. 1993).

Poolaw v. Bishop, 67 F.3d 830 (9th Cir. 1995).

Individualized Education Program (IEP)

When Congress enacted the Education for All Handicapped Children Act in 1975, federal policy prohibited educational officials from making arbitrary decisions that often excluded students with disabilities from schools. Moreover, as reflected in revisions of the same statute, the renamed Individuals with Disabilities

Education Act (IDEA), federal law continues to ensure that all eligible children between the ages of 3 and 21 are entitled to receive a free appropriate public education (FAPE) in the least restrictive environment (LRE). In providing children with a FAPE in the LRE, the IDEA also called for the creation of Individualized Education Programs (IEPs) to direct their education. IEPs are legal documents and part of a process; they are the cornerstone of special education that formalizes the IDEA's FAPE provisions. To this end, IEPs are publicly funded and individually designed to meet the unique needs of students with disabilities. IEPs are written by teams of school personnel in conjunction with, and approved by, parents.

What the Law Requires

To comply with IDEA regulations, IEPs must include students' present levels of performance, measurable goals, the extent to which children will not participate in general education curricula or assessments, full descriptions of all needed services (with amount and frequency), mechanisms for evaluating progress, and statements indicating whether students need, and will benefit from, assistive technology. IEPs of students with any category of disability who exhibit behavior problems that impede their learning or that of others must include well-designed behavior intervention strategies, including positive behavioral supports for developing adaptive skills. IEPs must be implemented as written even when students with disabilities are suspended or expelled from school. IEPs must also include transition statements, acknowledging the transfer of parental rights to students (unless the students are incapable of acting on their own), and transfer to employment settings or higher education is required no later than when students turn 16 years of age. Further, IEPs must indicate the language of instruction for students with disabilities who do not speak English.

While the IDEA does not specify the level of detail IEPs must contain, it does delineate the process of developing IEPs. By law, IEPs are developed by a multidisciplinary team that must include a representative from the local school board, a general education teacher, a special education teacher, school officials who can interpret the meaning of tests and measurements used in assessing children, a child's parent or guardian, the student (whenever appropriate), and others at the request of parents or school officials. IEPs should be clear enough to be understood by everyone on the multidisciplinary teams, useful for educators, and legally defensible should they end up in court.

Since the enactment of the IDEA's IEP requirement, school officials have faced difficulties writing and implementing IEPs. Problems include lack of adequate teacher training in developing IEPs, mechanistic compliance with paperwork requirements associated with IEPs, failure to link assessment data to instructional or behavioral goals, excessive demands on teacher time, poorly developed team processes, and minimal coordination among IEP team members. In fact, courts have ruled in favor of families and students with disabilities, charging procedural and substantive violations in the IEP. In many cases, state level due process hearings have determined that IEPs, or the process by which school personnel went about implementing the goals stated within IEPs, were inconsistent with a child's individual needs. Many courts have held that IEPs did not conform to the collaborative nature IDEA envisioned in the IEP process.

Despite strong support for IEPs, some education scholars argue that IEPs assume that teachers know in advance what children should and can learn and the speed at which they will learn. Skeptics conclude that such projections are difficult to make for students whose disabilities were not apparent when they started school; these skeptics add that making such projections are nearly impossible for preschool-aged children who have cognitive, emotional, or social disabilities. Others argue that current laws are inappropriate and that new legislation and federal rules are required.

2004 Revisions

In response to some of the problems associated with IEPs, the 2004 reauthorization of IDEA specifically targeted changes. First, based on the complaint that too much time is spent on paperwork, IDEA has eliminated the requirement that IEPs include short term goals, except for students who are assessed using

alternative assessment procedures that are aligned with alternate achievement standards. Another change in IDEA is the statement of transition, which until 2004 was required at the age of 14, not 16, as per the current language of the IDEA. IDEA 2004 also provides more flexibility in attendance to IEP meetings, indicating that team members do not have to attend if their area of expertise is not needed, as agreed by other members, or if they provide written information related to the IEP meeting prior to the meeting. This allows teams to make minor changes to IEPs through conference calls or letters. In addition, the IDEA permits the creation of pilot programs in which 15 states could apply to participate in a program allowing them to rewrite individual IEPs every three years instead of annually; one important condition here is that these IEPs must be designed to end with natural transition points in a child's education. Another important point to note is that measuring progress toward IEP goals must occur annually. The impact of these changes to IEPs remains to be seen, because the IDEA's new regulations were promulgated only in 2006, two years before publication of the current volume.

The process of writing IEPs and the documents themselves are important features as school systems seek to maintain compliance with the letter and spirit of the IDEA. When teams develop IEPs with an eye toward both the letter and the spirit of the law, it means that they have carefully assessed the needs of students with disabilities, that they have worked together to design programs of education to best meet the needs of children, and that they have clearly stated goals and objectives for each child so that they can evaluate whether children have been reaching their goals.

Theresa A. Ochoa

See also Assistive Technology; Disabled Persons, Rights of; Free Appropriate Public Education; Least Restrictive Environment; Manifestation Determination

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Ingraham v. Wright

The 1977 case of *Ingraham v. Wright* is mostly cited for its ruling on the applicability of the Eighth Amendment's Cruel and Unusual Punishment Clause to corporal punishment in public schools. The Eighth Amendment to the U.S. Constitution states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments be inflicted."

In *Ingraham,* the U.S. Supreme Court addressed two main issues: whether the use of corporal punishment violates the Cruel and Unusual Punishment Clause; and if so, whether the Due Process Clause of the Fourteenth Amendment requires that prior notice and an opportunity to be heard must be afforded students before corporal punishment is imposed. In *Ingraham,* students in Florida challenged the constitutionality of the corporal punishment at their school under the Cruel and Unusual Punishment Clause.

With respect to the first issue, the Supreme Court ruled that the Eighth Amendment is not applicable to corporal punishment in schools. According to *Ingraham,* the Eighth Amendment is applicable only to criminal punishments, because the original intent of the framers of the amendment was to protect those convicted of crimes from cruel, excessive, and unreasonable punishments. The Court captured the distinction between criminals and students as it relates to the Eighth Amendment in the following epigram: "The prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration" (p. 669). This distinction, according to the Supreme Court, is adequate justification

for excluding corporal punishment of students from the protections of the Eighth Amendment.

As to the second issue, the Supreme Court ruled that the imposition of corporal punishment is consistent with the Due Process Clause; therefore, notice and a hearing are not required prior to imposition of corporal punishment. While the Court recognized that corporal punishment implicates students' substantive due process rights to liberty, it nonetheless found adequate, for purposes of procedural due process, the common-law procedural safeguards in the various states subjecting teachers and administrators who inflict unreasonable or excessive corporal punishment to civil or criminal liability. In essence, if a state does not provide for civil or criminal liability for teachers who impose unreasonable or excessive corporal punishment, according to *Ingraham,* there is a stronger case for prior notice and hearing under the Due Process Clause.

In reaching its decision in *Ingraham,* the Court gave great weight to the historical tradition of corporal punishment in public schools in America, the longstanding common-law requirement that corporal punishment be reasonable but not excessive, and the impracticalities of requiring notice and a hearing each time a teacher decides to corporally punish a student. The tradition of judicial deference to the judgment of educators and school administrators regarding the education of children was also influential in the Court's opinion. *Ingraham* identified certain factors courts consider in making determinations as to whether corporal punishment is reasonable. Some of the factors are the age of the child, the strength of the child, past behavior of the child, seriousness of the offense, nature of the punishment, severity of the punishment, and availability of less severe but equally effective means of discipline.

While about half of the states prohibit corporal punishment, it is clear from *Ingraham* that the Eighth Amendment does not compel these jurisdictions and local school systems to do so. Likewise, in states and districts that do retain corporal punishment, prior notice and a hearing are not required before students are punished, because the ambit of corporal punishment is adequately defined and regulated by common law and statute.

Joseph Oluwole

See also Corporal Punishment; Due Process; Eighth Amendment

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Board of Regents v. Roth, 408 U.S. 564 (1972).
Goss v. Lopez, 419 U.S. 565 (1975).
Ingraham v. Wright, 430 U.S. 651 (1977).

In Loco Parentis

Parents send their child to school to spend the day in the company of educators. This simple everyday act removes their children from the physical control of their parents. While parents do not relinquish their responsibility for their children when the children attend school, parents share some of that responsibility with teachers and administrators. Schools take on some of the responsibilities and exercise some of the prerogatives typically reserved for parents. Over the years, this relationship, referred to as *in loco parentis,* has been defined and reviewed by the courts, as described in this entry.

Conferring Rights

Sir William Blackstone, in 1769, captured this shared responsibility when he articulated the doctrine of in loco parentis, literally "in the place of the parent." Blackstone asserted that part of parental authority is delegated to schoolmasters. Pursuant to this common-law doctrine, parents, in effect, delegate to schoolmasters the powers of "restraint and correction" that may be necessary to educate their children. Blackstone referred to the schoolmasters who were often the sole individuals responsible for the education of children.

The modern analogy is that of schools and their staffs. Schools assume custody of students and, at the same time, the students are deprived of the protection of their parents. In effect, the schools act in place of the parent or instead of the parent—in loco parentis. This status is legal and not just descriptive. For example an appellate court in New York, in *Garcia v. City of New York* (1996), held that schools, once they take over physical custody and control of children, effectively take the place of their parents and guardians.

In loco parentis has moved from being primarily a right of restraint and coercion used to discipline students to being a duty of school officials to protect those same students. School personnel have authority over students by virtue of in loco parentis and a concomitant duty to protect those students.

The right of educators to exercise the same degree of control over a student that a parent is privileged to exercise is found in many state laws. For example, California state law (§ 48907) holds that teachers, vice principals, principals, or other certificated employees of school boards are privileged to exercise the same degree of physical control over children that their parent may legally use and are immunized from criminal prosecution or criminal penalties when in the performance of those duties. An appellate court in California, in *In re Donaldson* (1969), upheld the statute maintaining that school officials stand in loco parentis, allowing the use of moderate force in disciplining students just as parents have the right to use force to gain obedience from their children. Other states, such as Georgia (§ 20–215) and West Virginia (§ 18A-5–1), also have codified in loco parentis, wherein educators have the right to discipline students to the same degree that parents may legally discipline their children.

Defining Duties

A second element of in loco parentis defines a duty that educators owe to their students. Under tort principles of negligence, educators owe students a duty to anticipate foreseeable dangers and to take reasonable steps to protect those students from that danger. To this end, educators owe the same degree of care and supervision to their students that reasonable and prudent parents would employ in the same circumstances for their children.

Under the two elements of in loco parentis, educators have the right to act as parents when controlling students; concomitantly, they have the duty to act like the parent when protecting students from foreseeable harm. While in loco parentis has described a portion of the relationship between educator and student, legal forces other than discipline and duty owed have structured the doctrine. School officials not only act like parents, they also have responsibilities that parents do not have. For instance, educators in public schools must protect the Constitutional rights of students, while parents do not have the same obligation. This leads to the issue of how the courts have balanced the concept of in loco parentis with constitutional obligations.

The U.S. Supreme Court has held that school officials exercise more than parental power over their students. In fact, cases involving school searches and seizures helped to define and shape the current doctrine of in loco parentis. In *New Jersey v. T. L. O.* (1985), the Supreme Court noted that school officials, in carrying out searches and other disciplinary functions, act as representatives of the state, not merely as surrogates for the parents, and thus cannot claim the parents' immunity from the requirements of the Fourth Amendment.

The Court did not dissolve the in loco parentis relationship; rather, it encapsulated the relationship. The Court explained that within the special context of search and seizure, school officials functions as representatives of the state. The Court did not declare that school officials act in the place of parents in all situations. This means that the role of school authorities encompasses, but is not restricted to, the functions of parents.

In another search and seizure case, this one involving drug testing of students involved in extracurricular activities, *Vernonia School District 47J v. Acton* (1995), the Court emphasized that the nature of the power over students is "custodial and tutelary," permitting a degree of supervision and control that could not be exercised over free adults. The Court pointed out that custodial power over children is that power often associated with parental control over children. A dictionary definition of *custodian* refers to a keeper or guardian. *Tutelary* means having the position of guardian or protector of a person, place, or thing. Both definitions, custodian, one who exercises custodial power, and tutelary, a guardian, encompass the meaning of in loco parentis. Whether the relationship is described as custodial and tutelary or in loco parentis, it is clear that educators have the authority to act in place of the parents when disciplining and protecting the students in their care.

Todd A. DeMitchell

See also Child Protection; Common Law; Negligence; *New Jersey v. T. L. O.; Vernonia School District 47J v. Acton*

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New Jersey v. T. L. O., 469 U.S. 325 (1985).

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

West Virginia Code, § 18A-5–1.

In re Gault

At issue in *In re Gault* (1967) was the constitutionality of juvenile court proceedings. The U.S. Supreme Court, in its only case on point, held that juveniles have a right to notice of the charges against them as well as the rights to counsel, to confront and cross-examine witnesses, and to exercise the privilege against self-incrimination.

Gault is noteworthy as an important part of the due process revolution of the 1960s, during which the guarantees of the Bill of Rights were made applicable to the states. *Gault* was a landmark because by affording procedural due process rights to juveniles, the very nature of the juvenile process was irrevocably changed.

Facts of the Case

Fifteen-year-old Gerald Gault, who was already on a six-month probation order, was accused of making an obscene phone call to a neighbor. Because he was subject to juvenile court proceedings in Arizona, officials did not provide Gault with the due process notifications that were ordinarily accorded adults in criminal matters after he was picked up and taken into custody without notice to his parents. Prior to the hearing, neither Gault nor his parents received notice about the specific charges that he faced.

At the hearing, there were no sworn witnesses, and not even the complainant appeared. Additionally, officials neither made nor saved a record of the hearing, and Gault's oral admissions were used against him as evidence. The juvenile court judge adjudicated Gault delinquent and committed him to the state industrial school until he reached the age of 21, unless he was discharged earlier.

Because there was no appeal of juvenile proceedings under Arizona law, Gault's parents filed a petition for a writ of habeas corpus, contending that the juvenile proceedings were unconstitutional. Gault's parents unsuccessfully appealed to the Supreme Court of Arizona contending that Gault was denied due process of law under the Fourteenth Amendment because of the unlimited discretion of the court and the denial of his basic rights. The court affirmed the dismissal of the parents' claim.

The Court's Ruling

On further review, the Supreme Court, reversing in favor of the parents, ruled that juveniles were entitled to due process under the Fourteenth Amendment. The Court was clear in its resolve, stating that neither the Fourteenth Amendment nor the Bill of Rights is for adults alone. Rather, the Court noted that the juvenile court's exercise of power as the state under parens patriae is not unlimited.

The Supreme Court reasoned that when a youth is adjudicated delinquent and deprived of freedom, procedural due process requirements should attach. Indeed, the Court acknowledged that the gravity of Gault's sentence turned on his being a juvenile, not an adult. Had Gault committed the same offense when he was 18 or older, the Court pointed out, he would have been sentenced to a punishment of a $50 fine or a maximum of two months in jail. In determining what process was due to ensure fair treatment, the Court found that juveniles who are subject to delinquency hearings were entitled to notice of the specific charges

against them, a right to legal counsel, the privilege against self-incrimination, and the right to confront and cross-examine witnesses. The sole dissenter in *Gault,* Justice Stewart (Justice Harlan dissented in part), argued that because the purpose of juvenile court was correction, not punishment, constitutional procedural safeguards should not have applied.

The Court was able to see that Gault's consignment to the state institution was the result of a number of careless errors. As the Court indicated, juvenile proceedings may provide the worst of both worlds when youth are neither allowed the protections given adults nor given the rehabilitative and solicitous care typically reserved for children. The Court thus repudiated the old paternalistic view of juvenile proceedings under parens patriae in order to provide procedural fairness in instances where youth faced the loss of liberty.

The Supreme Court's concern with procedural due process was echoed in later cases involving fundamental fairness in educational policies for students in public schools. In *Goss v. Lopez* (1975), for example, the Court was of the opinion that students who face expulsions and other exclusions from school may be entitled to varying levels of procedural due process. In *Goss,* the Court suggested that for suspensions of more than 10 days, the Fourteenth Amendment would require notice and an opportunity to be heard, at a minimum.

The Court thus stopped short of ordering greater due process for exclusions of 10 days or more, but states have since intervened to provide students with statutory procedural due process rights under such circumstances. In both *Goss* and *In re Gault,* the Court concluded that when students faced the substantial loss of liberty interests, their rights were best protected when officials safeguarded their rights to procedural due process.

Deborah Curry

See also *Goss v. Lopez;* Juvenile Courts; Parens Patriae

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Intellectual Property

Intellectual property includes literary or artistic works, inventions, business methods, industrial processes, logos, and product designs. Nearly every activity engaged in by students, staff, and faculty in schools involves the production or use of intellectual property; examples include lesson plans, student assignments, speeches and lectures, videos, books, school Web sites, publications, reports, concerts, and plays. Most items used in education are legally protected intellectual property, often owned by someone other than the user. All members of school communities are permitted to use protected intellectual property, but they must engage in "fair use" or get advance permission of the owners. Users must be careful not to use intellectual property unlawfully, or they risk having to pay damages, fines, and/or court costs. Items in the public domain, however, may be used without cost to the user or consent of the owner.

Legal issues affecting intellectual property in education involve both creation and use of intellectual works. Intellectual property law balances the rights of individuals to make, own, distribute, and profit from their creations and the rights of the public to make use of knowledge and inventions. Illustrations of the law of intellectual property in education include copyright and patent protection for the products of teaching and scholarship, copyright and patent infringement for improper use of protected works, and trademark licensing and protection of names, logos, symbols, and pictures used to identify schools.

Copyright Issues

By far, the most applicable category of intellectual property law in schools is copyright. Copyrights are intangible rights granted through the federal Copyright Act to an author or creator of an original artistic or literary work that can be fixed in a tangible

means of expression such as hard copies, electronic files, videos, or audio recordings. Copyright law protects literary, musical, dramatic, choreographic, pictorial, sculptural, and architectural works as well as motion pictures and sound recordings. Each copyrightable work has several "copyrights"—the exclusive rights to make copies of the work, distribute the work, prepare derivative works, and perform or display the work publicly.

With some important exceptions, two of which are highlighted here, teachers and students may not use the copyrighted works of others without permission of the copyright holders. The first exception, fair use, is the most important and most often cited. The fair use of a copyrighted work, "for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright." If the use is a fair use, then the user need not obtain advance consent of the copyright holder. Determining whether the use is fair requires the application of four factors: purpose and character of the use, nature of the copyrighted work, amount and substantiality of the portion used in relation to the work as a whole, and effect of the use upon the potential market for or value of the work. The second exception is also fairly common in schools; it is not an infringement for teachers and students to perform or display a copyrighted work in the course of face-to-face or online/distance education teaching activities. For electronic display or performance, the school must comply with several additional requirements.

Copyrightable works created today are protected from the time the work is fixed in a tangible medium of expression until 70 years after the death of the author/creator. Once a copyright term expires, the work goes into the public domain.

Patents

Under federal patent law, patents for "novel, useful, and nonobvious" inventions are granted for a nonrenewable 20-year term, granting the inventor the rights to exclude others from making, using, or selling the invention during that time. At term expiration, the invention enters the public domain.

In applications for patents, individuals must provide a "specification" describing how their invention works, and offer "claims" stating what is new, useful, and nonobvious (i.e., patentable) about the invention. When multiple applications (including recently granted patents) make identical or nearly identical claims, the U.S. Patent Office will conduct an investigation to determine which applicant first conceived and reduced the patent to practice. Effectively, a patent can be thought of as belonging to the winner of a race, the one who first brings the invention from conception to patent application and then to practice.

In patent infringement cases, the defendants may argue that the plaintiff's patent was unwarranted (e.g., failure to meet the novelty, utility, and/or nonobviousness requirements). However, there is no defense for good faith or ignorance of the patent. A patent owner is required to mark the product with a notice of patent or provide actual notice of the patent to the infringer. Even so, defendants may produce evidence that they, acting in good faith, put the product or process into practice at least one year in advance of the patent owner's application.

Litigation in patent cases is extremely rare in K–12 education. Colleges and universities, on the other hand, with their research activity, often have patent policies that regulate ownership of patents and require profit sharing between the inventors (often, faculty researchers) and their universities.

Trademarks

Under the federal Lanham Act, a *trademark* includes "any word, name, symbol, or device, or any combination thereof used . . . to identify and distinguish [a person's] goods . . . from those manufactured or sold by others and to indicate the source of the goods" (15 U.S.C. § 1127). Trademarks are also protected under state law. The intent of trademark law is to make "actionable the deceptive and misleading use of marks" in commerce; "to protect persons engaged in such commerce against unfair competition; [and] to prevent fraud and deception in such commerce by the use of reproductions, copies, counterfeits, or colorable imitations of registered marks."

The primary requirement for trademarks is distinctiveness—to identify the goods and services and avoid confusion or deception. Trademark law protects the trademark owner from losing his or her market. Several factors are analyzed in trademark infringement claims: the degree of similarity between the two marks, the strength of the owner's mark, evidence of actual confusion, the length of time the defendant has used the alleged similar mark without evidence of actual confusion, intent of the alleged infringer, the degree to which the two marks (and associated goods and services) are in the same competitive market, and the similarity of the goods and services in the minds of the public.

The more similar the competing marks are, the more likely a finding of confusion and infringement. The more distinctive the registered mark is, the more likely there will be a finding of infringement. There is likely no trademark infringement when a later use of a similar mark is established in a different geographical market where the second user has no notice of the first mark, he or she acts in good faith, and there is no confusion or other deception.

Trademark litigation in K–12 education is exceedingly rare, particularly because there is no real competitive sales market for school items. Further, in order to be registrable, a mark must be used to identify goods and services—not a common practice in K–12 education. In other words, it is perfectly understandable that a state, or even a region of a state, may have two high schools with the same nickname such as the "wildcats." So, while a logo or a symbol of a particular school may be distinctive and, therefore, confusing to others if nearby schools use strikingly similar ones, the name itself or the team colors would not be considered distinctive.

For another example, consider a high school and a local pizzeria that uses the name of the school or its nickname in the restaurant's name. Assuming that a school's nickname and/or logo can be trademarked, the school could make an argument that the pizzeria's use of the same name (or perhaps even the same mascot) could be confusing to the public.

Patrick D. Pauken

See also Copyright; Digital Millennium Copyright Act; Fair Use

Further Readings

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Internet Content Filtering

Internet content filtering uses software programs, available since the mid-1990s, that filter or restrict the amount and/or type of content that users have access to when surfing the Internet. This entry briefly describes the growing usage of these programs and discusses the Children's Internet Protection Act, which requires use of filters.

Background

Early filters on the market relied largely on keyword blocking, now regarded as a simplistic and ineffective way to filter content. The early filters were designed for parents who wished to control the content their children could access on the Internet. Increased demand for the technology precipitated an improvement, as many filter products soon began blocking entire Web sites when a user encountered a key word or key phrase.

The expansion of the customer base to include schools, libraries, and businesses caused the function of Internet filters to become even more sophisticated, though far from perfect. Some employers, including school boards, relied on filters and other types of

software to prevent their employees from engaging in non–work-related activities at work.

Federal Law

In December 2000, the Children's Internet Protection Act (CIPA) was signed into law as the latest chapter in a long battle waged by Congress to regulate children's access to content on the Web. CIPA was a provision conditioning federal subsidies on the use of Internet content filters, but it was different from previous failed legislation in that it imposed no criminal penalties.

Among other things, CIPA added the filtering mandate to e-rate subsidies administered by the Federal Communications Commission. The e-rate was implemented to assist schools and libraries in obtaining telecommunications and Internet access at discounted rates. The funds were made available through the Elementary and Secondary Education Act and the Library Services and Technology Act, programs that affected Internet access in public schools and libraries, respectively. The amendment represented a combination of proposals submitted in both the 105th and 106th congresses.

CIPA required that schools and libraries receiving funding must adopt and implement "technology protection" measures on all computers with Internet access. Specifically, each school or library must verify that it has adopted and implemented an Internet safety policy and installed Internet content filters to block Internet access to obscenity, child pornography, and material harmful to minors. To comply with CIPA requirements, the policy of each school or library shall address the following:

> (i) access by minors to inappropriate matter on the Internet and World Wide Web; (ii) the safety and security of minors when using electronic mail, chat rooms, and other forms of direct electronic communications; (iii) unauthorized access, including so-called "hacking," and other unlawful activities by minors online; (iv) unauthorized disclosure, use, and dissemination of personal identification information regarding minors; and (v) measures designed to restrict minors' access to materials harmful to minors. (CIPA, 2000, 47 U.S.C. § 254 (h))

Pursuant to CIPA's provisions, school boards, educational agencies, and/or officials responsible for administration of schools are required to provide reasonable public notice and conduct at least one public meeting to address their proposed Internet safety policies. In addition, school boards and educational officials must verify that they are enforcing the operation of blocking technology during the use of their schools' computers by minors.

Filters are required for all users on all access terminals regardless of the number of computers with Internet access that a school or library provides. However, when adults are using Internet terminals, CIPA allows filters to be configured to avoid blocking images that merely are "harmful to minors" but not obscene. Authorized persons may disable the blocking or filtering measures during any use by adults to enable them to have access for bona fide research or other lawful purposes. The statute defines minors as anyone who has not attained the age of 17. Some high school students will be classified as adults, and school officials should be careful not to allow use of filters to block their access to information. To be sure, Internet content filtering software is much improved from the mid-1990s, but it is still far from perfect and ill-equipped to supplant the discretion of the educator.

Court Cases

While CIPA has fared better than previous legislation, it has not gone unchallenged. *American Library Association v. United States* (2002) focused on the funding conditions that related to public libraries rather than schools. A federal trial court in Pennsylvania held that CIPA's filtering requirements for public libraries were unconstitutional because Internet access in public libraries was a designated public forum and that filtering requirements were an effort to exclude certain speech selectively from the forum.

On further review in *United States v. American Library Association* (2003), the Supreme Court reversed the finding that CIPA exceeded Congress's spending power to impose conditions on federal programs. The

Court noted that the government did not create a designated public forum by providing Internet access in public libraries and that CIPA's provisions regarding the disabling of filters were a modest restriction on speech. Chief Justice Rehnquist specifically pointed out that the use of Internet filters was not unconstitutional, because libraries normally exercise great discretion in selecting books for their collections and do not traditionally include pornography in their stacks. The majority deemphasized the First Amendment challenge as evidenced by the fact that it regarded the library's decision to use filtering software as "a collection decision, not a restraint on private speech" (p. 209, note 4).

The upshot of the unsuccessful challenge of CIPA and filters in *American Library Association* is that litigation filed by, or on behalf of, students or other school personnel such as teachers is unlikely to survive, because public library patrons, in general, enjoy more freedom to express themselves than children. It is interesting to note that in the trial court's disposition of the case, there was no challenge to the general requirement that recipients of funds create Internet safety policies. This is instructive insofar as the lesson is that educators should use their policies in conjunction with filters as they aim to educate, rather than punish, Internet users. Such an approach can give school officials and librarians the tools that they need to educate students and patrons on appropriate use of the Internet in public settings.

Mark A. Gooden

See also Acceptable Use Policies; Children's Internet Protection Act; Electronic Communication; Electronic Document Retention; Technology and the Law; *United States v. American Library Association*

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United States v. American Library Association, 539 U.S. 194 (2003).

INTERROGATORY

An interrogatory is a method of discovery that is used to gather or obtain facts and information that may be relevant to a pending suit. An interrogatory is a written question about the case that is prepared by one party to a case—or, more commonly, the party's attorney—and served on the other party or the other party's witnesses. An interrogatory is generally served as a part of a larger set of interrogatories, which consists of a series of written questions about the case. Answers to the interrogatories are given under oath. Put another way, answering parties or witnesses are usually required to sign sworn statements stating that the answers that they provided are true and correct.

In general, each interrogatory must be a simple, direct question that is aimed at a discrete topic or set of facts. However, each set of interrogatories may cover any range of topics that are either directly relevant to a case or reasonably calculated to lead to the discovery of additional relevant information. Most jurisdictions limit the number of interrogatories that parties may serve on witnesses. For example, under the Federal Rules of Civil Procedure, absent court orders or written agreements from other parties, one may not serve more than 25 written interrogatories on a particular witness.

Answering parties must ordinarily provide their answers within prescribed time limits, usually within 30 days of receipt. More often than not, answers to interrogatories are crafted by a party's attorney, who may pose objections to certain questions. Interrogatories that are not objectionable must be answered, and incomplete or evasive answers may subject answering parties or their attorneys to judicial sanctions. The grounds for objecting to specific interrogatories may include, among other things, that they seek privileged information, that they request information

that is neither relevant nor likely to lead to the discovery of relevant information, or that they wish to obtain information that is readily available to the opposing party. If a certain interrogatory is met with an objection, the party serving the interrogatory must either abandon the question or seek the court's assistance in compelling the witness to answer.

As noted above, interrogatories are a method of discovery. They, along with depositions, requests for documents, requests for admissions, and mental and physical examinations, are used during the pretrial discovery phase of suits. The discovery phase begins after the initial pleadings are filed, in other words, after a plaintiff's complaint and the defendant's answer, and it is the period in which the parties gather facts, testimony, documents, and other physical evidence that may be useful for trial or for preparing dispositive motions such as requests for summary judgment.

Interrogatories as a method of discovery serve a number of useful purposes and can be expected in almost every suit that proceeds to the discovery phase. Interrogatories can be extremely useful in obtaining essential background facts and information, the names and contact information of other witnesses or individuals with relevant information, the location or existence of relevant documents and physical evidence, and the exact dates and locations of important events. However, because answers to interrogatories are usually crafted by a party's attorney and lack the spontaneity of a deposition, they do not provide the same opportunity to control evasive answers, gauge a witness's credibility, or pursue new lines of questioning that are prompted by a witness's answers. For this reason, interrogatories are often served on witnesses before taking their depositions. The answers that witnesses provide in their interrogatories may then serve as a foundation for depositions, while the witnesses' answers to interrogatories can be challenged or expanded on during depositions.

Insofar as interrogatories are so widely used to gather facts, information, and testimony before trial, they should be expected in any education-related suit that proceeds to the discovery phase. Teachers, administrators, and other school officials that have facts or information regarding the incident or incidents that prompted litigation may be asked to answer written interrogatories. Those same individuals may also be asked to review the answers to interrogatories of other witnesses to evaluate whether their own understandings of the relevant events matches that of the other witnesses.

Christopher D. Shaw

See also Deposition; Electronic Document Retention

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Irving Independent School District v. Tatro

In *Irving Independent School District v. Tatro* (1984), the U.S. Supreme Court addressed the question of whether the related services provision of the Education of the Handicapped Act of 1975, now known as the Individuals with Disabilities Education Act (IDEA), required a school board in Texas to provide clean intermittent catheterization during class hours to a student who could not voluntarily empty her bladder because of her spina bifida. In holding that the board was required to provide catheterization, the Court reasoned that because this service was required in order for the child to remain at school during the day and that it was a simple procedure that could be performed in a few minutes by a lay person with less than an hour's training, it qualified for coverage under the IDEA.

Tatro stands out as the Supreme Court's first attempt to define the distinction between school supportive health services, which officials must provide under the IDEA as related services identified in students' Individualized Education Programs if they are necessary to assist children with disabilities to benefit from special education, and medical services, which they are not required to supply unless they are for diagnostic or evaluative purposes.

In resolving *Tatro,* the Supreme Court relied on the U.S. Department of Education's regulations to define the disputed terms. Pursuant to these regulations, school health services are those that can be provided by school nurses or other qualified lay persons. On the other hand, medical services are those that must be performed by licensed physicians. Insofar as clean intermittent catheterization did not have to be carried out by a physician, but could be performed by a school nurse or trained lay person, and because it would have allowed the child to remain at school during the day, the Court was satisfied that it qualified as a related service under IDEA. As such, the Court determined that school officials had to provide this service for the child.

Tatro also included general guidelines outlining the scope of a school board's responsibility for providing IDEA-related services to students. First, the Supreme Court reiterated that eligible children must be identified as having disabilities in order to receive special education services. Second, the Court acknowledged that school officials are required to supply only those services that are necessary to aid children to benefit from special education, regardless of how easily school nurses or lay persons could furnish the needed services. Third, the Court noted that school nursing services must be provided only if they can be performed by nurses or other qualified lay persons, not if they must be performed by physicians. In addressing this final point, the Court specified that it was reasonable to assume that the IDEA was designed to spare school boards from the responsibility of supplying medical services such as those performed by doctors that might have proved unduly expensive and beyond the range of educators' competence.

Courts most often cite *Tatro* in addressing questions of what qualifies as related services under the IDEA. The result is that courts frequently reach different results in applying *Tatro.* For example, two years after *Tatro,* a federal trial court in New York denied services to a child whose severe physical disabilities required constant nursing care (*Detsel v. Board of Education of Auburn Enlarged City School District,* 1986). Yet, 13 years later, the Supreme Court, in *Cedar Rapids Community School District v. Garret F.* (1999) decided that a child who was paralyzed from the neck down and required continuous one-on-one nursing services qualified for that care under the related services provision of IDEA. In *Garrett F.,* the Court recognized the importance of the distinction it explained in *Tatro,* namely that excluded medical services refer only to those that must be performed by physicians, not to those that can be provided by school health services, such as nursing care that can be delivered by a school nurse or trained lay persons.

Regina R. Umpstead

See also *Cedar Rapids Community School District v. Garret F.;* Disabled Persons, Rights of; Individualized Education Program (IEP); Related Services

Legal Citations

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Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Irving Independent School District v. Tatro, 468 U.S. 833 (1984).

Jackson v. Birmingham Board of Education

At issue in *Jackson v. Birmingham Board of Education* was whether a private person—in this instance, an athletic coach who was removed from his position when he complained about sexual discrimination against a girls' team—could file suit under Title IX, which prohibits discrimination in school programs that receive federal funds. The Supreme Court found that employees may file a private action for retaliation under Title IX, in that it constitutes a form of sexual discrimination in itself.

Insofar as *Jackson* was a 5-to-4 decision, some legal scholars think that it is not the final word on the issue. Even so, *Jackson* puts school officials on clear notice that they must comply with the requirements of Title IX when it comes to spending and support for athletics for female students. In addition, *Jackson* stands for the proposition that school boards may not retaliate against employees who challenge their policies and procedures under Title IX. Accordingly, school boards should examine their policies and procedures related to Title IX and do whatever is necessary to bring them into full compliance with its requirements.

Facts of the Case

Roderick Jackson was a physical education teacher and the girls' basketball coach at Ensley High School in Birmingham, Alabama. After investigating the level of support for the boys' basketball program, he began to complain that the girls' program was receiving inadequate funding and did not have equal access to facilities and equipment. Eventually, he received negative evaluations about his coaching and was removed from those duties; however, he continued to be employed as a teacher.

Jackson then filed suit, claiming that the board retaliated against him for voicing his complaints under Title IX of the Education Amendments of 1972. After a federal trial court dismissed his complaint, the Eleventh Circuit affirmed. The Supreme Court reversed in favor of the coach.

The Court's Ruling

In its ruling, the Supreme Court reviewed precedents related to Title IX and concluded that plaintiffs have a private right to action for damages under Title IX. The Court explained that discriminating against employees who complain about discrimination on the basis of sex (retaliation) is itself sex discrimination.

Title VII of the Civil Rights Act of 1964 expressly mentions practices that constitute sexual discrimination. Title IX does not. The Court rejected the school board's argument that Title IX does not allow an individual to initiate a private action for retaliation for alleging sexual discrimination. If the board retaliated against the plaintiff because he alleged discrimination

against the girls' program, the Court pointed out that it was discrimination covered under Title IX.

The board also argued that the plaintiff was an indirect victim of discrimination because an actual bias would have been against the girls in the basketball program, not against their coach. Although the coach was not the original subject of discrimination, the Court was convinced that retaliating against him made him a victim of discrimination. The Court found that it is important under Title IX for people to report incidents related to sexual discrimination. Title IX would have little meaning, the Court thought, if schools systems were allowed to retaliate against people who report such discrimination.

The school system further argued that because Title IX is based upon the Spending Clause of the Constitution, states were not put on notice that they could be sued for retaliating against persons who allege sexual discrimination. The Court disagreed, because previous cases of discrimination based on sex should have placed the school system on notice insofar as Title IX prohibits many diverse forms of sexual discrimination. The Court ruled that it may be much easier to establish retaliation than it is to establish deliberate indifference.

On remand, the Birmingham Board of Education reached a settlement with the plaintiff in November 2006, naming him head coach at Jackson-Olin High School with the same benefits as other head coaches. The board also agreed to level the playing field and to ensure compliance with Title IX.

Justice Thomas filed a lengthy dissenting opinion in which he was joined by three other justices. Justice Thomas argued that retaliation was not discrimination. According to Justice Thomas, the clear language of Title IX means that the discrimination has to be on the basis of the sex of the person who is alleging the discrimination. Justice Thomas also argued that the coach was alleging retaliation, which is not the same as complaining about sexual discrimination. In other words, Thomas determined that the coach was not alleging that the sexual discrimination underlying his complaint occurred. He added that the fact that Title IX does not mention retaliation is also very significant. Justice Thomas was of the opinion that the plain language of Title IX should have been analyzed, because it places a financial burden on the states.

J. Patrick Mahon

See also Sexual Harassment; Title IX and Athletics; Title IX and Sexual Harassment

Legal Citations

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Gebser v. Lago Vista Independent. School District, 524 U.S. 274 (1998).
Jackson v. Birmingham Board of Education, 544 U.S. 167 (2005).

Jacob K. Javits Gifted and Talented Students Education Act

The Jacob K. Javits Gifted and Talented Students Education Act of 1988 is the federal education act for gifted and talented education. The Javits Act, which was named after Senator Jacob Javits of New York for his role in promoting gifted education, defines talented and gifted students as those who give evidence of high performance capability in areas such as intellectual, creative, artistic, or leadership capacity or in specific academic fields. This entry looks at the legislation and its adequacy.

Legislation for the Gifted

Even before the Javits Act was officially enacted, the federal government was involved in gifted and talented education. In 1969, Congress dedicated an office to support gifted education. In 1972, after the publication of the Marland Report, a national report to Congress regarding the status of gifted and talented education, more attention was focused on gifted education. The Marland Report was considered a landmark study that made an important national impact,

because it stressed the need to recognize diverse types of giftedness and talent. Specifically, the study identified six areas in which high potential might be manifested, including general intellectual ability, specific academic aptitude, creative or productive thinking, leadership ability, visual and performing arts, and psychomotor ability. The Marland Report also influenced subsequent legislation, such as the Gifted and Talented Act enacted by Congress in 1978. Finally, in 1988, the Javits Act was passed to coordinate programs to meet the special educational needs of gifted and talented students.

In 1994, amid concerns over the state of America's public schools, the Javits Act was reauthorized in order to build a nationwide capability in elementary and secondary schools to meet the needs of gifted and talented students. The reauthorization came after a 1993 study released from the Office of Educational Research and Improvement indicated that the regular school curriculum does not challenge gifted and talented students. This report also noted that American students did poorly on international tests when compared with students in other industrialized countries.

Most recently, the U.S. Congress reauthorized the Jacob K. Javits Gifted and Talented Students Education Act as Title V, Part D, Subpart 6 of the No Child Left Behind Act of 2001. The Javits Act is the only federal program that focuses specifically on the needs of gifted and talented students. This legislation supports the development of gifted and talented students by reauthorizing the U.S. Department of Education to fund competitive grants involving research into gifted and talented education. According to the National Association for Gifted Children, the grants are awarded to state and local education agencies, institutions of higher education, and other public and private agencies. Priority funding is given to efforts to serve students from underresourced backgrounds, disabled students, and limited-English-proficient students. At the national level, the Javits program funds the National Research Center on the Gifted and Talented, which is run by the University of Connecticut and the University of Virginia.

Adequacy Issues

The Javits program must be funded every year by Congress. In fiscal years 2003 through 2005, Congress provided funding for the Javits Act of approximately $11.2 million. In 2006, the Javits Program was appropriated $9.6 million from the U.S. Congress. However, the Javits Act has been repeatedly threatened during the federal budget process and is routinely slated for elimination. Some observers argue that this is too small an amount of money to provide for the nation's 3 million gifted and talented students. In fact, researchers have noted that in 1990, less than two cents out of every $100 spent on public education was spent on gifted programs.

Unlike the Individuals with Disabilities Education Act, the Javits Act does not protect the legal rights of gifted students. Therefore, the primary source of rights for gifted students is found in state laws, which vary widely in their approach to addressing gifted education. Every state has some type of existing program for serving gifted and talented students, but it is difficult to assess how many gifted students are being served in each state. The overall number of students participating in gifted and talented programs has increased, however, but students from disadvantaged backgrounds are not being served to the same degree as their nondisadvantaged peers.

Without the support of extensive federal resources, the Javits Act is not as comprehensive and widespread as some advocates would prefer. In addition to the call for more legislative action at the national level, many advocates desire a national mandate for the education of gifted students. However, progress has been slow due to several factors. The misperception that high-ability students do not need special services, the commonly held belief that gifted students will not be severely harmed by a lack of services, and the need to focus advocacy efforts on protecting the Javits Act rather than on expanding beyond that legislation all contribute to a delay in the arena of national gifted legislation. Along with a focus on federal legislation, advocates argue that strong state laws must be tailored to provide greater services than what federal laws, such as the Javits Act, may offer.

Suzanne E. Eckes

See also Gifted Education; No Child Left Behind Act

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Jacobson v. Commonwealth of Massachusetts

Jacobson v. Commonwealth of Massachusetts (1905) is a classic case dealing with the public health and welfare, as one citizen unsuccessfully protested government-required vaccinations. *Jacobson* stands out as one of only two Supreme Court cases (the other reached a similar result in *Zucht v. King,* 1922) that allowed American public school systems to require incoming students to be inoculated against specified diseases prior to starting school.

The whole point is that, should a few students suffer from one of the maladies that had spread throughout vast numbers of children and adults, then they could potentially begin another epidemic, especially if classes were intermingled with those who received vaccinations and those whose parents opted not to do so. According to the Supreme Court's opinion in *Jacobson,* by insisting that all children must be vaccinated, no one is allowed a free ride at the risk of others. This entry reviews the case and its potential application to terrorism-related initiatives.

Facts of the Case

During the early years of the 20th century, Massachusetts witnessed a large increase in the number of smallpox deaths. In response, many communities there required vaccinations of their residents to try to stop the spread of the disease. In 1903, because the plaintiff, Henning Jacobson, believed that the smallpox vaccination was unsound for his health, he refused to have the vaccination that the city of Cambridge required of all of its residents. Pursuant to applicable law of the commonwealth, Jacobson was fined $5 for his refusal to be inoculated.

Jacobson then unsuccessfully filed suit, as the Supreme Judicial Court of Massachusetts found that the local statute was consistent with the commonwealth's constitution. On further review, Jacobson argued before the U.S. Supreme Court that the law violated his Fourteenth Amendment right to liberty, because it took away his right to care for his own body in the way that he deemed best.

The Court's Ruling

In unanimously upholding the constitutionality of the statute, the Court pointed out that part of being in a civilization meant giving up some personal freedom in exchange for belonging to that society. As such, the Court's decision hinged on the fact that Jacobson would enjoy the fact that he would be protected from smallpox because his neighbors had been inoculated, while he would not personally have had to accept the risk that was inherent in the vaccination. The Court viewed his rejection as an attempt to get a free ride from society.

The Supreme Court next considered whether Jacobson's right to contest the scientific basis of the vaccinations was legitimate. Although conceding that some people still doubted the efficacy of the vaccination, the Court determined that the legislature was within its prerogative in adopting one of many views based on its own study of the alternatives. The Court thus ruled that commonwealth officials engaged in a legitimate use of their police power in exercising the right to protect the public health and safety of citizens. The Court concluded that because local boards of health determined when mandatory vaccinations were necessary, such a requirement satisfied the Fourteenth Amendment, because it was neither unreasonable nor arbitrary. Vaccinations, of the kind at issue in Jacobson, are still a topic of some discussion and controversy, as occasional lawsuits still challenge the legitimacy of mandatory vaccinations and inoculations as a precondition of having children attend school.

Terrorism Application

In 2003, the *Journal of the American Medical Association* (2003) published an article about the use of *Jacobson* in an age of bioterrorism. Since the terrorist attacks in the United States in 2001, there has been a significant amount of discussion and planning for methods that could be used to inoculate most of the American population in the event of bioterrorism.

Jacobson still stands for the proposition that if it would benefit the public welfare, then the American people could be required to be inoculated, even against their will. The critics of the Model State Emergency Health Powers Act (MSEHPA) maintain that the law grants state governors a great deal of power to react in the event of medical emergencies. These critics argue that the society is not the same as the one in which *Jacobson* was decided, and that the MSEHPA puts too much power into the hands of the government. As with many issues, this is a controversy that will continue to linger on in schools and the wider society.

James P. Wilson

See also Vaccinations, Mandatory

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Jefferson, Thomas (1743–1826)

Thomas Jefferson was born on April 13, 1743, in what is now Albemarle County, Virginia, and died at Monticello, Virginia, on July 4, 1826. Jefferson is best known as the author of the Declaration of Independence and as the third president of the United States. Two of his proudest accomplishments, which he memorialized on his gravestone, were founding the University of Virginia and authoring the Virginia Statute of Religious Freedom. In addition, Jefferson is widely cited for his letter to the Danbury Baptist Association expressing his views on separation of church and state.

Jefferson's famous passages in the Declaration of Independence—that "all men are created equal" and that they enjoy "unalienable rights" including "life, liberty and the pursuit of happiness"—have been quoted by liberals and conservatives alike in cases ranging from equal protection of the law to substantive and procedural due process. His influence is apparent in the Due Process Clauses of the Fifth and Fourteenth Amendments, which provide that no person shall be deprived of "life, liberty, or property without due process of law."

To Jefferson, education and government were inseparable. Self-government was the safeguard preventing tyranny, and the key to self-government was an enlightened, informed citizenry. He thought that a repressive government could deprive its citizens of their rights and liberties only if the people were ignorant. Jefferson believed that education of the common man was an essential prerequisite to preservation of a republican form of government. As president of the United States, Jefferson proposed an amendment to the Constitution to legalize federal support for education.

Jefferson envisioned an educational system beginning with grammar school and continuing through university. He strongly advocated free public education and urged the Virginia legislature to fund elementary and secondary schools. Although unsuccessful in this endeavor, Jefferson did secure funding for the creation of the University of Virginia. Insofar as Jefferson's founding of the university fulfilled one of his greatest ambitions, he spent much of his later years designing its campus, organizing its administrative structure, and molding its curriculum. Many of Jefferson's educational plans and ideas were later adopted and implemented by state legislatures and universities throughout the nation.

Thomas Jefferson's most direct influence on the development of education law is in the area of First Amendment Establishment Clause jurisprudence.

When attempting to ascertain the "original intent" of the Founding Fathers, proponents of strict separation of church and state look to Virginia history and the writings of Jefferson and James Madison. In 1784, when the Virginia Assembly introduced an Assessment Bill, which would have established a tax to provide funds in support of teachers of the Christian religion, Jefferson and Madison led the opposition to the bill. Madison's "Memorial and Remonstrance," denouncing the tax, is his most famous writing on the subject of separation of church and state. In 1786, after the defeat of the Assessment Bill, Madison secured passage of a Bill for Establishing Religious Freedom, which had originally been introduced by Jefferson in 1779. Separationists argue that because the U.S. Bill of Rights is to a large extent modeled on the bill of rights in the Virginia constitution, great weight should be given to the Virginia experience.

Perhaps the language of Jefferson most cited in court decisions is his 1802 letter to the Danbury Baptist Association, in which he stated that the First Amendment built a "wall of separation between church and state." Jefferson's famous phrase was first referenced by Justice Hugo Black in his opinion in *Everson v. Board of Education of Ewing Township (*1947) wherein the Supreme Court incorporated the Establishment Clause and applied it to the states.

Justice Black's dictum has become embedded in American law. Yet, continuing questions have been raised concerning the relevancy of Jefferson's metaphor and how it should be interpreted. Strict separationists argue that the wall should be high and impenetrable. Accommodationists contend that even if a wall of separation has been erected, it prohibits only the establishment of an official national religion, or it forbids the state from preferring one religion over another. Nondiscriminatory support by government for all religions, they maintain, is constitutionally permissible.

The sharpest attack on the use of Jefferson's "wall of separation" metaphor came from Justice William Rehnquist in his dissenting opinion in *Wallace v. Jaffree* (1985), wherein the Supreme Court struck down Alabama's statute providing for a moment of silence for meditation or voluntary prayer. Rehnquist asserted that for almost 40 years since *Everson,* the Court had been misguided by a mistaken understanding of constitutional history. He pointed out that Jefferson was in France at the time the Bill of Rights was passed by Congress and ratified by the states, and that his letter to the Danbury Baptist Association was merely a short note of courtesy and not necessarily reflective his or the framers' intent on the question of the proper relationship between religion and government.

Thomas Jefferson's views on the role of the federal government, and particularly the role of the federal judiciary, were hotly contested during his lifetime and still debated today. His disputes with Alexander Hamilton, and later Chief Justice John Marshall, framed the national debate over issues such as states' rights, national supremacy, and judicial review. Jefferson disagreed with Marshall's pronouncement in *Marbury v. Madison* (1803) that the Supreme Court had the sole power to determine the constitutionality of laws enacted by Congress. Instead, he argued that each branch of government had a right to interpret questions of constitutionality. Moreover, he asserted that when the federal government assumed powers not granted to it by the Constitution, each state had a right to declare the action of the federal government unconstitutional.

The Court rejected much of Jefferson's theory of constitutional interpretation in such cases as *McCulloch v. Maryland* (1819) and *Cooper v. Aaron* (1958). Even so, throughout history, Jefferson's criticisms of the Court have been echoed by presidents such as Andrew Jackson and Franklin Roosevelt and are still reiterated by opponents of so-called judicial activism.

Thomas Jefferson, paradoxically, has become the symbol of American ideals as well as the embodiment of personal frailties. Jefferson was an aristocrat with exquisite, expensive tastes who praised the virtues of the "common man." A proponent of equality, he owned slaves. Polite, cordial, and civil in his public dealings, behind the scenes, he could be duplicitous and deceitful. Although he was a strict constructionist of the Constitution and a states' rights advocate, by actions such as purchasing the Louisiana Territory from France, he expanded the powers of the presidency and the national government beyond their express constitutional boundaries. However, the great

political and legal questions he raised are as pertinent today as they were 200 years ago. For example, it is unclear whether the No Child Left Behind Act is a worthy attempt to raise educational standards fostering a more educated citizenry or an improper interference by the federal government in an area, education, that is best reserved to the states.

Michael Yates

See also Establishment Clause; *Everson v. Board of Education of Ewing Township*; *Marbury v. Madison*; *Wallace v. Jaffree*

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Juvenile Courts

Juvenile courts are courts of limited jurisdiction created by states to work with children and their families in cases of the delinquent behavior of juveniles. The early argument in favor of the creation of juvenile courts was that the failure of the family was the reason for the bad behavior. Thus, public officials set up a new type of court to deal not only with the behavior, but also with the necessary rehabilitation and education of juveniles so that proper values and respect for authority could be taught. Essentially, the juvenile court system allows state governments to impose treatment on children rather than harsher criminal punishments. The right of states to intervene into the lives of juveniles (and their families) for purposes of care and custody is referred to as *parens patriae,* literally "parent of the country." This entry looks at the juvenile justice system, related court rulings, and principal applications in education.

The System

Juvenile delinquency is a generic term that refers to conduct ranging from relatively minor offenses such as truancy to major criminal offenses including homicide. The jurisdiction of juvenile courts varies from state to state, but the laws generally categorize children into three groups. First, there are delinquent offenders, those who have committed acts that would be crimes if committed by adults. Second, there are status offenders, juveniles who have committed acts that would not be crimes if committed by adults; these acts include running away from home, truancy, underage drinking, and habitual disobedience. They also include persons who are too unruly to be controlled by their parents. Third, there are neglected or abused children. These are the children who seek the court's protection. Neglected children include those children who are abandoned, homeless, or suffering from parental deprivation.

For the most serious crimes such as robbery, assault, rape, and murder, juveniles may be tried as adults. A key question asked in such a consideration is the likelihood that the juvenile has the potential to be "rehabilitated" before reaching the age of 18, or whatever age is identified in a state's legislation as the limit in juvenile court. If the likelihood of rehabilitation is low, then juveniles will be tried as adults. In making such a determination, juvenile courts also consider the seriousness of the offender's crime and his or her court record. Moreover, statutory age limits in juvenile law must be the same for females as they are for males.

Once juvenile courts establish jurisdiction over children, they generally have broad remedial authority. For delinquent offenders and status offenders, remedies and punishments include probation; restraining orders; mandatory curfews; detention (temporary custody) in a juvenile detention center, camp, or school; referral to the local department of youth services for a period of time commensurate

with the seriousness of the infraction, but usually not longer than the period until the offender reaches the statutory maximum age such as 18 or 21 depending on the jurisdiction; fines; restitution; educational programs such as drug education; periodic drug testing; rehabilitation; revocation or suspension of driving privileges; and homebound placement. In cases involving the possibility of assignment to a correctional facility, the court considers the juvenile's record. For abused or neglected children, the usual remedy is separation from their parents temporarily or until they reach the age of majority.

Court Rulings

The dispositional authority of juvenile courts is noticeably different from the parallel authority in adult courts. Juvenile courts seek to balance the need for punishment with the need for rehabilitation and education. Despite the differences, though, due process rights for juveniles are nearly as extensive as they are in adult court. The leading U.S. Supreme Court decision on juvenile court due process is *In re Gault* (1966), wherein the justices decided that juveniles have the right to notification of the charges against them, the right to an attorney, the right to confront and cross-examine witnesses, and the right to remain silent.

With respect to the standard of proof required in juvenile court proceedings, the Court has held that juveniles charged with a criminal act must be found "delinquent" with proof beyond a reasonable doubt, the same as the standard in adult courts (*In re Winship,* 1970). In a third case, the Court ruled that jury trials are not required in juvenile cases, because they would destroy the privacy and flexibility of juvenile hearings (*McKeiver v. Pennsylvania,* 1971).

Schools and the Courts

The relationship between schools and juvenile courts is developed in two central areas: education and discipline. First, with respect to discipline, the disciplinary authority granted to a school is independent of the power granted to juvenile court, or adult criminal courts, for that matter. In other words, if students commit infractions that warrant suspensions or expulsions, school officials may proceed with their discipline, regardless of whether criminal or juvenile courts adjudicate the matter. This includes any court proceeding that releases juveniles pending future hearings. As such, school official need not dispense with disciplinary proceedings while juvenile court hearings or judicial decisions are pending.

Second, with respect to education, juvenile delinquents of school age continue to have rights to education while they are detained in juvenile correctional facilities, both before and after adjudication and disposition. In cases of abused or neglected children, as well as juvenile delinquents or status offenders, the education may also include working with psychologists and other special service providers. Special consideration must also be given to those children with disabilities. Free appropriate public education, as required by the Individuals with Disabilities Education Act (IDEA), must still be provided. Similarly, school officials must provide juveniles with reasonable accommodations, as required by Section 504 of the Rehabilitation Act of 1973 and/or the Americans with Disabilities Act. The costs for the general education are incurred by the local agencies responsible for juvenile detention facilities regardless of whether the juveniles are enrolled in local school systems. For special education under IDEA, the responsibility remains with the school board of the child's residence. Clearly, it is also important that school officials and juvenile courts share records, including transcripts and grades.

Patrick D. Pauken

See also Due Process; *Goss v. Lopez*; *In re Gault*; Parens Patriae

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K

Kadrmas v. Dickinson Public Schools

At issue in *Kadrmas v. Dickinson Public Schools* (1988), the U.S. Supreme Court's only case on the topic, was whether educational officials violated a student's right to a public school education because her mother could not afford the transportation fee, and state law did not require a local board that met specified state requirements to provide free transportation. The Court upheld the district's right to charge such a fee.

Facts of the Case

Kadrmas arose because insofar as a school board was not required to provide student transportation to school, it charged a fee for such transportation of $97.00 per school year for families with one child and $150.00 for those with two children. The board charged the fee in order to defray transportation costs for students who lived in sparsely populated areas. When the plaintiff refused to accept the board's transportation contract, she instead chose to transport her daughter to and from school on her own.

However, after the mother realized that driving her daughter was cost prohibitive, she unsuccessfully challenged the validity of the fee in state courts. More specifically, the Supreme Court of North Dakota engaged in a detailed discussion in rejecting the mother's arguments that the transportation policy violated the state constitution's requirement of providing free schooling for students. The court also ruled that the policy passed constitutional muster under the Equal Protection Clause of the Fourteenth Amendment, because even though not all school systems chose to adopt a policy of charging fees for transporting children to school, the board's doing so was not discriminatory.

The Court's Ruling

On further review, the Supreme Court affirmed in favor of the school board. The Court began by noting that insofar as the board enacted the transportation fee policy in the face of economic realities, it would have to uphold the underlying policy unless the plaintiff could demonstrate that it was patently arbitrary and lacked a rational relationship to a legitimate governmental purpose.

At the heart of its analysis, the Court explained that the transportation fee was consistent with state statutory requirements and that it had a rational relationship to a governmental purpose. The Court was of the opinion that because the transportation fee was a means of assisting the government's intent of allocating limited resources, the statute that permitted the board to charge a fee did not violate the Equal Protection Clause by impermissibly discriminating on the basis of wealth. In addition, the Court recognized that transportation is certainly different from charging fees for such items as tuition or instructional materials. To this end, the Court concluded that the board had the authority to exercise its option of charging the mother for the cost of taking her daughter to school,

because transportation did not go to the essence of the state's obligation of providing all students with a free public school education.

Patrick M. O'Donnell

See also Equal Protection Analysis; Transportation, Students' Rights to

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Kennedy, Anthony M. (1936–)

When Justice Lewis Powell, Jr. resigned from the U.S. Supreme Court, federal court of appeals judge Anthony Kennedy became President Ronald Reagan's third appointment to fill the vacancy. Although Kennedy may have been President Reagan's third choice, most commentators consider it in retrospect to have been his best.

Justice Kennedy has been praised for his competence, impartiality, and collegiality. His voting record has generally been conservative, but his opinions tend to be narrowly drafted, avoiding ideological extremes. However, he has occasionally voted with the liberal block and has joined with moderates in forming a coalition that frequently determines the outcome of close decisions. Kennedy has been assigned to write the opinion of the Court in some of the most important cases in recent school law history. This entry summarizes his life and court contributions.

Early Years

Anthony M. Kennedy was born on July 23, 1936, in Sacramento, California. His father was a lawyer and lobbyist at the state capital, and his mother worked as a secretary for the California Senate. As a young boy, Anthony served as a page in the California Senate and worked in his father's law office. In high school, he was a model student who made the honor roll and was an altar boy for his Roman Catholic parish church.

Kennedy enrolled at Stanford University, where he majored in history and political science. At Stanford, he was elected to Phi Beta Kappa and completed his requirements for graduation in three years. He spent the last year of his studies attending the London School of Economics. Kennedy was then accepted to Harvard Law School, where he graduated cum laude in 1961.

After graduating from law school, Kennedy returned to California, where he briefly was employed for a San Francisco law firm. Two years later, when his father died, Kennedy returned to Sacramento to take over his father's law practice. Like his father, Kennedy became an influential lobbyist. He also pursued his academic interests by teaching constitutional law at McGeorge School of Law at the University of the Pacific. At this time, he married a childhood friend, Mary Davis.

While a lawyer and lobbyist, Kennedy developed friendships with important officials such as future U.S. attorney general and aide to Ronald Reagan, Edwin Meese. When Reagan became governor, he recruited Kennedy to help draft a tax-limitation amendment to the state constitution known as Proposition 1. While the initiative failed, it helped lay the foundation for success of its successor, Proposition 13.

On the Bench

Governor Reagan was impressed with Kennedy, and when a vacancy opened on the U.S. Court of Appeals for the Ninth Circuit, Reagan recommended Kennedy for the seat. President Gerald Ford followed Reagan's recommendation, and at the age of 38, Kennedy became the youngest federal appellate court judge in the nation. Kennedy served as a judge on the Ninth Circuit for the next 13 years. Although a conservative on what many regarded as the most liberal circuit, Judge Kennedy developed a reputation for having an open mind and deciding cases based on the immediate facts and the law.

In 1987, when swing vote Justice Lewis Powell, Jr. announced his retirement from the Supreme Court, Judge Kennedy was on President Reagan's short list of potential nominees. However, Reagan was persuaded to nominate as Powell's replacement the outspoken conservative, Judge Robert Bork. Following one of the most contentious hearings in history, Bork's nomination was defeated by the U.S. Senate. Reagan's next selection was another staunch conservative, Judge Douglas Ginsburg. After Ginsburg withdrew his name from consideration following allegations of marijuana use, Reagan turned to Kennedy. In contrast

to the tension-filled confirmation hearings for Judge Bork, Kennedy's hearings were relatively low key. Kennedy appeared to be more moderate and personable than Bork, and his nomination was unanimously approved by the Senate.

Justice Kennedy's experience as an appellate court judge served him well once he took his seat on the Supreme Court. He easily fit into the Court's routine and soon was assigned opinions in important cases. As the 1997–1998 Term concluded, Kennedy wrote the majority opinion in *Burlington Industries v. Ellerth* (1988) where the Court held that under Title VII, an employee who refuses a supervisor's unwelcoming and threatening sexual advances, yet suffers no adverse, tangible job consequences, may recover damages from the employer without showing that the employer was negligent or otherwise at fault for the supervisor's actions. Justice Kennedy's voting pattern began to emerge. Often he was, like Powell, the decisive swing vote. Kennedy tended to side with the conservative wing of the Court. However, he occasionally joined with liberals in cases such as *Texas v. Johnson* (1989), where, in spite of his personal beliefs, he concurred with Justice Brennan's decision that flag burning was a protected form of symbolic speech.

Kennedy disappointed conservatives by his refusal to vote to overrule *Roe v. Wade* (1973). In *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), he joined with Justices Sandra Day O'Connor and David Souter in authoring the plurality opinion that upheld most of the state's restrictions on abortion but left the principle of a constitutional right to abortion intact.

In race discrimination cases, Kennedy's vote has been more predictably conservative. For example, in *City of Richmond v. J. A. Croson Co.* (1989) and *Adarand Constructors, Inc. v. Pena* (1995), he voted against minority set-aside and preference programs in the construction industry.

School-Related Opinions

Kennedy authored the opinion of the Supreme Court in *Freeman v. Pitts* (1992), determining that federal courts could incrementally release control of formerly segregated schools on a step-by-step basis, even if unitary status had not been achieved in all areas. In the two University of Michigan disputes, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), he voted that race-conscious admissions policies were unconstitutional for law school and undergraduate students, respectively.

In First Amendment Establishment Clause cases, Kennedy has generally taken an accommodationist position. In two recent cases involving public displays of the Ten Commandments, *Van Orden v. Perry* and *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005), he upheld both displays as constitutional.

Justice Kennedy supported decisions upholding government assistance to parochial schools, such as providing for sign-language interpreters, remedial instruction, audiovisual equipment, and school vouchers. Additionally, he voted to grant access by student religious organizations and community church groups to public school facilities. Kennedy wrote the majority opinion in *Rosenberger v. Rectors and Visitors of the University of Virginia* (1995), noting that the denial of student activity funds to support the printing of a Christian newsletter violated freedom of speech.

Kennedy demonstrated his independence in *Lee v. Weisman* (1992) as he cast the deciding vote and authored the majority opinion holding that a nonsectarian prayer at a public middle school graduation ceremony where school officials selected the minister and issued guidelines was unconstitutional. Kennedy also joined in the Court's decision in *Santa Fe Independent School District v. Doe* (2000) striking down student-led prayers over the public address system at high school football games. Applying a coercion test that he believed should have been the proper standard in Establishment Clause cases, Kennedy found that the prayers were not truly voluntary.

In First Amendment Free Exercise cases, Kennedy joined in the majority in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), pointing out that granting a special exemption to Native Americans to use peyote in religious ceremonies was not required when a state criminal law that was neutral on its face and of general applicability prohibited such usage. When Congress, in response to *Smith,* enacted the Religious Freedom Restoration Act (RFRA) restoring the balancing test of *Sherbert v. Verner* (1963), Justice Kennedy wrote for the Court in *City of Boerne v. Flores* (1997), ruling that RFRA was

an unconstitutional attempt by the legislature to assume the power reserved to the judiciary of interpreting the Constitution.

In students' right cases, Kennedy usually sides with school authorities. He voted to uphold random drug testing of student athletes and participants in extracurricular activities in *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002). In *Owasso Independent School District No. 1011 v. Falvo* (2002), writing for the Court, Justice Kennedy ruled that teachers' use of peer-grading of assignments by students did not violate the Family Educational Rights and Privacy Act (FERPA).

In cases involving the rights of those who are gay, Kennedy's voting record has been mixed. In *Boy Scouts of America v. Dale* (2000), he joined in the Supreme Court's opinion holding that as a private organization, the Scouts had the right to exclude a gay scoutmaster from membership, because accepting him would have derogated its express membership requirements. Yet, he authored the Court's opinion in *Romer v. Evans* (1996), determining that an amendment to the Colorado state constitution denying heightened legal protection from discrimination to persons because of their sexual orientation violated the Equal Protection Clause of the Fourteenth Amendment. Kennedy also wrote for the majority in *Lawrence v. Texas* (2003), striking down as unconstitutional a state statute criminalizing homosexual conduct between consenting adults.

Justice Kennedy's performance on the Court has been criticized by some who claim he has no philosophical base and often decides cases with no consistent rationale. However, many commentators praise him for his deliberate consideration of the unique circumstances of each case and for his tendency not to reach conclusions based on a preconceived ideological disposition. Kennedy has already written opinions in several landmark cases. With the make-up of the Court apparently shifting to the right, Kennedy's moderate brand of conservatism will likely continue to make his a decisive vote and place him in a position to be even more influential in education law in the future.

Michael Yates

See also Rehnquist Court

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Keyes v. School District No. 1, Denver, Colorado

The U.S. Supreme Court's 1973 decision in *Keyes v. School District No. 1, Denver, Colorado,* has had a profound and lasting effect on school desegregation litigation. While the Court ruling included some findings of benefit to plaintiffs in such cases, of more lasting import was its decision to let stand the legal distinction

between de jure and de facto segregation. This has severely limited the ability of minority students to sue for more integrated public schools under the Fourteenth Amendment. In the years since *Keyes,* school systems have become more segregated, and minority students are unable to obtain judicial redress.

Facts of the Case

In *Keyes,* the parents of Latino and African American students who attended schools in Denver's Park Hill area sued the school board, alleging that officials acted intentionally to create a racially segregated system. The parents sought to have the school district desegregated.

Following several inconclusive rounds of litigation in lower federal courts, *Keyes* became the first Supreme Court desegregation case that did not concern a Southern school system with a history of explicit legislative segregation. *Keyes* was also the first desegregation case that involved both large Latino and African American populations. From these new circumstances emerged holdings that reshaped the fight over school desegregation.

The Court's Ruling

Two aspects of the Supreme Court's rationale in *Keyes* expanded the ability of minority students to sue for more integrated schools. First, the Court ruled that Latino and African American students may be placed in the same category in contrast to Anglo peers for the purposes of defining segregated schools. The Court explained that a school with a sizable population of both African American and Latino students is not integrated because there are students of different races. Rather, the Court indicated that these schools were still segregated, because both African American and Latino students suffered the same educational inequities as compared to Anglo students in schools with predominantly Anglo student populations. This, in the Court's opinion, allowed minority students to demonstrate racial segregation more easily.

Second, the Court reasoned that if the plaintiffs could prove that school officials intentionally implemented a policy of segregation in a substantial portion of a district, then lower courts could find that the system as a whole was essentially segregated into two racially divided districts. The Court pointed out that in order to succeed, the plaintiffs had to establish intent to engage in racial segregation by providing evidence that school officials used policies that were known to likely cause segregation, such as manipulating neighborhood school policies, including student attendance zones and school site selection criteria. Once the plaintiffs demonstrated that there was segregation in a substantial portion of the district, the Court noted that the burden shifted to the board to prove that its actions regarding other segregated schools in the district were not racially motivated. Again, the Court reduced the burden for minority students to demonstrate that racial segregation was present.

In *Keyes,* the plaintiffs provided extensive evidence that officials in the Park Hill area segregated minority students from Anglo peers for the previous ten years based on an intentional policy to do so. To this end, the Court was convinced that the burden shifted back to the school board. The Court thus directed the trial court to address this question. On remand, the trial court maintained that because board officials failed to meet the board's burden of proof, the entire Denver Public School District was a dual system based on race, and it had to be desegregated.

Inherent in the Supreme Court's second holding was another issue that severely limited the ability of plaintiffs to prove racial segregation and greatly outweighed the gains for minority students in *Keyes.* The Court let stand the requirement that plaintiffs had to prove the existence of de jure, not just de facto, segregation. *De jure* segregation, which derives from the direct actions of government officials or institutions, is usually present in the form of explicit legislation or policies. When government actions are direct and explicit, the intent to discriminate is clear. However, absent evidence of clear government intent to racially segregate, that a school system is in fact, or *de facto,* racially segregated, it is difficult to prove that the actions of public officials are unconstitutional. Even if government policies directly result in de facto school segregation, if the policies were not specifically designed to racially segregate, then no intent to segregate can be legally inferred.

In the time since *Keyes,* the requirement to prove de jure segregation has all but eliminated unconstitutional school segregation, and the number of segregated public schools has increased. The Denver Public Schools provide a prime example. In 1974, Colorado voters passed the facially neutral Poundstone Amendment to the state constitution, which prevented annexation of surrounding suburban communities to the Denver Public Schools district without a majority vote of the community affected. Due to White suburban flight and a large influx of Latinos to urban Denver, the schools in and around Denver are once again profoundly segregated. Following *Keyes,* this is considered to be de facto and not de jure segregation. As a result, minority students have little or no legal recourse to demand the opportunity to attend schools with Anglo peers.

Eric Haas

See also Equal Protection Analysis; Fourteenth Amendment; *Milliken v. Bradley;* Segregation, de Facto; Segregation, De Jure; *Swann v. Charlotte-Mecklenburg Board of Education;* White Flight

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Keyishian v. Board of Regents

The U.S. Supreme Court considered two issues in *Keyishian v. Board of Regents.* The first issue was whether regents of the State University of New York (SUNY) could require faculty to sign a loyalty oath as a condition of employment. The second issue concerned whether references to "treasonable or seditious speech or acts" in Section 3021 of the New York Education Law threatened the freedoms of speech and press that are fundamental to academic freedom in higher education. The Court declared both sections of state law unconstitutional in a decision that remains the foundation of jurisprudence in the area of academic freedom.

Facts of the Case

Keyishian and other appellants were faculty members at the University of Buffalo (UB), a private institution, and they became state employees in 1962 when UB joined the SUNY system. In accordance with state law, they were required to sign the "Feinberg Certificate" declaring their loyalty to state and federal governments. Section 3022 (the Feinberg Law) of New York's Education Law required all faculty members to certify that they were not members of the Communist Party and that if they ever had been members, they had communicated that fact to the President of SUNY. Membership in the Communist Party was prima facie cause to deny or discontinue employment.

Keyishian refused to sign on principle, and his one-year contract was not renewed. The state also served notice that the unexpired contracts of his colleagues would not be extended. Keyishian filed suit, alleging violation of their constitutional rights to free speech and assembly. Subsequently, the federal district court declared the New York law constitutional and dismissed the complaint.

The Court's Ruling

On appeal, the Supreme Court focused on two questions. First, did Section 3022 of the New York Education Law violate the constitutional rights of faculty? Second, were the references to treasonable and seditious actions in Section 3021 and related civil service regulations vague and overbroad and, therefore, likely to infringe the free speech and academic freedom rights of faculty?

After considering the first question in terms of existing case law, the Court ruled that membership in a subversive organization was not sufficient cause to deny employment at a public college or university.

Lacking evidence that the person plans to join in a group's illegal actions, denying them employment "infringes unnecessarily on constitutional rights and implies guilt by association which has no place [in a free society]." Consequently, the Court concluded that merely belonging to the Communist Party was not a constitutionally permissible ground for dismissal. After the *Keyishian* decision, public colleges and universities could not require faculty to sign loyalty oaths as a condition of employment.

Having rejected the constitutionality of Section 3022, the Supreme Court considered Section 3021 and related civil service regulations that mandated removal of faculty for "treasonable or seditious" acts. While commending New York's efforts to protect its educational system from subversion, the Court cautioned that constitutional rights could not be violated in the process. Indeed, the Court said, the greater the threat to schools and colleges,

> the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press, and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the . . . people and that changes, if desired, may be obtained by peaceful means. (p. 602)

To the Supreme Court, governmental sanctions for ill-defined "treasonable or seditious" speech or actions could have a chilling effect on the free discussion that is essential in a democratic society. Nowhere is free and open dialogue more important than on college and university campuses, the Court declared, where faculty must have the academic freedom to research, write, teach, and publish without fear of retaliation based on the unpopularity of their ideas. Describing the classroom as a "marketplace of ideas," the *Keyishian* Court defined academic freedom as "a special concern of the First Amendment which does not tolerate laws that cast a pall of orthodoxy over the classroom" (p. 603).

It was clear to the Court that the provisions in Section 3021 referencing treason and sedition were far too vague to meet constitutional muster; they could easily create "an atmosphere of suspicion and distrust" on college campuses, the Court said, and they posed a real threat to the academic freedom of faculty in New York state institutions if not amended or eliminated. Consequently, on January 23, 1967, the Supreme Court declared Sections 3021 and 3022 of the New York Education Law to be unconstitutional. Since that date, *Keyishian v. Board of Regents* has been perhaps the most frequently cited decision in academic freedom jurisprudence.

Robert C. Cloud

See also Academic Freedom; Loyalty Oaths

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Wieman v. Updegraff, 344 U.S. 183 (1952).

KINDERGARTEN, RIGHT TO ATTEND

Ever since the first kindergartens opened in the United States in the mid-1800s, discussions about the right to kindergarten, principles for kindergarten entry and eligibility, and what should be taught in kindergarten have taken place in most jurisdictions. This entry takes a broad view of kindergarten and then focuses on relevant law.

Background

When discussing the right to attend kindergarten, it is important to look at not only the legal rights, but also the moral, civil, parental, and ethical rights of all concerned. Morally, kindergarten can provide children from all walks of life with a sense of belonging to a peer group and should provide appropriate modeling of social, behavioral, and academic skills. In terms of civil rights, and flowing from the U.S. Supreme Court's monumental decision, in *Brown v. Board of Education of Topeka* (1954), to end racial segregation in public schools, it is now clear that in American society,

separate is not equal. Therefore, all children should have an equal opportunity to attend kindergarten.

Parents have the most knowledge of their own children's development and early childhood experiences as well as a responsibility for and interest in their children's future. To this end, parents should be able to pursue programs with the best support and service that will provide the optimal chances for their children to achieve to their fullest potential. Ethically, providing a diverse group of children the opportunity to learn how to function together despite different ability levels enhances the quality of life for all students. Even so, most of the discussion of the rights to kindergarten must focus on legal rights.

Insofar as education is not mentioned in the U.S. Constitution, it is a responsibility of the states to provide education to their citizens. The only way that the federal government participates in education is through ensuring that the rights of all citizens are fairly met under the Equal Protection Clause of the Fourteenth Amendment to the federal Constitution. In recent years, this has meant that Congress has enacted a number of laws, and many cases have been litigated with the intent of ensuring equal educational opportunities for all classes and types of children.

Relevant Law

At the same time, even though education is not a responsibility of the federal government, this does not mean that laws have not been enacted at the national level. For example, the Civil Rights Act of 1964 protects the rights of all minority groups. Under this law's provisions, particularly Title I, now incorporated in the No Child Left Behind Act (NCLB), the federal government has sought to ensure that all children, whatever their ability, social or economic background, race, physical condition, or other specific condition, be granted equal opportunities to participate in the kindergarten programs offered by the states within which they live. In fact, these laws have allowed the federal government to become involved at all levels of education to ensure equal opportunity.

The Individuals with Disabilities Education Act (IDEA), which was originally passed in 1975 as PL 94–142 and was amended in 1997 and again in 2004, also seeks to make kindergarten available to another class of children. The IDEA provides that children with disabilities are to be educated to the maximum extent with children who do not have disabilities. The IDEA's provisions address the need for the early childhood education, including kindergarten, for all students with disabilities.

In most states, kindergarten has not been a required element of compulsory attendance laws. Yet, kindergarten has become a more important part of the educational system in many states. In fact, some states have made full-day kindergarten a part of the goals for education in the next few years.

Differences will continue to exist among the states in terms of kindergarten offerings: whether it should be a full-time or part-time program, the proper age to start kindergarten, what academic content standards should be set, and which other criteria need to be considered. There are studies in progress that show that full-day kindergarten may help to close the achievement gap between those who are economically and socially deprived and those who are not lacking in these areas. Others believe that such programs are more an effort to meet the requirements of new federal laws such as NCLB and that the important part of kindergarten is the time spent with other children learning to plan their own activities, socialize with peers, and become prepared for their entry into the required school programs that start with the first grade.

A group known as the National Association of Early Childhood Specialists in State Departments of Education has pointed out that narrowing the curriculum in kindergarten programs actually constricts the equal education opportunity because it restricts teachers and forces them to treat children with various levels of need too similarly. As more research is done in the area of early childhood education, there will undoubtedly be more theories and opinions developed with respect to exactly what rights to kindergarten are available and which are most successful at producing students prepared to move ahead in school beyond kindergarten.

James P. Wilson

See also *Brown v. Board of Education of Topeka;* Compulsory Attendance; Disabled Persons, Rights of; Equal Protection Analysis; No Child Left Behind Act

Further Readings

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Encyclopedia of EDUCATION LAW

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Lamb's Chapel v. Center Moriches Union Free School District

In disputes over the question of separation of church and state, the use of school facilities by religious groups has been an issue numerous times. The landmark case of *Lamb's Chapel v. Center Moriches Union Free School District* (1993) set a broad precedent for the use of public school facilities by outside groups, including religious organizations. In a rare unanimous decision, the U.S. Supreme Court ruled that a school board's denial of school facility use to a religious group violated the group's First Amendment guarantee to free speech.

Facts of the Case

Lamb's Chapel arose where a New York state law allowed school boards to permit a wide variety of groups to use their facilities and property for a wide array of outside purposes, including social, civic, and recreational meetings and entertainment. However, the law did not include the use of meetings for religious purposes.

A local church twice requested to use school facilities at Center Moriches Union Free School District, outside of school hours, to show a 6-hour video series dealing with parenting issues that centered on Christian family values. Board officials denied the church's request on both occasions, claiming that the film was "church related."

When the church and its pastor sued the board for violating the Free Speech Clause of the First Amendment of the U.S. Constitution, a federal trial court granted its motion for summary judgment. The court maintained that since the school's facilities were only a limited public forum, the board's denials of the group's request to use them for religious activities were, in fact, viewpoint neutral. The Second Circuit affirmed in favor of the board.

The Court's Ruling

On further review, the U.S. Supreme Court reversed in favor of the religious organization, on the basis that the board's denial of its request to use school facilities solely because the group planned to show a film with a religious basis did, indeed, violate the church's free speech rights as protected by the First Amendment. The Court explained that since the facilities were used by other non-school-related groups for functions during nonschool hours, the board had in effect established a "limited public forum."

The Court added that since there was no apparent threat of violence or disruption for allowing the group to use school facilities, the request to use district facilities should likely have been granted. The Court thus found that insofar as the only reason the board rejected the organization's request was solely that the group was of a religious nature, denying it access for this reason was a violation of the "viewpoint neutrality" standard that requires state agencies to exhibit neither a positive nor negative attitude toward religion.

By allowing school facilities to be used by civic and social groups, such as the Boy Scouts or Girl Scouts, the Supreme Court was of the opinion that school boards such as the one in Center Moriches establish a "limited public forum" and cannot then deny similar access or facility use to religious groups or organizations. The Court reasoned that opening school doors for some groups but not specifically for religious groups violates both the notion of viewpoint neutrality and their rights to free speech as protected by the First Amendment, even if this speech has its basis in religion or is made for religious purposes.

Likewise, the Court observed that allowing a group to use school facilities for religious purposes does not imply that school or board officials promote or establish religion. In fact, the Court pointed out that the use of facilities does not imply that a meeting (or movie, as in the case at bar) is a school-sponsored or school-endorsed event, because while such a gathering is not necessarily closed to the public, there is nothing to suggest that the board has established an open forum for the use of its facilities.

As the Supreme Court noted in *Lamb's Chapel,* and reiterated almost a decade later in *Good News Club v. Milford Central School* (2001), if the message being delivered by the use of school facilities is appropriate (which the movie on child rearing and family values was), then a government-sponsored agency such as a school board cannot discriminate solely on the basis of the religious nature of the messenger.

Stacey L. Edmonson

See also First Amendment; *Good News Club v. Milford Central School;* Religious Activities in Public Schools

Legal Citations

Good News Club v. Milford Central School, 21 F. Supp. 2d 147 (N.D.N.Y. 1998); *aff'd,* 202 F.3d 502 (2d Cir. 2000, *rev'd*); 533 U.S. 98 (2001). *Lamb's Chapel v. Center Moriches School District,* 508 U.S. 384 (1993).

Lau v. Nichols

At issue before the U.S. Supreme Court in *Lau v. Nichols* was whether a school system is required to provide a program to address the language problems of non-English-speaking students. In this civil rights class action suit, the Court ruled that school districts receiving federal funds must act to correct students' linguistic deficits to ensure they receive an equal education. The decision, based on the Civil Rights Act of 1964, failed to specify what kinds of remedies were required. This entry describes the case, the decision, and its impact on education.

Facts of the Case

Kinney Kinmon Lau and other non-English-speaking Chinese students sought to compel the San Francisco Unified School District (SFUSD) to provide all non-English-speaking Chinese students with bilingual compensatory education in the English language. The non-English-speaking Chinese students claimed that the SFUSD violated their rights under the Fourteenth Amendment Equal Protection Clause, Section 601 of the Civil Rights Act of 1964, the California Constitution, and provisions of the California Education Code.

According to the Equal Protection Clause, states are prohibited from denying any person equal protection of the laws. In *Brown v. Board of Education of Topeka* (1954), the Supreme Court relied on the Equal Protection Clause in reasoning that "separate but equal" educational facilities were unconstitutional. In the *Lau* case, a federal trial court determined that the SFUSD satisfied students' rights to an education and to equal educational opportunities; it denied relief to the non-English-speaking Chinese students. Interpreting *Brown* as mandating the provision of education on equal terms, the trial court concluded that the board did not violate the Equal Protection Clause, because officials provided the students with equal educational opportunities when they received the same education that was available to all other students in the SFUSD.

In 1973, the Ninth Circuit affirmed that the SFUSD did not violate either the equal protection rights of non-English-speaking Chinese students or Section 601 of the Civil Rights Act of 1964. The Ninth Circuit court focused extensively on distinguishing the facts and decision in *Lau* from those in *Brown.* Insofar as

the SFUSD had not directly or indirectly caused the language deficiencies, the Ninth Circuit found that the requisite discriminatory state action was absent. The Ninth Circuit explained that there were neither constitutional nor statutory mandates requiring the SFUSD to provide special remedial programs to students who were disadvantaged.

The Court Ruling

The Supreme Court granted certiorari because of the public importance of the issue in *Lau v. Nichols.* The Court decided that since the students could not read or speak English proficiently, the SFUSD had denied them their right to equal educational opportunities as required by Section 601 of the Civil Rights Act of 1964. Consistent with the Court's approach of seeking to avoid constitutional grounds in reviewing disputes, Section 601 of the Civil Rights Act was the sole basis on which it resolved *Lau.* According to Section 601, individuals may not be discriminated against based on race, color, or national origin in any program or activity receiving federal financial assistance.

The Department of Health, Education and Welfare (HEW) clarified this section of the Civil Rights Act of 1964 based on its duty to promulgate regulations prohibiting discrimination in school systems that receive federal financial assistance. In 1968, HEW issued a guideline directing school systems to provide students of a particular race, color, or national origin with an opportunity to obtain the same education that was available to all students. In 1970, HEW issued a second guideline, which specifically imposed upon federally funded school systems the responsibility of rectifying students' linguistic deficiencies to make instruction accessible for these students. These two guidelines attempted to clarify the responsibility of school systems to educate students in a nondiscriminatory fashion as required under Section 601 of the Civil Rights Act. In *Lau,* the Court pointed out both that HEW had authority to regulate the Civil Rights Act and that school boards were contractually obligated to comply as a condition of receiving federal funds.

Lau influenced state and federal policies that impacted the development of bilingual education programs in many school districts. For example, soon after *Lau,* Congress enacted the Equal Educational Opportunity Act (EEOA) of 1974 and the Bilingual Education Act of 1974. Thus, *Lau* signifies a fundamental turning point that reaffirmed the rights of non-English-speaking students to be free from discriminatory practices in educational programs and services.

Although *Lau* had a significant impact on the education of non-English-speaking students, the Court failed to adopt specific remedies to redress the school board's discriminatory practices. As a result, the Court did not deliver a clear mandate to the SFUSD or to other school systems regarding the provision of specific programs or services that would satisfy the obligation to educate non-English-speaking students in a nondiscriminatory fashion pursuant to Section 601 of the Civil Rights Act of 1964. Consequently, policy debates to determine appropriate programs for non-English-speaking students have been and will continue to be waged in school systems, state legislatures, and Congress.

Susan C. Bon

See also Bilingual Education; *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Act of 1964; English as a Second Language

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f).
Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).
Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

League of United Latin American Citizens (LULAC)

Responding to a long history in which their people have been at best ignored and at worst suffered discrimination, Mexican American citizens have formed

numerous civil rights organizations, typically in cities, to work to improve the conditions facing them. Perhaps the most notable of these civil rights organizations is the League of United Latin American Citizens (LULAC), with approximately 115,000 members in over 700 councils in the United States and Puerto Rico. Since its founding in 1929, LULAC has been an active advocacy organization dedicated to defending and protecting the rights of Hispanics, including their right to education.

Background

American history textbooks rarely recount the lives of the people who lived in Texas and California before and after these areas were incorporated into the United States during the early and mid-19th century. Typical history texts fail to mention that Mexican American citizens had to endure numerous forms of discrimination. In many places, they were barred from voting because they did not know English and were also deprived of English language instruction. Further, if they were allowed to vote, they had to pay a "poll tax."

Similarly, Mexican Americans were not allowed to serve on juries. If their children were able to attend a school, they attended segregated "Mexican schools," which had poorly prepared teachers and deplorable physical facilities. Finally, many private businesses posted signs stating "No Mexicans Allowed."

Emerging out of such conditions was LULAC, created in Corpus Christi, Texas, on February 17, 1929, when the local chapter of the Order of the Sons of America, the Knights of America of San Antonio, and the League of Latin American Citizens of South Texas united into one organization. The convention adopted as the organization's motto "All for One and One for All," as a constant reminder of the trials of unification and as basis for all LULAC's future activities. According to LULAC's mission statement, its goal is to advance the economic condition, educational attainment, political influence, health, and civil rights of the Hispanic population of the United States.

Civil Rights Litigation

LULAC has been involved in a number of cases at the state and federal levels that led to changes in laws affecting Mexican Americans. In the earliest case, *Mendez v. Westminster* (1947), an en banc panel of the Ninth Circuit held that the segregation of Mexican and Mexican American students into separate "Mexican schools" was unconstitutional.

Seven years later, LULAC spearheaded a successful effort in *Hernandez v. Texas* (1954), a dispute that involved a Mexican American who was tried and convicted for murder by an all-Anglo jury. Insofar as Mexican Americans had not served on a jury in Texas for 25 years, the plaintiff claimed that they had been discriminated against as a class. In writing the Supreme Court's unanimous opinion, Chief Justice Earl Warren explained as follows:

> When the existence of a distinct class is demonstrated, and it is shown that the laws, as written or as applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated. (*Hernandez v. Texas,* p. 478)

Two civil rights laws, Title VI of the Civil Rights Act of 1964 and the Equal Educational Opportunity Act (EEOA) of 1974, and the Supreme Court ruling in *Lau v. Nichols* (1974) afforded LULAC additional legal bases and precedents for bringing suits to protect Mexican American interests. Subsequently, in *Castaneda v. Pickard* (1981), parents of Mexican American students in Texas alleged that the instructional practices of the schools that their children attended violated their rights.

The Fifth Circuit established a three-pronged test in evaluating the claim: first, boards must use research-based programs viewed as sound by experts; second, boards must make adequate resources to implement programs; and, third, boards must evaluate programs and modify them if they fail to produce acceptable results. The Office for Civil Rights adopted this prong test for English Language Learning Classes, and LULAC has used the precedent to bring other suits involving the education of Mexican American students.

Two cases from Texas reached dissimilar results for Mexican Americans. In the first, *Plyler v. Doe* (1982), the Supreme Court ruled that a law denying a free public education to children whose parents were

undocumented violated the Equal Protection Clause of the Fourteenth Amendment. Conversely, a year later, in *Martinez v. Bynum* (1983), the Court upheld a residency law that did not permit a minor to live apart from his parents in order to attend a public school tuition free, because the sister with whom he lived refused to become his legal guardian.

LULAC initiated a suit against the Florida State Department of Education concerning the education provided to Hispanic students (*LULAC v. Florida Board of Education,* 1990), leading to a consent decree between the parties. Pursuant to this consent decree, Florida agreed to comply with the federal and state laws and judicial order addressing the education of limited-English-proficient (LEP) students. The consent decree provided for specific actions by the state in educating the students and preparing the teachers who would instruct the LEP children. Even so, on January 13, 2003, LULAC alleged that the state violated Section IV of the agreement. The Florida State Board of Education approved a mediation agreement on August 19, 2003, that required school administrators and guidance counselors to earn 60 hours of in-service in English for Speakers of Other Languages (ESOL); teachers who passed the ESOL test also had to complete 120 hours within a 3-year period.

LULAC was also involved in a political gerrymandering case from Texas that alleged that Hispanics would not be fairly represented because of the way the district was redrawn after the 2000 census. In *League of United Latin American Citizens v. Perry* (2006), the Supreme Court ordered the lower court to remedy the situation by redrawing district lines.

Robert J. Safransky

See also Civil Rights Movement; *Lau v. Nichols; Martinez v. Bynum; Plyler v. Doe*

Legal Citations

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).
Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703(f).
Hernandez v. Texas, 347 U.S. 475 (1954).
Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).
League of United Latin American Citizens v. Perry, 548 U.S. 399 (2006).
LULAC v. Florida Board of Education, C.A. # 90–1913-M (S.D. Fla. 1990).
Martinez v. Bynum, 461 U.S. 321 (1983).
Mendez v. Westminster School District of Orange County, 64 F. Supp. 544 (D.C. Cal. 1946), aff'd, 161 F.2d 774 (9th Cir. 1947).
Plyler v. Doe, 457 U.S. 202 (1982).
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Least Restrictive Environment

One of the key mandates of the Individuals with Disabilities Education Act (IDEA) is that all students with disabilities are to be educated in the *least restrictive environment* (LRE). This requirement applies across the continuum of placement alternatives that a school board needs to maintain under the statute.

In particular, the IDEA requires states, and consequently school boards, to set up procedures ensuring that students with disabilities are educated to the maximum extent appropriate with children who do not have disabilities. The IDEA further directs that students with disabilities be placed in special classes or separate facilities, or otherwise be removed from the general education environment only when the nature or severity of their disabilities is such that instruction in general education classes cannot be achieved satisfactorily, even with supplementary aids and services. The IDEA's LRE provisions relate to students who attend private schools, institutions, or other care facilities at public expense in addition to those who attend special education programs within the public schools. The IDEA's LRE provisions are so intertwined with the statute's requirement to provide a free appropriate public education that one is rarely mentioned without reference to the other.

Required Inclusion

In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), the U.S. Supreme Court stated that an appropriate education is one that is formulated pursuant to all of the IDEA's procedures and is sufficient to confer some educational benefit on a student with disabilities. The Court added that the

program provided to a student in a special education placement who attends school in a regular classroom setting should enable the child to achieve passing marks and advance from one grade to the next.

In determining the least restrictive setting for a given student, school officials need to consider a variety of factors, including the student's educational needs and social needs. Initial guidance in this regard was provided by several high-profile court cases. In two of these cases, federal appellate courts directed school boards to place students with disabilities in regular settings, as opposed to segregated special education classrooms. In both disputes, the courts insisted that educators must consider a variety of factors when formulating the LRE for children with disabilities.

In a case from New Jersey, *Oberti v. Board of Education of the Borough of Clementon School District* (1993), the Third Circuit adopted a two-part test, originally outlined by the Fifth Circuit in litigation from Texas (*Daniel R. R. v. State Board of Education,* 1989), for evaluating compliance with the IDEA's LRE mandate. The first component of the test asks whether the child in question can be educated satisfactorily in a regular classroom with the use of supplementary aids and services. The second element of the test, which is applicable when a placement outside of the general education setting is necessary, asks whether the child will be placed to the maximum extent appropriate with children who are not disabled.

The Ninth Circuit in *Sacramento City Unified School District Board of Education v. Rachel H.* (1994), a dispute from California, summarized the pronouncements of several courts when it stated that school officials must consider four factors in making LRE placements: the educational benefits of placing children with disabilities in regular classrooms, the nonacademic benefits of such placements, the effect that the presence of students with disabilities would have on teachers and other children in a class, and the costs of inclusionary placements. Each of these factors must be taken into account when placing students with disabilities in any educational program.

Approved Exceptions

Included in both the *Oberti* and *Rachel H.* opinions is the principle that school authorities must make reasonable efforts to place students with disabilities in inclusive settings by providing them with supplementary aids and services to ensure their success prior to considering more restrictive placements. Despite the emphasis on inclusion, not all students with disabilities are best placed in general education classes. Due to the nature or severity of their disabilities, many students are better served in more restrictive settings. Courts will approve segregated settings over parental objections when individualized educational (IEP) teams can show that students with disabilities cannot function in regular classrooms or will not receive educational benefit in such settings, even with the addition of supplementary aids and services *(Beth B. v. Van Clay,* 2002; *Clyde K. v. Puyallup School District No. 3,* 1994; *Capistrano Unified School District v. Wartenberg,* 1995). In one such situation, the federal trial court in New Hampshire recognized that an IEP calling for inclusion in some subjects was not suitable for a 15-year-old student who was reading on a first-grade level (*Manchester School District v. Christopher B.,* 1992).

In essence, a placement in the general education setting should be the placement of choice, and a segregated setting should be considered only if a fully inclusive placement has failed despite the best efforts of educators or there is overwhelming evidence that it is not reasonable.

Allan G. Osborne, Jr.

See also *Board of Education of the Hendrick Hudson Central School District v. Rowley;* Free Appropriate Public Education; Inclusion

Legal Citations

Beth B. v. Van Clay, 282 F.3d 493 (7th Cir. 2002).
Board of Education of the Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).
Capistrano Unified School District v. Wartenberg, 59 F.3d 884 (9th Cir. 1995).
Clyde K. v. Puyallup School District No. 3, 35 F.3d 1396 (9th Cir. 1994).
Daniel R. R. v. State Board of Education, 874 F.2d 1036 (5th Cir. 1989).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Manchester School District v. Christopher B., 807 F. Supp. 860, (D.N.H. 1992).

Oberti v. Board of Education of the Borough of Clementon School District, 995 F.2d 1204 (3d Cir. 1993).

Sacramento City Unified School District Board of Education v. Rachel H., 14 F.3d 1398 (9th Cir. 1994), *cert. denied,* 512 U.S. 1207 (1994).

Leaves of Absence

School boards and other employers offer an array of leaves, including sick leave, emergency leave, personal leave, vacation, jury duty leave, Family and Medical Leave Act (FMLA) leave, and sabbatical leave. Leaves of absence are generally granted through federal or state statutes to state, local, and federal employees, including school employees. Leave categories are either unpaid or paid leave for employees meeting eligibility requirements, which usually address length of service. Labor agreements generally contain specifics for local education systems requirements, along with school board policy, for paid and unpaid leaves and must be in compliance with state and federal statutes.

Unpaid Leaves

The FMLA ensures eligible employees up to 12 work weeks unpaid leave within a 12-month period for one or more of the following reasons: the birth and care of the newborn child of the employee; placement with the employee of a son or daughter for adoption or foster care; caring for an immediate family member identified as a spouse, child, or parent with a serious health condition; or taking medical leave when the employee is unable to work because of a serious health condition. To be eligible, employees must have been employed by the employer for at least 12 months and for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. FMLA's "serious health condition" is defined in state statutes or labor agreements. Benefits continue while employees are on approved FMLA leave. Employees may elect to use (or boards may require the use of) available, accrued paid vacation, personal, or medical/sick leave for all or part of the maximum 12-week period of medical leave. Special rules apply to school employees who wish to take FMLA leave at or near the end of an academic year.

Maternal/paternal/parental leave for birth, adoption, or child care is unpaid leave when school employees have utilized other forms of paid leaves available to them through statutes. The FMLA allows for up to 12 work weeks of unpaid leave for maternal/paternal/parental leave.

Guidelines for educational/professional leave and sabbatical vary by state and district. The purpose of these leaves is to permit educational professionals to study, and typically this is limited to no more than 1 academic year to eligible employees. In states that offer this as a form of paid leave, it is generally based on a formula of no more than one half of an individual's annual salary

Overused sick leave occurs when school employees have used all available sick leave. If sick leave banks are not available, employees would then be on unpaid leave.

Personal leaves may be granted through labor agreements and can be both paid and unpaid if employees have used their available days. Eligibility perimeters are typically set forth in school board policies or collective bargaining agreements. Personnel who are on unpaid leaves may be granted the opportunity to retain insurance benefits by personally paying the premiums.

Military 1eave is addressed in both state and federal law. Under this leave, school boards must grant their employees defense service leave to fulfill their military obligations.

Paid Leaves

Most paid leaves are short term and range from a few days to a few weeks. Generally, benefits continue while school employees are on paid leaves.

Sick leave is used for employees' medical examinations and treatments or occurs due to the physical inability to work because of personal illness or the illness or death of an immediate or close family member. In many states, school employees earn 1 day of sick leave for each month that they are on the job. State statutes usually grant school boards the authority to establish policies that allow for portions of accrued sick leave to be used for personal reasons.

Illness-in-the-line-of-duty leave is paid leave for school employees who are absent from their duties on account of personal injuries received in the discharge of their jobs or having contracted illness from a contagious or infectious disease. Personal injury claims, which are usually handled through worker's compensation laws, vary according to state laws. Depending on state law, employees (or their estates) may have to forfeit their benefits if their injuries or deaths result from willful misconduct or from intoxication.

Maternity leave is considered a short-term disability and can be paid leave if teachers use their accrued vacation and personal leave. Discrimination on the basis of pregnancy, childbirth, or other related medical conditions is considered unlawful sex discrimination under the terms of the Pregnancy Discrimination Act, as incorporated into Title VII of the Civil Rights Act of 1964.

Jury duty leave for the majority of employers is paid leave if employees are summoned to serve on juries or are subpoenaed as witnesses, but not as defendants or plaintiffs in litigation. School boards typically require employees to submit copies of the summonses or subpoenas to their supervisors.

Vacation leave is normally earned according to a formula based on days/hours worked. It is usually earned by school employees on 12-month contracts.

Paid holidays are addressed in both federal and state statutes. In states where school employees operate under collective bargaining agreements, designated paid holidays are negotiated and may be celebrated on dates other than the public holiday date as set by the state. Holidays are part of the total contractual days. For example, in Florida, teachers work 196 to 198 days (180 instructional days), including six paid holidays and the remainder designated as work days or professional development.

Darlene Y. Bruner

See also Collective Bargaining; Family and Medical Leave Act; Title VII

Legal Citations

Family and Medical Leave Act, 29 U.S.C. §§ 2611 *et seq.*
Pregnancy Discrimination Act, incorporated in Title VII, 42 U.S.C. 2000e(k).

Lee v. Weisman

Prayer as a long-standing tradition in many public school graduation ceremonies came under the scrutiny of the Supreme Court in *Lee v. Weisman* (1992). The Court ruled that having the school principal select a clergyman to deliver a prayer at graduation violated the Establishment Clause's prohibition against state involvement in establishing religion.

Facts of the Case

A public middle school in *Lee* had a practice of selecting clergy to deliver a graduation invocation and benediction graduation. Clergy who were interested in participating in graduation ceremonies had only to contact the middle school principal who was in charge of graduation. The principal in *Lee* selected a rabbi to deliver the prayers, provided him with a pamphlet containing guidelines for the composition of public prayers at civic ceremonies, and advised him that the prayers should be nonsectarian.

The invocation and benediction delivered by the rabbi had two references to "God" and one to "Lord" (*Lee,* p. 581). Attendance at the middle school graduation was voluntary. Those attending the graduation at issue in *Lee* stood for the Pledge of Allegiance and remained standing for the rabbi's invocation and, at the end of the graduation, stood again for the benediction.

A parent of a middle school student challenged, under the Establishment Clause, the use of prayer at graduation. Although the parent was unsuccessful in securing a preliminary injunction prohibiting the use of the prayers at his daughter's graduation, the federal trial court in Rhode Island subsequently found the prayers unconstitutional under the second part of the three-part *Lemon v. Kurtzman* (1971) test, which

prohibits government interaction with religion that has the impermissible effect of advancing religion. The First Circuit affirmed, also on the basis of *Lemon.*

The Court's Ruling

The Supreme Court affirmed in *Lee* that the practice of prayer at the public school graduation ceremony violated the Establishment Clause. Critical to the Court's analysis was the involvement of the principal in selecting the person to deliver the prayers, wherein the Court perceived "the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony" (*Lee,* p. 587). Despite what the Court characterized as the "good-faith attempt by the school" (p. 589) to eliminate sectarianism from the prayers, the Court was of the opinion that "our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students" (p. 590).

In reaching its holding, the Court took issue with the school's position that attendance at graduation was voluntary, with the observation that graduation is a rite of passage in which those closest to students "celebrate success and express mutual wishes of gratitude and respect" (*Lee,* p. 596). According to the Court, compelling graduates and their families to make a choice between missing graduation or attending graduation and feeling compelled to stand for a religious part of the ceremony with which they disagree amounts to a kind of psychological coercion that leaves them "with no alternative but to submit" (p. 597).

In the end, the Court found the prayer exercises a violation of the Establishment Clause "because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid" (*Lee,* p. 598).

Justice Scalia wrote a scathing dissent, observing that the majority's opinion in *Lee* "lays waste a tradition that is as old as public-school graduation ceremonies themselves" (p. 632). Nevertheless, *Lee* has not been overturned. *Lee* resulted in cases where school officials sought to circumvent the Court's decision by permitting students to decide whether a prayer was permissible at a school event and then by changing a prayer to a student message. The notion was that student votes would have avoided the problem in *Lee,* in which a school official selected the person to pray, and the use of the student message was thought desirable to allow for secular content while avoiding the religious connotation of a prayer.

Eight years after *Lee,* in *Santa Fe Independent School District v. Doe* (2000), the Supreme Court invalidated the use of a student message prior to every home football game despite a two-step process whereby students would first vote on whether to have a message and then vote on the student who would deliver the message. The Court pointed out that student-initiated and student-led messages did not amount to private speech because they were delivered over the school's public address system on government property at a government-sponsored, school-related event and because the school's tradition would encourage a message that was religious in nature.

On the other hand, the Eleventh Circuit, in *Adler v. Duval County School Board* (2000), reached a conclusion just the opposite of *Santa Fe,* finding that student-initiated and student-led messages at graduations constituted private speech and were not so entwined with governmental policies or so impregnated with governmental character as to become subject to the constitutional limitations placed on state action.

Ralph D. Mawdsley

See also *Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Schools; *Santa Fe Independent School District v. Doe*

Legal Citations

Adler v. Duval County School Board, 206 F.3d 1070 (2000).
Lee v. Weisman, 505 U.S. 577 (1992).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

Lee v. Weisman (Excerpts)

In Lee v. Weisman *the Supreme Court decided that school sponsored prayer at a graduation ceremony violated the Establishment Clause not only because educational officials were involved in selecting who would pray but also because prayer may have psychologically coerced those who did not wish to participate.*

Supreme Court of the United States

LEE

v.

WEISMAN

750 U.S. 577

Argued Nov. 6, 1991.

Decided June 24, 1992.

Justice KENNEDY delivered the opinion of the Court.

School principals in the public school system of the city of Providence, Rhode Island, are permitted to invite members of the clergy to offer invocation and benediction prayers as part of the formal graduation ceremonies for middle schools and for high schools. The question before us is whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the Religion Clauses of the First Amendment, provisions the Fourteenth Amendment makes applicable with full force to the States and their school districts.

I

A

Deborah Weisman graduated from Nathan Bishop Middle School, a public school in Providence, at a formal ceremony in June 1989. She was about 14 years old. For many years it has been the policy of the Providence School Committee and the Superintendent of Schools to permit principals to invite members of the clergy to give invocations and benedictions at middle school and high school graduations. Many, but not all, of the principals elected to include prayers as part of the graduation ceremonies. Acting for himself and his daughter, Deborah's father, Daniel Weisman, objected to any prayers at Deborah's middle school graduation, but to no avail. The school principal, petitioner Robert E. Lee, invited a rabbi to deliver prayers at the graduation exercises for Deborah's class. Rabbi Leslie Gutterman, of the Temple Beth El in Providence, accepted.

It has been the custom of Providence school officials to provide invited clergy with a pamphlet entitled "Guidelines for Civic Occasions," prepared by the National Conference of Christians and Jews. The Guidelines recommend that public prayers at nonsectarian civic ceremonies be composed with "inclusiveness and sensitivity," though they acknowledge that "[p]rayer of any kind may be inappropriate on some civic occasions." The principal gave Rabbi Gutterman the pamphlet before the graduation and advised him the invocation and benediction should be nonsectarian.

Rabbi Gutterman's prayers were as follows:

"INVOCATION

"God of the Free, Hope of the Brave:

"For the legacy of America where diversity is celebrated and the rights of minorities are protected, we thank You. May these young men and women grow up to enrich it.

"For the liberty of America, we thank You. May these new graduates grow up to guard it.

"For the political process of America in which all its citizens may participate, for its court system where all may seek justice we thank You. May those we honor this morning always turn to it in trust.

"For the destiny of America we thank You. May the graduates of Nathan Bishop Middle School so live that they might help to share it.

"May our aspirations for our country and for these young people, who are our hope for the future, be richly fulfilled.

AMEN"

"BENEDICTION

"O God, we are grateful to You for having endowed us with the capacity for learning which we have celebrated on this joyous commencement.

"Happy families give thanks for seeing their children achieve an important milestone. Send Your blessings upon the teachers and administrators who helped prepare them.

"The graduates now need strength and guidance for the future, help them to understand that we are not complete with academic knowledge alone. We must each strive to fulfill what You require of us all: To do justly, to love mercy, to walk humbly.

"We give thanks to You, Lord, for keeping us alive, sustaining us and allowing us to reach this special, happy occasion.

AMEN"

The record in this case is sparse in many respects, and we are unfamiliar with any fixed custom or practice at middle school graduations, referred to by the school district as "promotional exercises." We are not so constrained with reference to high schools, however. High school graduations are such an integral part of American cultural life that we can with confidence describe their customary features, confirmed by aspects of the record and by the parties' representations at oral argument. In the Providence school system, most high school graduation ceremonies are conducted away from the school, while most middle school ceremonies are held on school premises. . . . The parties stipulate that attendance at graduation ceremonies is voluntary. The graduating students enter as a group in a processional, subject to the direction of teachers and school officials, and sit together, apart from their families.

We assume the clergy's participation in any high school graduation exercise would be about what it was at Deborah's middle school ceremony. There the students stood for the Pledge of Allegiance and remained standing during the rabbi's prayers. Even on the assumption that there was a respectful moment of silence both before and after the prayers, the rabbi's two presentations must not have extended much beyond a minute each, if that. We do not know whether he remained on stage during the whole ceremony, or whether the students received individual diplomas on stage, or if he helped to congratulate them.

The school board (and the United States, which supports it as *amicus curiae*) argued that these short prayers and others like them at graduation exercises are of profound meaning to many students and parents throughout this country who consider that due respect and acknowledgment for divine guidance and for the deepest spiritual aspirations of our people ought to be expressed at an event as important in life as a graduation. We assume this to be so in addressing the difficult case now before us, for the significance of the prayers lies also at the heart of Daniel and Deborah Weisman's case.

B

Deborah's graduation was held on the premises of Nathan Bishop Middle School on June 29, 1989. Four days before the ceremony, Daniel Weisman, in his individual capacity as a Providence taxpayer and as next friend of Deborah, sought a temporary restraining order in the United States District Court for the District of Rhode Island to prohibit school officials from including an invocation or benediction in the graduation ceremony. The court denied the motion for lack of adequate time to consider it. Deborah and her family attended the graduation, where the prayers were recited. In July 1989, Daniel Weisman filed an amended complaint seeking a permanent injunction barring petitioners, various officials of the Providence public schools, from inviting the clergy to deliver invocations and benedictions at future graduations. We find it unnecessary to address Daniel Weisman's taxpayer standing, for a live and justiciable controversy is before us. Deborah Weisman is enrolled as a student at Classical High School in Providence and from the record it appears likely, if not certain, that an invocation and benediction will be conducted at her high school graduation.

The case was submitted on stipulated facts. The District Court held that petitioners' practice of including invocations and benedictions in public school graduations violated the Establishment Clause of the First Amendment, and it enjoined petitioners from continuing the practice. The court applied the three-part Establishment Clause test set forth in *Lemon v. Kurtzman*. . . .

On appeal, the United States Court of Appeals for the First Circuit affirmed. . . . We granted certiorari and now affirm.

II

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

This case does not require us to revisit the difficult questions dividing us in recent cases, questions of the definition and full scope of the principles governing the extent of permitted accommodation by the State for the religious beliefs and practices of many of its citizens. . . . We can decide the case without reconsidering the general constitutional framework by which public schools' efforts to accommodate religion are measured. Thus we do not accept the invitation of petitioners and *amicus* the

United States to reconsider our decision in *Lemon v. Kurtzman.* The government involvement with religious activity in this case is pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school. Conducting this formal religious observance conflicts with settled rules pertaining to prayer exercises for students, and that suffices to determine the question before us.

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so." The State's involvement in the school prayers challenged today violates these central principles.

That involvement is as troubling as it is undenied. A school official, the principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State. The reason for the choice of a rabbi is not disclosed by the record, but the potential for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.

Divisiveness, of course, can attend any state decision respecting religions, and neither its existence nor its potential necessarily invalidates the State's attempts to accommodate religion in all cases. The potential for divisiveness is of particular relevance here though, because it centers around an overt religious exercise in a secondary school environment where, as we discuss below, subtle coercive pressures exist and where the student had no real alternative which would have allowed her to avoid the fact or appearance of participation.

The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," and that is what the school officials attempted to do.

Petitioners argue, and we find nothing in the case to refute it, that the directions for the content of the prayers were a good-faith attempt by the school to ensure that the sectarianism which is so often the flashpoint for religious animosity be removed from the graduation ceremony. The concern is understandable, as a prayer which uses ideas or images identified with a particular religion may foster a different sort of sectarian rivalry than an invocation or benediction in terms more neutral. The school's explanation, however, does not resolve the dilemma caused by its participation. The question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all when the object is to produce a prayer to be used in a formal religious exercise which students, for all practical purposes, are obliged to attend.

We are asked to recognize the existence of a practice of nonsectarian prayer, prayer within the embrace of what is known as the Judeo-Christian tradition, prayer which is more acceptable than one which, for example, makes explicit references to the God of Israel, or to Jesus Christ, or to a patron saint. There may be some support, as an empirical observation . . . that there has emerged in this country a civic religion, one which is tolerated when sectarian exercises are not. If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.

The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State. The design of the Constitution is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere, which itself is promised freedom to pursue that mission. It must not be forgotten then, that while concern must be

given to define the protection granted to an objector or a dissenting nonbeliever, these same Clauses exist to protect religion from government interference. James Madison, the principal author of the Bill of Rights, did not rest his opposition to a religious establishment on the sole ground of its effect on the minority. . . .

These concerns have particular application in the case of school officials, whose effort to monitor prayer will be perceived by the students as inducing a participation they might otherwise reject. Though the efforts of the school officials in this case to find common ground appear to have been a good-faith attempt to recognize the common aspects of religions and not the divisive ones, our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students. And these same precedents caution us to measure the idea of a civic religion against the central meaning of the Religion Clauses of the First Amendment, which is that all creeds must be tolerated and none favored. The suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds strikes us as a contradiction that cannot be accepted.

The degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position. We turn our attention now to consider the position of the students, both those who desired the prayer and she who did not.

To endure the speech of false ideas or offensive content and then to counter it is part of learning how to live in a pluralistic society, a society which insists upon open discourse towards the end of a tolerant citizenry. And tolerance presupposes some mutuality of obligation. It is argued that our constitutional vision of a free society requires confidence in our own ability to accept or reject ideas of which we do not approve, and that prayer at a high school graduation does nothing more than offer a choice. By the time they are seniors, high school students no doubt have been required to attend classes and assemblies and to complete assignments exposing them to ideas they find distasteful or immoral or absurd or all of these. Against this background, students may consider it an odd measure of justice to be subjected during the course of their educations to ideas deemed offensive and irreligious, but to be denied a brief, formal prayer ceremony that the school offers in return. This argument cannot prevail, however. It overlooks a fundamental dynamic of the Constitution.

The First Amendment protects speech and religion by quite different mechanisms. Speech is protected by ensuring its full expression even when the government participates, for the very object of some of our most important speech is to persuade the government to adopt an idea as its own. The method for protecting freedom of worship and freedom of conscience in religious matters is quite the reverse. In religious debate or expression the government is not a prime participant, for the Framers deemed religious establishment antithetical to the freedom of all. The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lesson of history that was and is the inspiration for the Establishment Clause, the lesson that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce. A state-created orthodoxy puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed.

The lessons of the First Amendment are as urgent in the modern world as in the 18th century when it was written. One timeless lesson is that if citizens are subjected to state-sponsored religious exercises, the State disavows its own duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people. To compromise that principle today would be to deny our own tradition and forfeit our standing to urge others to secure the protections of that tradition for themselves.

As we have observed before, there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools. Our decisions in *Engel v. Vitale* and *School Dist. of Abington* recognize, among other things, that prayer exercises in public schools carry a particular risk of indirect coercion. The concern may not be limited to the context of schools, but it is most pronounced there. What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

We need not look beyond the circumstances of this case to see the phenomenon at work. The undeniable fact

is that the school district's supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion. Of course, in our culture standing or remaining silent can signify adherence to a view or simple respect for the views of others. And no doubt some persons who have no desire to join a prayer have little objection to standing as a sign of respect for those who do. But for the dissenter of high school age, who has a reasonable perception that she is being forced by the State to pray in a manner her conscience will not allow, the injury is no less real. There can be no doubt that for many, if not most, of the students at the graduation, the act of standing or remaining silent was an expression of participation in the rabbi's prayer. That was the very point of the religious exercise. It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. What matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it.

Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting. We do not address whether that choice is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position. Research in psychology supports the common assumption that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention. To recognize that the choice imposed by the State constitutes an unacceptable constraint only acknowledges that the government may no more use social pressure to enforce orthodoxy than it may use more direct means.

The injury caused by the government's action, and the reason why Daniel and Deborah Weisman object to it, is that the State, in a school setting, in effect required participation in a religious exercise. It is, we concede, a brief exercise during which the individual can concentrate on joining its message, meditate on her own religion, or let her mind wander. But the embarrassment and the intrusion of the religious exercise cannot be refuted by arguing that these prayers, and similar ones to be said in the future, are of a *de minimis* character. To do so would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority. And for the same reason, we think that the intrusion is greater than the two minutes or so of time consumed for prayers like these. Assuming, as we must, that the prayers were offensive to the student and the parent who now object, the intrusion was both real and, in the context of a secondary school, a violation of the objectors' rights. That the intrusion was in the course of promulgating religion that sought to be civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront.

There was a stipulation in the District Court that attendance at graduation and promotional ceremonies is voluntary. Petitioners and the United States, as *amicus,* made this a center point of the case, arguing that the option of not attending the graduation excuses any inducement or coercion in the ceremony itself. The argument lacks all persuasion. Law reaches past formalism. And to say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme. True, Deborah could elect not to attend commencement without renouncing her diploma; but we shall not allow the case to turn on this point. Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. A school rule which excuses attendance is beside the point. Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

The importance of the event is the point the school district and the United States rely upon to argue that a formal prayer ought to be permitted, but it becomes one of the principal reasons why their argument must fail. Their contention, one of considerable force were it not for the constitutional constraints applied to state action, is that the prayers are an essential part of these ceremonies because for many persons an occasion of this

significance lacks meaning if there is no recognition, however brief, that human achievements cannot be understood apart from their spiritual essence. We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands.

The Government's argument gives insufficient recognition to the real conflict of conscience faced by the young student. The essence of the Government's position is that with regard to a civic, social occasion of this importance it is the objector, not the majority, who must take unilateral and private action to avoid compromising religious scruples, hereby electing to miss the graduation exercise. This turns conventional First Amendment analysis on its head. It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice. To say that a student must remain apart from the ceremony at the opening invocation and closing benediction is to risk compelling conformity in an environment analogous to the classroom setting, where we have said the risk of compulsion is especially high. Just as in *Engel v. Vitale* and *School Dist. of Abington v. Schempp,* where we found that provisions within the challenged legislation permitting a student to be voluntarily excused from attendance or participation in the daily prayers did not shield those practices from invalidation, the fact that attendance at the graduation ceremonies is voluntary in a legal sense does not save the religious exercise.

. . . .

We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation. We know too that sometimes to endure social isolation or even anger may be the price of conscience or nonconformity. But, by any reading of our cases, the conformity required of the student in this case was too high an exaction to withstand the test of the Establishment Clause. The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid.

Our jurisprudence in this area is of necessity one of line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State. "The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow."

Our society would be less than true to its heritage if it lacked abiding concern for the values of its young people, and we acknowledge the profound belief of adherents to many faiths that there must be a place in the student's life for precepts of a morality higher even than the law we today enforce. We express no hostility to those aspirations, nor would our oath permit us to do so. A relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution. We recognize that, at graduation time and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students. But these matters, often questions of accommodation of religion, are not before us. The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform. No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise. That is being done here, and it is forbidden by the Establishment Clause of the First Amendment.

For the reasons we have stated, the judgment of the Court of Appeals is

Affirmed.

Citation: *Lee v. Weisman,* 505 U.S. 577 (1992).

LEMON V. KURTZMAN

Lemon v. Kurtzman (1971), or "*Lemon I,*" is best known for its three-part test, which the Supreme Court created to be used in evaluating whether government action violates the Establishment Clause; this provision prohibits the government from making laws "respecting an establishment of religion." The three parts of the "*Lemon* test" are that (1) a statute or program must have a secular legislative purpose, (2) its principal or primary effect must be one that neither advances nor inhibits religion, and (3) it must not foster an excessive government entanglement with religion (*Lemon,* pp. 612–613). This entry examines the background of that decision and succeeding rulings.

The Original Cases

Lemon I involved jointure of two separate cases interpreting statutes in Rhode Island and Pennsylvania that provided funds and materials for religious schools. The case from Rhode Island addressed the constitutionality of a Salary Supplement Act enacted in 1969 that provided for a 15% salary supplement to be paid to teachers in nonpublic (including religious) schools at which the average per-pupil expenditure on secular education was below the average in public schools. For teachers in nonpublic schools to be eligible for the supplement, they had to teach only courses offered in the public schools, use only materials that were used in the public schools, and agree not to teach courses in religion.

The case from Pennsylvania involved a constitutional challenge to the state's Nonpublic Elementary and Secondary Education Act, passed in 1968, which authorized reimbursement for specific secular subjects and for textbooks and materials used in those courses by nonpublic schools and approved by the superintendent. The law did not allow for any payment for teachers' salaries, textbooks, and instructional materials for any courses containing subject matter expressing religious teaching or the morals or forms of worship of any sect.

Approximately 25% of all elementary students in Rhode Island and 20% in Pennsylvania attended religious schools, virtually all of which were operated by the Roman Catholic Church. Three-judge federal trial courts in Rhode Island and Pennsylvania reached opposite conclusions about the constitutionality of the state statutes, with the court in Rhode Island finding the state's statute a violation of the Establishment Clause. Conversely, the court in Pennsylvania did not think that there was any such violation. On direct appeal to the Supreme Court in *Lemon I,* it struck down both statutes as violating the Establishment Clause.

The Supreme Court held that both statutes violated the third part of the so-called *Lemon* test, namely, that supervision of the nonpublic school support programs authorized by the statutes would excessively entangle the states with the religious schools being served. In both cases, the Court decided that the law violated the Establishment Clause because of the restrictions and surveillance that were necessary to ensure that teachers played a strictly nonideological role and by creating state supervision of nonpublic school accounting procedures to establish the cost of secular as distinguished from religious education.

The Court also determined that political divisiveness along religious lines would likely result, as religious groups benefiting from the successive and probably annual state legislative appropriations would intensify their lobbying efforts for more funding.

Two years after *Lemon I,* the Supreme Court, in *Lemon II* (1973), revisited the case from Pennsylvania after a federal trial court refused to permit reimbursements to be made for the 1970–1971 school year, even though *Lemon I* had not occurred until June 28, 1971. A bare majority of the Supreme Court maintained that the payment of the allocated funds for the 1970–1971 school year would not have substantially undermined the constitutional interest at stake and that the denial of the payment would have serious financial consequences on private schools that relied on the agreement.

Worth noting is that the attorney successfully representing the interests of the religious schools in *Lemon II* was William Ball, the same attorney who, in another U.S. Supreme Court case during the previous year, defended two Amish fathers from a truancy charge in *Wisconsin v. Yoder* (1972).

The *Lemon* Test

The *Lemon* three-part test became a prominent feature in the 1970s, as the Supreme Court and lower courts used it in a variety of cases to invalidate state efforts to assist religious schools (see *Committee for Public Education & Religious Liberty v. Nyquist,* 1973; *Meek v. Pittenger,* 1975; and *Wolman v. Walter,* 1977). However, beginning with *Mueller v. Allen,* in 1983, the Court began relaxing *Lemon I*'s stranglehold on public assistance of religious schools by relying on a neutrality test. In addition, Justice O'Connor, in her concurring opinion in *Lynch v. Donnelly* (1976), suggested a new two-part endorsement test that became a staple in Establishment Clause analysis. The two parts of the endorsement test are a *secular government purpose* (virtually unchanged from the first part of the *Lemon I* test) and a *reasonable objective observer* test as to whether state involvement with religion would be perceived as endorsing or sponsoring religion.

In addition to *Lemon I,* neutrality, and endorsement tests, the Supreme Court had over the years referenced three other tests: divisiveness (*Meek v. Pittenger,* 1975, p. 375), coercion (*Lee v. Weisman,* 1992, p. 588), and historical intent (*McCreary County v. American Civil Liberties Union,* 2005, pp. 2748–2749). Even so, the use of these other tests has not eliminated judicial reliance on the *Lemon I* test, much to the chagrin of some justices. In his memorable, concurring opinion in *Lamb's Chapel v. Center Moriches Union Free School District* (1993), Justice Scalia lamented the resiliency of the *Lemon* test:

> Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under. (p. 398)

New Standards

As Justice Scalia so eloquently expressed, the *Lemon* test is not dead, but it has survived with a somewhat subdued vitality, as reflected in two recent Supreme Court cases, *McCreary County v. American Civil Liberties Union* (2005) and *Van Orden v. Perry* (2005). While both of these disputes concerned the display of the Ten Commandments on public property and were handed down on the same day, the Court reached opposite results. In *McCreary,* a bare majority of the Court relied on the "purpose" part of the *Lemon* test to invalidate the display of the Ten Commandments in two county courthouses. Despite the presence of other historical documents, the display was arranged in such a manner that juxtaposed the Commandments with other documents, with highlighted references to God as their sole common element. The Court observed that "the display's unstinting focus was on religious passages, showing that the Counties were posting the Commandments precisely because of their sectarian content" (*McCreary,* p. 2739).

Another bare Supreme Court majority in *Van Orden* held that a monument inscribed with the Ten Commandments located on the Texas State Capitol grounds did not violate the Establishment Clause. The Court observed that "whatever may be the fate of the *Lemon* test in the larger scheme of Establishment Clause jurisprudence, we think it not useful in dealing with the sort of passive monument that Texas has erected on its Capitol grounds" (*Van Orden,* p. 2861). Instead, the Court created an historical intent test, noting that in terms of the nation's history, "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789" (*Van Orden,* p. 2861, quoting from *Lynch,* p. 674).

The Court refused to find that the mere presence of the Ten Commandments on government property was sufficient to violate the Establishment Clause, with the Court candidly observing that "since 1935, Moses has stood, holding two tablets that reveal portions of the Ten Commandments written in Hebrew, among other lawgivers in the south frieze [of the Supreme Court Building]" (*Van Orden,* p. 2862). Thus, even though the monument on the grounds of the Texas capitol building had "religious significance . . . the Ten Commandments [also] have an undeniable historical meaning" (p. 2863).

McCreary and *Van Orden* suggest that while the *Lemon* test is a useful instrument for analyzing the relationship between government and religion, it is by no means the only test. The Court's position in *Van Orden* that the *Lemon* test was inappropriate suggests that courts can be more selective when choosing which of the Establishment Clause tests are most appropriate for particular sets of facts.

Ralph D. Mawdsley

See also *Committee for Public Education & Religious Liberty v. Nyquist; Lamb's Chapel v. Center Moriches Union Free School District; Lee v. Weisman; Meek v. Pittenger; Mueller v. Allen;* State Aid and the Establishment Clause; *Wisconsin v. Yoder; Wolman v. Walter*

Legal Citations

Committee for Public Education & Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).
Lee v. Weisman, 505 U.S. 577 (1992).
Lemon v. Kurtzman I, 403 U.S. 602 (1971).
Lemon v. Kurtzman II, 411 U.S. 192 (1973).
Lynch v. Donnelly, 465 U.S. 668 (1984).
McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005).
Meek v. Pittenger, 421 U.S. 349 (1975).
Mueller v. Allen, 463 U.S. 388 (1983).
Van Orden v. Perry, 545 U.S. 677 (2005).
Wisconsin v. Yoder, 406 U.S. 205 (1972).
Wolman v. Walter, 433 U.S. 229 (1977).

Lemon v. Kurtzman (Excerpts)

Lemon v. Kurtzman *and its companion case,* Earley v. DiCenso, *are the Supreme Court's most important cases on the parameters of permissible state aid to students and their religiously affiliated non-public schools under the Establishment Clause of the First Amendment to the United States Constitution. In creating the so-called tripartite* Lemon *test, which also applies in disputes involving prayer and religious activities in public schools, the Court ruled that interactions between religion and government must have a secular legislative purpose, must have a principal or primary effect that does not advance or inhibit religion, and do not result in excessive entanglement of government in religion.*

Supreme Court of the United States

LEMON

v.

KURTZMAN,

EARLEY

v.

DICENSO

403 U.S. 602

Argued March 3, 1971.

Decided June 28, 1971.

Mr. Chief Justice BURGER delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment.

Pennsylvania has adopted a statutory program that provides financial support to nonpublic elementary and secondary schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects. Rhode Island has adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary. Under each statute state aid has been given to church-related educational institutions. We hold that both statutes are unconstitutional.

I

The Rhode Island Statute

The Rhode Island Salary Supplement Act was enacted in 1969. It rests on the legislative finding that the quality of education available in nonpublic elementary schools has been jeopardized by the rapidly rising salaries needed to attract competent and dedicated teachers. The Act authorizes state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by paying directly to a teacher an amount not in excess of 15% of his current

annual salary. As supplemented, however, a nonpublic school teacher's salary cannot exceed the maximum paid to teachers in the State's public schools, and the recipient must be certified by the state board of education in substantially the same manner as public school teachers.

In order to be eligible for the Rhode Island salary supplement, the recipient must teach in a nonpublic school at which the average per-pupil expenditure on secular education is less than the average in the State's public schools during a specified period. Appellant State Commissioner of Education also requires eligible schools to submit financial data. If this information indicates a per-pupil expenditure in excess of the statutory limitation, the records of the school in question must be examined in order to assess how much of the expenditure is attributable to secular education and how much to religious activity.

The Act also requires that teachers eligible for salary supplements must teach only those subjects that are offered in the State's public schools. They must use 'only teaching materials which are used in the public schools.' Finally, any teacher applying for a salary supplement must first agree in writing 'not to teach a course in religion for so long as or during such time as he or she receives any salary supplements' under the Act.

Appellees are citizens and taxpayers of Rhode Island. They brought this suit to have the Rhode Island Salary Supplement Act declared unconstitutional and its operation enjoined on the ground that it violates the Establishment and Free Exercise Clauses of the First Amendment. Appellants are state officials charged with administration of the Act, teachers eligible for salary supplements under the Act, and parents of children in church-related elementary schools whose teachers would receive state salary assistance.

A three-judge federal court . . . found that Rhode Island's nonpublic elementary schools accommodated approximately 25% of the State's pupils. About 95% of these pupils attended schools affiliated with the Roman Catholic church. To date some 250 teachers have applied for benefits under the Act. All of them are employed by Roman Catholic schools.

The court held a hearing at which extensive evidence was introduced concerning the nature of the secular instruction offered in the Roman Catholic schools whose teachers would be eligible for salary assistance under the Act. Although the court found that concern for religious values does not necessarily affect the content of secular subjects, it also found that the parochial school system was 'an integral part of the religious mission of the Catholic Church.'

The District Court concluded that the Act violated the Establishment Clause, holding that it fostered 'excessive entanglement' between government and religion. In addition, two judges thought that the Act had the impermissible effect of giving 'significant aid to a religious enterprise.' We affirm.

The Pennsylvania Statute

Pennsylvania has adopted a program that has some but not all of the features of the Rhode Island program. The Pennsylvania Nonpublic Elementary and Secondary Education Act was passed in 1968 in response to a crisis that the Pennsylvania Legislature found existed in the State's nonpublic schools due to rapidly rising costs. The statute affirmatively reflects the legislative conclusion that the State's educational goals could appropriately be fulfilled by government support of 'those purely secular educational objectives achieved through nonpublic education. . . .'

The statute authorizes appellee state Superintendent of Public Instruction to 'purchase' specified 'secular educational services' from nonpublic schools. Under the 'contracts' authorized by the statute, the State directly reimburses nonpublic schools solely for their actual expenditures for teachers' salaries, textbooks, and instructional materials. A school seeking reimbursement must maintain prescribed accounting procedures that identify the 'separate' cost of the 'secular educational service.' These accounts are subject to state audit. The funds for this program were originally derived from a new tax on horse and harness racing, but the Act is now financed by a portion of the state tax on cigarettes.

There are several significant statutory restrictions on state aid. Reimbursement is limited to courses 'presented in the curricula of the public schools.' It is further limited 'solely' to courses in the following 'secular' subjects: mathematics, modern foreign languages, physical science, and physical education. Textbooks and instructional materials included in the program must be approved by the state Superintendent of Public Instruction. Finally, the statute prohibits reimbursement for any course that contains 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.'

. . . . More than 96% of these pupils attend church-related schools, and most of these schools are affiliated with the Roman Catholic church.

Appellants brought this action in the District Court to challenge the constitutionality of the Pennsylvania statute. The organizational plaintiffs-appellants are associations of persons resident in Pennsylvania declaring belief in the separation of church and state; individual plaintiffs-appellants are citizens and taxpayers of Pennsylvania. Appellant Lemon, in addition to being a citizen and a taxpayer, is a parent of a child attending public school in Pennsylvania. Lemon also alleges that he purchased a ticket at a race track and thus had paid the specific tax that supports the expenditures under the Act. Appellees are state officials who have the responsibility for administering the Act. In addition seven church-related schools are defendants-appellees.

A three-judge federal court . . . held that the individual plaintiffs-appellants had standing to challenge the Act. The organizational plaintiffs-appellants were denied standing. . . .

The court granted appellees' motion to dismiss the complaint for failure to state a claim for relief. It held that the Act violated neither the Establishment nor the Free Exercise Clause, Chief Judge Hastie dissenting. We reverse.

II

In *Everson v. Board of Education*, this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There Mr. Justice Black, writing for the majority, suggested that the decision carried to 'the verge' of forbidden territory under the Religion Clauses. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church or a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be 'no law respecting an establishment of religion.' A law may be one 'respecting' the forbidden objective while falling short of its total realization. A law 'respecting' the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not establish a state religion but nevertheless be one 'respecting' that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: 'sponsorship, financial support, and active involvement of the sovereign in religious activity.'

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster 'an excessive government entanglement with religion.'

Inquiry into the legislative purposes of the Pennsylvania and Rhode Island statutes affords no basis for a conclusion that the legislative intent was to advance religion. On the contrary, the statutes themselves clearly state that they are intended to enhance the quality of the secular education in all schools covered by the compulsory attendance laws. There is no reason to believe the legislatures meant anything else. A State always has a legitimate concern for maintaining minimum standards in all schools it allows to operate. As in Allen, we find nothing here that undermines the stated legislative intent; it must therefore be accorded appropriate deference.

In [*Board of Education v.*] *Allen* the Court acknowledged that secular and religious teachings were not necessarily so intertwined that secular textbooks furnished to students by the State were in fact instrumental in the teaching of religion. The legislatures of Rhode Island and Pennsylvania have concluded that secular and religious education are identifiable and separable. In the abstract we have no quarrel with this conclusion.

. . . .

III

In *Walz v. Tax Commission,* the Court upheld state tax exemptions for real property owned by religious organizations and used for religious worship. That holding, however, tended to confine rather than enlarge the area of permissible state involvement with religious institutions by calling for close scrutiny of the degree of entanglement involved in the relationship. The objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz,* the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a 'wall,' is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance.

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority. Mr. Justice Harlan, in a separate opinion in *Walz,* echoed the classic warning as to 'programs, whose very nature is apt to entangle the state in details of administration. . . .' Here we find that both statutes foster an impermissible degree of entanglement.

(a) Rhode Island program

The District Court made extensive findings on the grave potential for excessive entanglement that inheres in the religious character and purpose of the Roman Catholic elementary schools of Rhode Island, to date the sole beneficiaries of the Rhode Island Salary Supplement Act.

The church schools involved in the program are located close to parish churches. This understandably permits convenient access for religious exercises since instruction in faith and morals is part of the total educational process. The school buildings contain identifying religious symbols such as crosses on the exterior and crucifixes, and religious paintings and statutes either in the classrooms or hallways. Although only approximately 30 minutes a day are devoted to direct religious instruction, there are religiously oriented extracurricular activities. Approximately two-thirds of the teachers in these schools are nuns of various religious orders. Their dedicated efforts provide an atmosphere in which religious instruction and religious vocations are natural and proper parts of life in such schools. Indeed, as the District Court found, the role of teaching nuns in enhancing the religious atmosphere has led the parochial school authorities to attempt to maintain a one-to-one ratio between nuns and lay teachers in all schools rather than to permit some to be staffed almost entirely by lay teachers.

On the basis of these findings the District Court concluded that the parochial schools constituted 'an integral part of the religious mission of the Catholic Church.' . . .

The substantial religious character of these church-related schools gives rise to entangling church-state relationships of the kind the Religion Clauses sought to avoid. Although the District Court found that concern for religious values did not inevitably or necessarily intrude into the content of secular subjects, the considerable religious activities of these schools led the legislature to provide for careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.

The dangers and corresponding entanglements are enhanced by the particular form of aid that the Rhode Island Act provides. Our decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause. . . . .

In *Allen* the Court refused to make assumptions, on a meager record, about the religious content of the textbooks that the State would be asked to provide. We cannot, however, refuse here to recognize that teachers have a substantially different ideological character from books. In terms of potential for involving some aspect of faith or morals in secular subjects, a textbook's content is ascertainable, but a teacher's handling of a subject is not. We cannot ignore the danger that a teacher under religious control and discipline poses to the separation of the religious from the purely secular aspects of precollege education. The conflict of functions inheres in the situation.

In our view the record shows these dangers are present to a substantial degree. The Rhode Island Roman

Catholic elementary schools are under the general supervision of the Bishop of Providence and his appointed representative, the Diocesan Superintendent of Schools. In most cases, each individual parish, however, assumes the ultimate financial responsibility for the school, with the parish priest authorizing the allocation of parish funds. With only two exceptions, school principals are nuns appointed either by the Superintendent or the Mother Provincial of the order whose members staff the school. By 1969 lay teachers constituted more than a third of all teachers in the parochial elementary schools, and their number is growing. They are first interviewed by the superintendent's office and then by the school principal. The contracts are signed by the parish priest, and he retains some discretion in negotiating salary levels. Religious authority necessarily pervades the school system.

The schools are governed by the standards set forth in a 'Handbook of School Regulations,' which has the force of synodal law in the diocese. It emphasizes the role and importance of the teacher in parochial schools: 'The prime factor for the success or the failure of the school is the spirit and personality, as well as the professional competency, of the teacher. . . .' The Handbook also states that: 'Religious formation is not confined to formal courses; nor is it restricted to a single subject area.' Finally, the Handbook advises teachers to stimulate interest in religious vocations and missionary work. Given the mission of the church school, these instructions are consistent and logical.

Several teachers testified, however, that they did not inject religion into their secular classes. And the District Court found that religious values did not necessarily affect the content of the secular instruction. But what has been recounted suggests the potential if not actual hazards of this form of state aid. The teacher is employed by a religious organization, subject to the direction and discipline of religious authorities, and works in a system dedicated to rearing children in a particular faith. These controls are not lessened by the fact that most of the lay teachers are of the Catholic faith. Inevitably some of a teacher's responsibilities hover on the border between secular and religious orientation.

We need not and do not assume that teachers in parochial schools will be guilty of bad faith or any conscious design to evade the limitations imposed by the statute and the First Amendment. We simply recognize that a dedicated religious person, teaching in a school affiliated with his or her faith and operated to inculcate its tenets, will inevitably experience great difficulty in remaining religiously neutral. Doctrines and faith are not inculcated or advanced by neutrals. With the best of intentions such a teacher would find it hard to make a total separation between secular teaching and religious doctrine. What would appear to some to be essential to good citizenship might well for others border on or constitute instruction in religion. Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authorities over the meaning of the statutory restrictions.

We do not assume, however, that parochial school teachers will be unsuccessful in their attempts to segregate their religious beliefs from their secular educational responsibilities. But the potential for impermissible fostering of religion is present. The Rhode Island Legislature has not, and could not, provide state aid on the basis of a mere assumption that secular teachers under religious discipline can avoid conflicts. The State must be certain, given the Religion Clauses, that subsidized teachers do not inculcate religion—indeed the State here has undertaken to do so. To ensure that no trespass occurs, the State has therefore carefully conditioned its aid with pervasive restrictions. An eligible recipient must teach only those courses that are offered in the public schools and use only those texts and materials that are found in the public schools. In addition the teacher must not engage in teaching any course in religion.

A comprehensive, discriminating, and continuing state surveillance will inevitably be required to ensure that these restrictions are obeyed and the First Amendment otherwise respected. Unlike a book, a teacher cannot be inspected once so as to determine the extent and intent of his or her personal beliefs and subjective acceptance of the limitations imposed by the First Amendment. These prophylactic contacts will involve excessive and enduring entanglement between state and church.

There is another area of entanglement in the Rhode Island program that gives concern. The statute excludes teachers employed by nonpublic schools whose average per-pupil expenditures on secular education equal or exceed the comparable figures for public schools. In the event that the total expenditures of an otherwise eligible school exceed this norm, the program requires the government to examine the school's records in order to determine how much of the total expenditures is attributable to secular education and how much to religious activity. This kind of state inspection and evaluation of

the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids. It is a relationship pregnant with dangers of excessive government direction of church schools and hence of churches. The Court noted 'the hazards of government supporting churches' in *Walz v. Tax Commission* and we cannot ignore here the danger that pervasive modern governmental power will ultimately intrude on religion and thus conflict with the Religion Clauses.

(b) Pennsylvania program

The Pennsylvania statute also provides state aid to church-related schools for teachers' salaries. The complaint describes an educational system that is very similar to the one existing in Rhode Island. According to the allegations, the church-related elementary and secondary schools are controlled by religious organizations, have the purpose of propagating and promoting a particular religious faith, and conduct their operations to fulfill that purpose. Since this complaint was dismissed for failure to state a claim for relief, we must accept these allegations as true for purposes of our review.

As we noted earlier, the very restrictions and surveillance necessary to ensure that teachers play a strictly non-ideological role give rise to entanglements between church and state. The Pennsylvania statute, like that of Rhode Island, fosters this kind of relationship. Reimbursement is not only limited to courses offered in the public schools and materials approved by state officials, but the statute excludes 'any subject matter expressing religious teaching, or the morals or forms of worship of any sect.' In addition, schools seeking reimbursement must maintain accounting procedures that require the State to establish the cost of the secular as distinguished from the religious instruction.

The Pennsylvania statute, moreover, has the further defect of providing state financial aid directly to the church-related schools. This factor distinguishes both *Everson* and *Allen*, for in both those cases the Court was careful to point out that state aid was provided to the student and his parents—not to the church-related school. In *Walz v. Tax Commission*, the Court warned of the dangers of direct payments to religious organizations. . . .

The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance. The government cash grants before us now provide no basis for predicting that comprehensive measures of surveillance and controls will not follow. In particular the government's post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state.

IV

A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs. In a community where such a large number of pupils are served by church-related schools, it can be assumed that state assistance will entail considerable political activity. Partisans of parochial schools, understandably concerned with rising costs and sincerely dedicated to both the religious and secular educational missions of their schools, will inevitably champion this cause and promote political action to achieve their goals. Those who oppose state aid, whether for constitutional, religious, or fiscal reasons, will inevitably respond and employ all of the usual political campaign techniques to prevail. Candidates will be forced to declare and voters to choose. It would be unrealistic to ignore the fact that many people confronted with issues of this kind will find their votes aligned with their faith.

Ordinarily political debate and division, however vigorous or even partisan, are normal and healthy manifestations of our democratic system of government, but political division along religious lines was one of the principal evils against which the First Amendment was intended to protect. The potential divisiveness of such conflict is a threat to the normal political process. To have States or communities divide on the issues presented by state aid to parochial schools would tend to confuse and obscure other issues of great urgency. We have an expanding array of vexing issues, local and national, domestic and international, to debate and divide on. It conflicts with our whole history and tradition to permit questions of the Religion Clauses to assume such importance in our legislatures and in our elections that they could divert attention from the myriad issues and problems that confront every level of government. The highways of church and state relationships are not likely to be one-way streets, and the Constitution's authors sought to protect religious worship from the pervasive power of government. The history of many countries attests to the hazards of religion's

intruding into the political arena or of political power intruding into the legitimate and free exercise of religious belief.

Of course, as the Court noted in *Walz,* '[a]dherents of particular faiths and individual churches frequently take strong positions on public issues.' We could not expect otherwise, for religious values pervade the fabric of our national life. But in *Walz* we dealt with a status under state tax laws for the benefit of all religious groups. Here we are confronted with successive and very likely permanent annual appropriations that benefit relatively few religious groups. Political fragmentation and divisiveness on religious lines are thus likely to be intensified.

. . . .

V

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach 'the verge,' have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a 'downhill thrust' easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the 'verge' of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

The judgment of the Rhode Island District Court in No. 569 and No. 570 is *affirmed.* The judgment of the Pennsylvania District Court in No. 89 is *reversed,* and the case is *remanded* for further proceedings consistent with this opinion.

Citation: *Lemon v. Kurtzman I,* 403 U.S. 602 (1971).

Licensure Requirements

Teacher licensure is a measure designed to ensure a minimal level of competency for educators. Couched in the definition is the impression that the licensing agency warrants that the educator is qualified. Current licensure, or certificate, practices focus on ensuring proficiency in subject matter and pedagogy, often by means of testing. In addition, the licensure process allows licensing agencies to examine applications for individuals with prior criminal records. Agencies may require periodic license renewals, continued professional development, and established levels of acceptable behavior for educators to maintain their licenses.

In short, states may impose reasonable restrictions, such as citizenship, loyalty oaths, and residency requirements, as long as these requirements further a legitimate state interest. For example, in *Ambach v. Norwick* (1979), the U.S. Supreme Court held that the New York State's licensure requirement to be a citizen bore a rational relationship to the state's educational goals. New York prohibited noncitizens from obtaining licensure unless the individual indicated intent to become a citizen. The Court noted that the state's interest in promoting civic values was rationally related to the citizenship requirement.

There is no national teacher certification requirement, yet each state has adopted some form of licensure. As a result, there is substantial disparity in the specific rules and procedures among the states, although traditional state licensure schemes are similar. First, state licensing agencies establish standards or minimum guidelines for teacher education colleges within the states. In most instances, the licensing agency is the state's board of education or a professional practices board made up of elected or appointed licensed teachers and administrators. Second, teacher education colleges (and universities) establish programs to meet the minimally established state criteria. Finally, when prospective educators complete the college programs, their institutions recommend the students to the state agencies, which then provide licenses to successful candidates.

Supportive of the licensure process, the No Child Left Behind Act (2002) requires all teachers in the core subject areas to be highly qualified. The U.S. Department of Education defines "highly qualified teachers" as those who possess bachelor's degrees, are licensed by their states, and have demonstrated competency in the core academic areas they teach. Yet empirical studies supporting the efficacy of teacher licensure are scant, at best. There is some evidence that student performance in mathematics is positively associated with teacher licensure. However, studies that explore relationships between licensure and student success in other subject areas are inconclusive.

Standards Movement

The awarding of teacher's licenses based on the completion of state-approved programs was the predominant means of licensing during the early 20th century. By the early 1950s, most states issued licenses based on this model. Citing studies showing the importance of the teacher on student learning, policymakers in the 1980s began to focus on teacher quality. Shifting from the process-oriented emphasis of teacher preparation, states moved to a standards-based emphasis. Influenced greatly by standards developed by the National State Directors of Teacher Education and Certification, most state standards are similar in nature. Due to the similarity of standards, states frequently honor reciprocity agreements.

Affiliated with the standards-based movement, states implemented testing to make certain that licensed teachers met the minimum standards. Teacher testing serves two primary purposes. First, testing provides for an efficient method of evaluating teacher competence. Second, testing enables licensing agencies to focus on standards-related performances, as opposed to process-oriented regulations. Yet due to the pressure to help prospective educators excel on the state-administered tests, teacher testing also had the effect of altering teacher preparation curricula. Many programs adjusted the curricula to (a) align the content of the course work with the standards and (b) adjust course assessment to mimic the state assessment.

Legal challenges to the system of licensure tied to testing have produced few changes. As long as tests maintain content validity, the courts have upheld their use as a prerequisite to licensure.

Adverse Certification Actions

Each state has a method for taking adverse actions against licensed educators. These adverse actions include private reprimands, public reprimands, license suspensions, and license revocations. Using an administrative hearing process, licensing agencies can take adverse actions due to a wide range of improper actions on the part of educators in public schools. The improper actions include ethics violations, contract abandonment, and the violation of state or federal laws.

In sum, states may establish reasonable requirements for licensure as long as they are rationally related to the educational interests of the state. Often, those

requirements include minimum levels of educational attainment, minimum age requirements, acceptable criminal records, and adequate performance on measures of academic and pedagogical competence. Continued licensure may be predicated on demonstrated continuing professional growth and adherence to state and federal laws and state educational ethical codes.

Mark Littleton

See also *Ambach v. Norwick;* Drug Testing of Teachers; Educational Malpractice; Highly Qualified Teachers; No Child Left Behind Act

Further Readings

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No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

Limited English Proficiency

All demographers have noted that the United States is clearly experiencing a high growth in students who are English language learners (ELLs). Moreover, almost all researchers predict this trend will continue and increase substantially. How school officials respond to the challenge to meet the needs of students who seek to learn English in an appropriate way will determine much of the future of American education. This entry describes how politics is influencing decisions that schools make in this area.

Bilingual Controversy

Unfortunately, this area of educational praxis is highly politicized and controversial. In American education law and politics, there is no more volatile mix of policy, research, folklore, myth, and xenophobia than in the various state and federal laws and regulations addressing the needs of language minority students attempting to learn English. As a result, even the term *bilingual* has become polemic.

Bilingual is monolithic neither in its meaning nor in the programs it describes. The term is generally used as a label to describe several programs and a group of theories and varied implementation practices to address the needs of ELLs in public education that to some extent utilize the abilities of students with their native languages to facilitate acquisition of the target languages. However, the term *bilingual,* and thus to some extent the methodology it employs, has become politicized. The administration of President George W. Bush has excised the term *bilingual* from almost all documents, and the word is almost nonexistent in the extensive No Child Left Behind Act (NCLB) (2002). The Office for Bilingual Education and Minority Language Affairs of the United States Department of Education has undergone a name and focus change, with the word *bilingual* being excised from its name and focus. Currently, it is called the Office of English Language Acquisition, Language Enhancement, and Academic Achievement for Limited English Proficient Students.

Research Issues

In such a policy environment, it is difficult to conduct, access, and utilize research in meeting the needs of language minority students. Some states have actually outlawed bilingual methods for meeting the needs of ELLs. The laws in these states have declared that immersion or sheltered immersion for a year by waiver, followed by immersion in the target language, is the only worthwhile and certainly the only legally allowable methodology. The first of these was passed by referendum, Proposition 227 in California, followed by similar but increasingly stringent referenda in Arizona and Massachusetts. Totalizing pronouncements in these referenda laws, such as the following from California,

have replaced research on language acquisition: "Whereas, young immigrant children can easily acquire full fluency in a new language, such as English, if they are heavily exposed to that language in the classroom at an early age." Such authoritative pronouncements do not necessarily reflect all or even most of the research in this area.

The results of research on bilingual methodologies have, in fact, often contradicted the reasoning behind current administration policy. For example, a recent meta-analytical study combining earlier research regarding the effectiveness of bilingual versus monolingual educational methods, conducted by a panel of researchers selected by the Bush administration, found small to modest gains from bilingual programs. The researchers also discovered that greater gains were revealed in those studies that used random assignment and other more rigorous and effective research designs. However, after seeing the findings, the Bush administration declined to release the report.

Current anti-intellectual or anti-research policy mandates notwithstanding, language minority students still have the bedrock right, based on the classic case of *Lau v. Nichols* (1974), to receive some type of language intervention or program that will enable them to benefit from public education. This seminal case was followed by legislation codifying its holdings in the form of the Equal Educational Opportunity Act. The act requires that equal educational opportunity must not be denied any individual as a result of "the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs."

No Child Left Behind

Currently, the impact of the NCLB on ELLs is significant. Other than receiving exemptions for their first year of enrollment in the U.S. education system, such learners are generally required to take the same state assessments required of native-English-speaking students in the third and eighth grades. Officials in local school systems can make some accommodations for ELL students so long as they have not yet attended 3 years of public instruction in the United States. These accommodations may include options such as small-group administration of examinations, extra time to complete examinations, and simplified instructions. These accommodations may even include native language examinations for reading/language arts assessments for 3 to 5 years if states allow for such modifications. In addition, school officials must assess ELLs annually on their English proficiency in the areas of reading, writing, speaking, and listening in English.

NCLB is salutary because it provides information about the progress of ELLs through the provision of disaggregated data about their performance. Yet since school systems are assessed as failing or not based on how quickly and how many ELLs are moved into the status of "English proficient," the statute forces schools to push students to quickly display minimal English proficiency for their own benefit under the NCLB. This approach ignores theories regarding practices that result in high-level acquisition of English. It is possible that rushing to show low-level proficiency by moving students quickly into English-proficient status, and thus into immersion in English, causes school systems to tend to ignore programs and theories that may require more instructional time but may result in a higher-level acquisition by ELLs of English and academic content at the same time. Due to the NCLB's mandates and the political climate, late transition bilingual and dual-immersion programs may not survive the current policy strife in most states. The net result is that studies of educational and linguistic gains or features of these programs may not be available as a laboratory to compare with the current penchant for short-term basic language proficiency.

Certainly, the coming decade will call for assessment of group outcomes of ELLs in terms of their access to higher education and full participation in the American economy under the current educational policies. It is one thing to be classified quickly as being "proficient" or making "adequate yearly progress" on an average level. It may be very different, and require different methodologies, to be prepared to continue in demanding college preparation and Advanced Placement courses that will enable ELLs to enter and succeed in higher education, and in

our increasingly sophisticated economy. The challenge for the future will be whether American education will be allowed to assess and to adapt to achieve the latter long-range goal for ELLs.

Scott Ellis Ferrin

See also Bilingual Education; *Lau v. Nichols*

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Locker Searches

Locker searches are common occurrences in American public schools. The use of locker searches has proliferated in recent years due to continuing threats of drugs and violence. Many school officials view locker searches as an indispensable tool to deter negative behaviors, and on the whole, lower courts seem clearly to side with the efforts of school officials to curb crime by conducting locker searches. While recent acts of violence in schools justify their use, students' privacy interests and school safety should be equally balanced. Although locker searches may represent a minimally intrusive search, their unchecked use could very well weaken students' expectations of privacy. This entry reviews the case law on this issue.

An Early Case on Privacy

In 1985, the U.S. Supreme Court handed down its first decision clarifying the Fourth Amendment rights of students. Although *New Jersey v. T. L. O.* afforded school officials greater flexibility by way of permitting searches of students based on the less rigid "reasonable suspicion" standard (as opposed to the "probable cause" expected of the police), the Court acknowledged that students are entitled to legitimate expectations of privacy.

Justice White, author of the majority in *T. L. O.,* recognized this expectation, writing as follows:

> School children may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds. (p. 339).

Although the presumption that students relinquish all privacy is clearly rebutted, the Court chose not to offer specific implementation guidelines with regard to privacy protection in lockers, desks, or other forms of school property, nor did it place any restrictions on mass suspicionless searches. The Court's refusal to elaborate is not unusual given its usual deference to the expertise of school officials in administrative matters.

In *T. L. O.,* interest groups such as the National School Boards Association (NSBA) rallied in support of school officials' powers in maintaining safety and order through so-called friend-of-the-court briefs. As to lockers, the NSBA contended that since student lockers are neither student domiciles nor "castle[s]," they are not protected by the Fourth Amendment.

Mass Suspicionless Searches

Two subsequent U.S. Supreme Court cases, *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of*

Pottawatomie County v. Earls (2002), validated the constitutionality of mass suspicionless searches, specifically random drug testing, through a three-part analysis. The analysis involved assessing students' privacy interest, the relative unobtrusiveness of the searches, the severity of the need to justify such a search, and the likelihood that it would achieve its goal.

Lower courts apply similar analyses in justifying mass locker searches. At the same time, there appears to be a fair amount of consensus across lower courts regarding the degree to which privacy in lockers should be afforded. Case law reflects a trend of upholding searches on the basis that doing so is clearly in the best interest of maintaining school safety and order.

Courts typically view mass locker searches as a minimally intrusive method of confronting drug and weapons problems. In *Commonwealth v. Cass* (1998), the Supreme Court of Pennsylvania ruled that a search of 2,000 high school lockers was reasonable at its inception, in light of suspicious activity that included students' use of beepers, students' dilated eyes, and students carrying around large amounts of money, as well as reasonable in scope because of the minor intrusiveness of the type of search.

Similarly, in *State of Iowa v. Marzel Jones* (2003), a scheduled locker cleanout for the purposes of "[ensuring] the health and safety of the students and staff and to help maintain the school's supplies" (p. 144) resulted in the discovery of a blue jacket containing a small amount of marijuana. Initially, the identity of the student to whom the locker was assigned was unknown, but it was later discovered. The student was eventually charged but prevailed in an Iowa district court, which ruled that the evidence was illegally obtained. The Supreme Court of Iowa reversed an earlier decision to the contrary in relying heavily on the three-part test enunciated in *Earls;* the court concluded that school officials acted reasonably under the circumstances.

In re Patrick Y. (2000) may best reflect the state and national press toward school safety. A school security officer obtained a tip that drugs and weapons had been reported in the middle school portion of the campus. After the principal was informed, the security officer was authorized to search all lockers in the middle school campus. A search of a book bag within a locker revealed a knife and pager—both school violations. While the student argued that a lack of reasonable suspicion along with the intrusiveness of a book bag search violated the legitimate expectations of privacy afforded to students in *T. L. O.,* the Court of Appeals of Maryland affirmed a bylaw of the state board of education that students have no reasonable expectation of privacy in temporarily assigned lockers.

Individual Searches

As these cases demonstrate, courts rarely find that mass locker searches undermine the Fourth Amendment. As for individualized searches, the tendency is much the same. In *M. E. J. v. State of Florida* (2002), in which a middle school student smelling of marijuana was loitering in the faculty parking lot, a school official subsequently searched his locker and discovered a knife. Consequently, the student was charged with possession of a weapon on school premises. The student unsuccessfully claimed that school officials violated his Fourth Amendment rights because the suspicion was based on drugs and not the knife. An appellate court affirmed that the knife was legally obtained evidence because educators had already met the standard of reasonable suspicion.

In another case, an appellate court in Ohio upheld an individualized search of two students that yielded a marijuana pipe but censured the school's use of a blanket random locker search as unreasonable, since educators lacked an inadequate basis on which to act (*In re Adam,* 1997).

Mario S. Torres, Jr.

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drugs, Dog Searches for; In Loco Parentis; *New Jersey v. T. L. O.; Vernonia School District 47J v. Acton*

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Locke v. Davey

In *Locke v. Davey* (2004), the U.S. Supreme Court upheld the constitutionality of "no-funding provisions" in Washington State's constitution, as applied to a student who attended a religiously affiliated institution of higher learning. Such no-funding provisions are often referred to as "Blaine Amendments," after Senator James K. Blaine of Maine, who unsuccessfully introduced a constitutional amendment to limit governmental aid to "sectarian" or religious schools in 1876. In *Davey,* however, the Court specifically asserted that the constitutional provision underlying the dispute was not a Blaine Amendment, but rejected the claim that state officials violated the student's First Amendment rights in denying him a scholarship because he wished to study devotional theology.

Facts of the Case

The state of Washington created a scholarship program for low- and middle-income students who had excellent academic credentials. The Promise Scholarship Program provided funds for education-related expenses, including room and board, for eligible students. However, state officials refused to award the scholarship to students who were studying for degrees in theology. Davey, who was pursuing a degree in devotional theology as part of a joint major, challenged the prohibition of the scholarship for theology majors on the basis that it singled out religion for unfavorable treatment in violation of the First Amendment.

A federal trial court in Washington rejected the student's claim, but the Ninth Circuit reversed in his favor. In so doing, the court cited *McDaniel v. Paty* (1978) for the proposition that the scholarship policy lacked neutrality. In *McDaniel,* the Supreme Court struck down a state constitutional provision from Tennessee that barred ministers or priests from seeking public office. As a result, the Ninth Circuit concluded that the Promise Scholarship Program impermissibly singled out religion for unfavorable treatment.

The Court's Ruling

Reversing in favor of the state, the Supreme Court, in a 7-to-1 opinion authored by Chief Justice Rehnquist, rejected Davey's argument. Instead, the Court held that the state's refusal to grant Davey an award as part of the Promise Scholarship Program did not violate the Establishment, Free Exercise, or Free Speech Clauses of the First Amendment. In reviewing the facts, the Court pointed out that the Promise Scholarship could have been used at any accredited public or private institution of higher education in Washington. However, the Court also pointed out that in an attempt to avoid a conflict with its own constitutional constraints, the state legislature stipulated that student recipients may not be pursuing degrees in theology while receiving the scholarship.

At the heart of its analysis, the Supreme Court declared that nothing in the history or the text of the Washington State Constitution suggested animus toward religion. The Court was of the opinion that since there is "play in the joints" between the Establishment and Free Exercise Clauses, the Establishment Clause permits some state actions that are not required by the Free Exercise Clause. In addition, the Court determined that the nontheology degree provision in the Promise Scholarship Program was an example of just such an instance. The court maintained that unlike *McDaniel,* the scholarship program was constitutionally permissible because it did not require students to choose between governmental service and their religious beliefs.

On the other hand, Justice Scalia's dissent, which Justice Thomas joined, thought that the program should have been vitiated as unconstitutional because it discriminated against religion. In a two-paragraph dissent, Justice Thomas added that he objected to the program's having been applied only to students who wished to study theology.

The upshot of *Davey* is that since it was set in the context of higher education, it is likely to be of limited applicability in elementary and secondary schools, should it be used to challenge choice programs. Of course, the outcome of such challenges may well depend on the wording of state statues and constitutions. At the same time, in states such as Washington with Blaine-type provisions, it remains to be seen whether *Davey* will impact the bounds of permissible aid for students who wish to seek similar scholarships while attending religiously affiliated institutions of higher learning.

Mark Littleton

See also First Amendment; State Aid and the Establishment Clause

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Loyalty Oaths

Loyalty oaths are administered as a condition to public employment or entrance into the practice of a given occupation, such as teaching. A teacher loyalty oath is a promise to uphold the constitutions and laws of a jurisdiction. Typically, in cases involving education law, loyalty oaths involve state laws that mandate adherence to the federal and state constitutions and laws. For instance, the language of the oath may state,

> I do solemnly swear (or affirm) that I will uphold and defend the Constitution of the United States of America and the Constitution of the State of [insert state name] and that I will oppose the overthrow of the government of the United States of America or of this State by force, violence or by any illegal or unconstitutional method. (*Cole v. Richardson,* 1972)

In many instances, loyalty oaths were passed into law as a reaction to heightened concerns over threats to national security. The balance between the sensitive nature of individual rights and governmental interests limits the acceptable application and wording of loyalty oaths. Stated another way, constitutional protections set parameters regarding to whom loyalty oaths apply and what considerations exist in the crafting of the loyalty oath language.

The difficulty with loyalty oaths rests in the construction of constitutionally permissible language. In other words, questions emerge over how public employers can adopt loyalty oaths that do not offend the constitutional rights of employees. In attempting to address this question, the courts have created constitutional doctrines to assess the legality of loyalty oaths. Through a series of decisions, the Supreme Court established four parameters: Loyalty oaths (1) may not infringe on established constitutional rights, (2) may not prevent or chill protected speech, (3) may not limit associational memberships and activities or presume subscription to beliefs based on associational affiliations, and (4) may not contain vague language so that a person of "common intelligence" cannot decipher their meaning. These parameters are discussed further in this entry.

Established Rights

First, the courts have made it clear that loyalty oaths may not infringe on established constitutional rights. For instance, shortly after the Civil War, early cases in the application of a loyalty oath for public office challenged the constitutionality of its statutory language. One Missouri statute required public officials to attest to never having participated in activities that were connected to actions against the federal or state governments, which would have included actions in support of the Confederates.

The U.S. Supreme Court declared the law unconstitutional because it made once-legal acts illegal retrospectively (i.e., ex post facto laws) while declaring individuals guilty of crimes based on those acts (i.e., bill of attainder), in violation of Article I, Section 9, of the U.S. Constitution. Similarly, in instances of an otherwise constitutionally permissible loyalty oath, the U.S. Supreme Court held that an individual's refusal to take the oath cannot result in a default interpretation that the individual subscribes to the nonsupport of the federal and state constitutions and believes in the overthrow of the government. According to the Court, a default interpretation of an individual's subscription of disloyalty—without an opportunity to explain coupled with the summary dismissal from public employment—violates the individual's due process rights.

Protected Speech

Second, courts have agreed that loyalty oaths may not prevent or chill protected speech. In *Keyishian v. Board of Regents* (1967), a New York state loyalty oath law included a provision through which educators within the state would be removed from their positions if they participated in subversive activities. Pursuant to an internal memo to state employees, examples of subversive activities included "writing of articles, the distribution of pamphlets, the endorsement of speeches made or articles written or acts performed by others" (*Keyishian,* p. 602), whether inside or outside the classroom.

Insofar as these acts of speech and expression are protected for common citizens under the First Amendment, as well as within legitimate educational and scholarly applications under constitutional interpretations of academic freedom, the loyalty oath and its administrative policies classified protected speech as prohibited acts. Consequently, the Supreme Court struck the loyalty oaths down as impermissible under the Constitution.

Associational Memberships

Third, courts have noted that loyalty oaths may not limit associational memberships and activities or presume disloyalty based on associational memberships and activities. Several Supreme Court cases involved challenges to state loyalty oaths that barred individuals from public employment due solely to their associational memberships. Based on a series of cases, the Court, in *Wieman v. Updegraff* (1952), identified three clear problems with this irrefutable categorization of disloyalty based on organizational associations.

In one situation, an individual may associate with an organization that was initially lawful and innocent but later takes on active threats of treason. Similarly, an individual may associate with an organization that had engaged in "subversive" activities but later changed its position and eliminated these activities so it conformed to lawful behavior. Equally notable, an individual's membership by itself cannot determine that the person is aware of the activities and purposes of a group. Indeed, the Court, in *Elfbrandt v. Russell* (1966), even elaborated that mere organizational associations cannot qualify as violations to loyalty oaths. To determine whether one has been disloyal, the Court explained that more evidence is required, such as the individual's subscription to treasonous or seditious acts and demonstrating a specific intent to further a group's unlawful goals.

Vague Language

Fourth, courts have indicated that loyalty oaths may not contain such vague language that its interpretation may deter legitimate acts and seemingly approve unintended, illegal acts. Based on a standard set by the Supreme Court, a person of "common intelligence" must be able to decipher the loyalty oath's meaning. In *Cramp v. Board of Public Instruction* (1961), a Florida loyalty oath law required public employees to attest that they did not and will not "lend . . . aid, support, advice, counsel or influence to the Communist Party" (p. 280). The statutory language included many conceivable acts that some may interpret as acceptable and others may not.

Further, the Court pointed out that the problem becomes more complex when one factors in the recent past. Not long before the case arose, the Communist Party had legal candidates on the ballot, and the Communist Party had legitimately endorsed candidates from other parties. To this end, the Court posed the questions of whether these activities precluded individuals from taking the oath or made oath takers

subject to perjury. To the Court, these facts contextualized reasons to explain why misinterpretation occurs easily and questions of constitutional vagueness are asserted in these cases. As such, the Court concluded that interpretations and subsequent behaviors caused by loyalty oaths from an unconstitutionally vague statute subjected individuals to "risk of unfair prosecution and the potential deterrence of constitutionally protected conduct" (*Cramp v. Board of Public Instruction,* p. 279). With these possibilities, the Court struck down loyalty oaths that contained unconstitutionally vague language because they tend to violate the First and Fourteenth Amendments.

Jeffrey C. Sun

See also Due Process; Due Process Rights: Teacher Dismissal; *Keyishian v. Board of Regents;* Pledge of Allegiance; Political Activities and Speech of Teachers

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LULAC

See League of United Latin American Citizens (LULAC)

M

MALDEF

See MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND (MALDEF)

MANIFESTATION DETERMINATION

Disciplining students with disabilities is one of the most contentious practices that educators in public schools must face on a regular basis. In 1997, for the first time, and nine years after the Supreme Court's only case involving the disciplining of students with disabilities, *Honig v. Doe* (1988), the Individuals with Disabilities Education Act (IDEA) codified the process by which school officials may discipline students with disabilities. Pursuant to the IDEA's discipline provisions, school officials must engage in multidisciplinary decision-making processes and are prohibited from taking unilateral actions when students with disabilities violate school codes of conduct if there are questions about whether their misbehaviors are manifestations of their disabilities. This entry looks at these *manifestation determinations* and how they are implemented.

What the Law Requires

By definition, *manifestation determinations* are formal inquiries that evaluate whether there are relationships between student disabilities and their misconduct. In effect, teams that have developed the student's individualized education program (IEP) must consider the appropriateness of that program at the time specific behavioral incidents occurred that prompted disciplinary actions, as well as the possible need to change aspects of those programs and whether the behavior of concern resulted from the student's disabilities. At the end of the manifestation determination process, IEP teams must evaluate and decide whether the behaviors of concern are direct manifestations of disabilities that are beyond the student's comprehension and control.

The IDEA mandates manifestation determinations when students with disabilities undergo changes in their educational placement due to suspensions for periods of 10 school days or longer. Such determinations must be made by local educational agencies, parents (or guardians), and relevant members of the IEP team, as determined jointly by the parents and the local educational officials. Although the IDEA encourages parents to have a say in the composition of IEP teams, parents may not prevent specified individuals from participating if educational officials deem the presence of such persons necessary.

Pursuant to the IDEA, teams must conclude that a relationship between disability and misconduct exists if the conduct in question was caused by or had a direct and substantial relationship to the student's disabilities or if the conduct in question was the direct result of the failure of local educational officials to implement the

IEP properly. If either of these circumstances is present, then the behavior is a manifestation of a student's disability. If neither is true, then the behavior is not a manifestation of the student's disability.

How the Law Is Implemented

In situations where the IEP team decides that there was no relationship present, school officials may apply the same disciplinary procedures and severity that they use for students without disabilities. Even so, students with disabilities must continue to receive services consistent with the content of their IEPs. In circumstances where IEP teams are convinced that misconduct was related to student disabilities, school officials may not apply the same disciplinary procedures that they use for children without disabilities. Where manifestations are established, the IDEA requires IEP teams to conduct functional behavioral assessments if they are not already in place or review these assessments and plans if they have already been implemented for students with disabilities, revise the IEPs as necessary to implement behavior intervention plans, and return children to their then-current placements unless their parents and local educational officials agree to changes in placements based on the modifications of the behavioral intervention plans.

The differential application of disciplinary procedures when manifestations are established represents the fundamental belief that students with disabilities should not be treated the same as children without disabilities for behavior that is a function of their disabilities, because their actions are out of their control. The language of IDEA 2004 differs subtly but in meaningful ways from its 1997 predecessor, which required only that IEP teams evaluate simply whether misconduct was a "manifestation of" student disabilities. In contrast, IDEA 2004 directs IEP teams to consider whether misconduct was caused by student disabilities or was the direct result of the failure of local educational officials. The new language essentially places more accountability on students, because IEP teams are unlikely to meet the stringent criteria of evaluating whether misbehavior is a manifestation of students' disabilities.

Students with disabilities may be removed from school for up to 45 school days and placed in appropriate interim alternative placements without manifestation determinations (as long as the same penalties would apply to students who do not have disabilities) under three circumstances: possession of weapons at school or school related functions; knowing possession or use of illegal drugs or selling or soliciting the sale of controlled substances while at school, on school premises, or at school functions; and infliction of serious bodily injury on another person while at school, on school premises, or at school functions. When parents and local educational officials disagree with the decisions of IEP teams, either party may appeal by requesting hearings to challenge their actions. Appeals must be arranged by the educational agency within 20 school days of the date the hearings are requested, and a determination must be made within 10 school days after the hearings are completed. Once parents request appeals, students remain in their then-interim alternative placements pending the outcomes of hearings or until the expiration of their suspensions. The burden of proof at such hearings rests on the parties making the appeals.

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See also Behavioral Intervention Plan; Due Process Hearing; *Honig v. Doe;* Individualized Education Program (IEP); Stay-Put Provision

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Marbury v. Madison

In *Marbury v. Madison* (1803), the fledgling U.S. Supreme Court asserted its authority both to review acts of Congress and to invalidate those acts that conflict with the U.S. Constitution. In a case that depended upon power granted to the Court by Congress over and above what the Constitution provided, the Court emphasized that the Constitution is paramount. At the same time, the Court established itself as the appropriate body to evaluate whether a law either conflicts with or conforms to the Constitution. *Marbury v. Madison* is thus an important case defining the concept of judicial review that is so important in cases relating to schools and many other aspects of American life.

Facts of the Case

The facts in *Marbury* reflect the politics of the day. Thomas Jefferson was elected as the third U.S. president, defeating John Adams in the election of 1800, which was ultimately resolved on February 17, 1801. After losing the election, but before leaving office, President Adams determined to fill a number of judicial vacancies created by the Judiciary Act of 1801 with members of his own Federalist Party. The appointments were made on March 2, 1801, just two days before the expiration of his term, and were approved by the Senate on the next day; and Adams signed the commissions. However, in order for the appointments to be effective, the commissions had to be delivered to those who were appointed. This task was delegated to John Marshall, acting secretary of state and soon to be chief justice of the Supreme Court.

Despite his best efforts, Mr. Marshall was unable to deliver a number of the judicial commissions prior to President Adams's leaving office. When President Jefferson took office on March 4, 1801, he directed his new secretary of state, James Madison, *not* to deliver the remaining commissions for President Adams's "eleventh hour" appointments. Jefferson believed that the commissions, not having been delivered prior to the expiration of President Adams's term, were void.

William Marbury was one of Adams's "midnight appointees" to a newly created justice of the peace position in the District of Columbia. When his commission was not delivered, Marbury sued James Madison. Marbury, taking advantage of a provision in Section 13 of the Judiciary Act of 1789, began an original action in the Supreme Court seeking an order to show cause why a writ of mandamus should not issue. In essence, Marbury was asking the Supreme Court to order the secretary of state to deliver his commission.

Marbury's action raised the issue of whether the Supreme Court had the jurisdiction, or the power, to hear and resolve his case. The U.S. Constitution defines the jurisdiction of the Court in Article III, Section 2, Clause 2:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned [within the judicial power of the United States], the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Judiciary Act of 1789, and in particular Section 13 of the act, on which Mr. Marbury relied in bringing his action, addressed the jurisdiction of the Supreme Court as follows:

> The Supreme Court shall also have appellate jurisdiction from the circuit courts and courts of the several states, in the cases herein after provided for; and shall have power to issue writs of prohibition to the district courts . . . and writs of mandamus . . . to any courts appointed, or persons holding office, under the authority of the United States.

The constitutional issue in *Marbury* was whether Congress had the authority to expand the Supreme

Court's original jurisdiction. Insofar as Marbury filed his petition for a writ of mandamus directly in the Supreme Court, the justices needed to be able to exercise original jurisdiction over the dispute in order to have the power to hear the case. Marbury argued that Congress granted the Court original jurisdiction over petitions for writ of mandamus by enacting the Judiciary Act of 1789.

The Court's Ruling

The Court rendered its unanimous judgment on February 24, 1803. Chief Justice John Marshall, the same person who was acting secretary of state under President Adams, wrote the opinion for the Court. Essentially, Marshall held that while Madison should have delivered the commission to Marbury, the Supreme Court did not have the authority to issue the requested writ of mandamus. While it was true that Section 13 of the Judiciary Act of 1789 gave the Court the authority to issue writs of mandamus, the Court found that by including Section 13 in the Act, Congress exceeded the authority allotted to the Court under Article 3 of the Constitution. The Court ruled that Congress did not have the authority to modify the Supreme Court's original jurisdiction as defined in the Constitution.

Although Marbury never became a justice of the peace in the District of Columbia, his case gave the Supreme Court an opportunity to establish its power to declare acts of Congress unconstitutional, with extensive consequences.

Jon E. Anderson

See also Marshall, John

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Marshall, John (1755–1835)

John Marshall was the longest serving and arguably greatest chief justice of the United States (1801–1835). Marshall was born on September 24, 1755, in what is now Fauquier County, Virginia. As a young man, Marshall fought in the Revolutionary War and served with George Washington at Valley Forge in 1777–1778. During 1780, when the fighting had subsided, he studied law under George Wythe at the College of William & Mary. Following the British surrender at Yorktown, Virginia, in October 1781, Marshall was elected to the Virginia General Assembly. He also began a law practice in Richmond, the new capital of Virginia. He was a delegate to the Virginia Ratifying Convention for the Constitution in 1788 and distinguished himself with a speech defending the proposed federal judiciary.

Following Virginia's ratification of the U.S. Constitution and subsequent establishment of the new national government, Marshall declined various suggestions that he seek election to Congress or some other federal appointment. In 1797, he did accept an appointment from President Adams to be part of a commission negotiating with France. Although the commission failed due to French intrigues and corruption, Marshall established a national reputation by resisting French demands. As a result, Marshall was elected to Congress in 1798 and was appointed secretary of state in 1800. When the chief justice position became vacant and President Adams' first choice declined, the appointment was offered to Marshall. He assumed office one month before President Adams left office.

During Marshall's tenure as chief justice, the fundamental question before the Court, indeed before the nation, was the nature of the more perfect union created by the Constitution of 1787. Many Americans regarded the union as merely a treaty between independent states, each of which was actually an

independent country. They saw the national government as nothing more than an early example of the European Union or NATO. It was not sovereign. In sharp contrast, others believed that the union was a distinct nation. The national government, like the states, was a sovereign. Within the spheres of responsibility explicitly assigned by the Constitution, the national government was supreme.

Marshall subscribed to the latter view and, through his extraordinary powers of persuasion, convinced his fellow justices to go along with him. Several of Marshall's opinions form the foundation of modern constitutional law. First and most significantly, in *Marbury v. Madison* (1803), Marshall established the principle of judicial review—the Court could review the constitutionality of an act of Congress. Thus, the Court acquired the right to have the final say as to the meaning of the Constitution and to set aside legislation passed by democratically elected legislators. In *Fletcher v. Peck* (1810), he held that the Contracts Clause of the Constitution forbids the states from rescinding land grants. *McCulloch v. Maryland* (1819) established a broad view of the enumerated powers of the national government. His opinion in *Gibbons v. Ogden* (1824) suggested a broad view of Congress's power to regulate interstate commerce.

Yet, while affirming that the national government was sovereign, he also recognized the sovereignty of the states. The Court's decision in *Barron v. Baltimore* (1833) held that the Bill of Rights limited only the national government, not the states. *Wilson v. Black Bird Creek Marsh Co.* (1829) recognized the right of a state to block a navigable waterway and, thus, regulate interstate commerce.

Marshall's tenure spanned the Adams, Jefferson, Madison, Monroe, Quincy Adams, and Jackson administrations. He died in July 1835.

William E. Thro

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McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819).
Wilson v. Black Bird Creek Marsh Co., 27 U.S. (2 Pet.) 245 (1829).

Marshall, Thurgood (1908–1993)

Justice Thurgood Marshall was the first African American appointed to the Supreme Court of the United States. His service there was the capstone on an already noteworthy legal career in which he led the NAACP's battle against segregation, especially in schools. It was his argument on behalf of the plaintiffs that led to the Court's landmark *Brown v. Board of Education of Topeka* ruling. Later, as an associate justice himself, he often raised an eloquent voice on behalf of equity.

Early Years

Born in Baltimore, Maryland on July 2, 1908, Thurgood Marshall was the younger of two sons of William Canfield Marshall and Norma A. Marshall. He received his formative education in the public school system of Baltimore, Maryland. After completing public school, Marshall enrolled in Lincoln University, a public, historically Black university in Oxford, Pennsylvania, where he attempted to study dentistry, but it failed to keep his interest. His academic interest soon changed to law, and he graduated with honors from Lincoln University in 1930.

Marshall's first choice of law schools was the University of Maryland; but his application was

denied by the state's segregated system of higher education. Instead, he attended Howard University School of Law in Washington, D.C., where, under the tutelage of law school Dean Charles Hamilton Houston, he graduated in 1933 as class valedictorian.

On graduation, Marshall entered the private practice of law, starting his career as a labor and antitrust lawyer. His early years in Baltimore, Maryland, were arduous and discouraging due to the Depression making profitable cases few and far between. Marshall did not expect to become wealthy in private practice, but did expect to make a modest income. However, during the Depression, even a modest income was difficult to achieve.

The NAACP Years

In 1934, Marshall volunteered his legal services to the local branch of the National Association for the Advancement of Colored People (NAACP). In 1935, he won his first case for the NAACP by persuading the Maryland Court of Appeals to order the University of Maryland Law School to admit its first African American applicant. By 1936, the national NAACP had taken notice of Marshall, and he joined the organization's national legal staff in the role of assistant special counsel to the NAACP. This began Marshall's series of legal battles to persuade the local, state, and federal courts to overrule the "separate but equal" doctrine that the U.S. Supreme Court had enunciated in 1896 in *Plessy v. Ferguson.* Marshall's long association with the NAACP and appointment as assistant special counsel was the beginning of many milestones in his legal career.

Under the direction of Thurgood Marshall, the NAACP's Legal Defense and Educational Fund adopted a strategy of attrition against the concept of separate but equal facilities in education. Beginning with its attack on segregated public professional schools and colleges and proceeding to elementary and high school education, Marshall and his staff sought to erode the basis of discrimination by advocating for equality not only in tangible facilities, but also in intangible factors. Marshall argued before the Supreme Court that it was impossible for a state to provide equality in such intangible features as the prestige of an institution, the quality of faculty, and the reputation of degrees for African Americans in separate schools.

Marshall and the NAACP sought to prove the inconsistency of the separate but equal doctrine itself and compel the Supreme Court to re-examine the constitutionality of the doctrine of separate but equal educational facilities. Turning from specific discrimination to racial segregation, Marshal argued that the doctrine of separate but equal was without legal foundation or social justification. The result of this strategy was the overturning of the separate but equal doctrine in *Brown v. Board of Education of Topeka* (1954).

In the decade following *Brown,* Marshall and the Legal Defense and Educational Fund challenged local and state actions upholding separate but equal policies and practices. They argued that *Brown* had to be construed and applied to other areas of state activity besides education, that the separate but equal policy had no place in the area of legitimate state responsibility, including the use of public facilities. After countless court battles, Marshall grew weary of arguing cases and believed that state legislation was sorely needed to advance equality for all persons.

On the Bench

President John F. Kennedy nominated Thurgood Marshall to the Second Circuit Court of Appeals in New York in 1961. He then received a recess appointment in October 1961, and his nomination was confirmed by the Senate on September 11, 1962. Of the 150 opinions he authored after his appointment to the Second Circuit, not one was overturned. President Lyndon B. Johnson nominated Justice Marshall as solicitor general of the United States on June 13, 1965. He assumed the office of solicitor general on August 24, 1965.

Judge Thurgood Marshall was the first African American to serve as solicitor general of the United States. President Johnson nominated Marshall to the bench of the Supreme Court as associate justice on June 13, 1967. The Senate confirmed his nomination on August 30, 1967; he took the oath of office on October 2, 1967.

Justice Marshall was appointed during Chief Justice Earl Warren's tenure. During this period, Associate Justice Marshall consistently joined with his liberal colleagues on the Supreme Court in most of its 99 opinions. Justice Marshall dissented in 6; concurred in 3; and joined in the majority opinion on

66 cases. He wrote 11 majority opinions in this period. As the Warren Court gave way to the Burger Court (1969–1986), Justice Marshall voted as a dissenter in 754 decisions with opinions and 183 in memorandum decisions, for a total of 937 dissenting votes.

Justice Marshall's service to the government of the United States, like his role as lawyer and judge, was filled with activity. In 1951, he investigated court-martial cases involving African American soldiers in both Japan and Korea. Marshall served as a consultant at the Constitutional Conference of Kenya in London in 1961 and as the U.S. representative to the independence ceremonies of Sierra Leone in 1961. He was also the chief of the U.S. delegation to the Third United Nations Congress on Prevention of Crime and Treatment of Offenders in Stockholm, Sweden, in August 1965. President Harry S. Truman appointed Marshall to represent the United States at the laying of the cornerstone ceremony at the Harry S. Truman Center for the Advancement of Peace. He was a member of numerous boards and the recipient of many prestigious national and international medals, awards, and citations for his tireless pursuits in the field of civil rights.

Suffering from poor health, Justice Thurgood Marshall submitted his resignation from the Supreme Court on June 27, 1991. His career as a justice of the court did not end with his resignation. For a brief period of time, the Court by special order assigned Justice Marshall to perform judicial duties in the Second Circuit in 1992 and to hear cases in the Fourth Circuit. Supreme Court Justice Thurgood Marshall died on January 24, 1993, and is buried in Arlington National Cemetery in Washington, D.C.

Paul Green

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities

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Plessy v. Ferguson, 163 U.S. 537 (1896).

Martinez v. Bynum

In *Martinez v. Bynum* (1983), the Supreme Court held that a bona fide residence requirement was a permissible precondition before even a U.S. citizen could demand a state's services such as public education. The Court thus ruled that a child who was a citizen but who did not meet the requirements of Texas's bona fide residence was not entitled to a free public education.

Facts of the Case

Roberto Morales, who was born in McAllen, Texas, was a citizen of the United States. After his birth, Roberto and his parents, Mexican citizens, returned to Mexico, where he lived until he was eight years old. When Roberto turned eight, his mother and father sent him to live with his sister, who had established legal residency in McAllen, Texas. The family's goal was that Roberto would re-enter the United States and live with his sister in order to attend American public schools and to learn English.

Even though Roberto was a citizen, local school board officials denied Roberto a tuition-free education pursuant to a state statute that denied such an education to children who lived apart from their parents or guardians and who were present in districts merely to obtain an education. Roberto's sister filed a lawsuit claiming this statute was unconstitutional, as it violated provisions of the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause.

The lower courts ruled in favor of the school board on the ground that Texas had a substantial interest in assuring that services intended for the state's residents were provided only to residents.

The Court's Ruling

The sister appealed to the Supreme Court, which deemed it necessary to define two major components

of the Texas statute. The first of these components was the issue of whether Roberto lived apart from a parent or guardian. Roberto's sister claimed that her "custody" of Roberto for five years was sufficient to meet the requirement of parent or guardian. However, the Court determined that the wording of the statute deliberately intended that in order to establish residency, a child was required to live with his or her natural parents or with guardians; guardians were defined as persons appointed by the courts or those having lawful control over children with the responsibility to care for their rights and needs. The Court reasoned that while the sister had cared for her brother, her custody did not rise to the level of parenthood or guardianship.

In reviewing the second component of the statute, concerning the need to be present in a district to obtain an education, the Supreme Court pointed out that history revealed that board officials had been liberal in allowing students to attend school without benefit of a parent or guardian if they resided in the district for any reason other than to obtain an education. The Court acknowledged that while the board had, on occasion, granted tuition-free admission to children who were in the district without benefit of a parent or guardian, the state of Texas (and the McAllen School District) was within its rights to deny a tuition-free education to students who lived in the school district solely to receive a free American education.

Additionally, the Supreme Court was of the opinion that because a public education is not a right guaranteed to individuals by the Constitution, bona fide residence requirements that are clearly defined and uniformly applied further a state's interest in meeting constitutional standards. The Court concluded both that the statute that denied a tuition-free education to students who lived in a school district without parents or a guardian and whose sole purpose was to obtain an education satisfied constitutional standards and that the board was not required to provide tuition-free education.

Brenda Kallio

See also Due Process; Equal Protection Analysis; Parens Patriae; *Plyler v. Doe*

Legal Citations

Martinez v. Bynum, 461 U.S. 321 (1983).
Plyler v. Doe, 457 U.S. 202 (1982).

Martinez v. Bynum (Excerpts)

In Martinez v. Bynum, *the Supreme Court upheld the constitutionality of residency laws for school attendance as long as they are clearly defined and uniformly applied.*

Supreme Court of the United States

MARTINEZ

v.

BYNUM

461 U.S. 321

Argued Jan. 10, 1983.

Decided May 2, 1983.

Justice POWELL delivered the opinion of the Court.

This case involves a facial challenge to the constitutionality of the Texas residency requirement governing minors who wish to attend public free schools while living apart from their parents or guardians.

I

Roberto Morales was born in 1969 in McAllen, Texas, and is thus a United States citizen by birth. His parents are Mexican citizens who reside in Reynosa, Mexico. He left Reynosa in 1977 and returned to McAllen to live with his sister, petitioner Oralia Martinez, for the primary purpose of attending school in the McAllen Independent School District. Although Martinez is now Morales's custodian, she is not—and does not desire to become—his guardian. As a result, Morales is not entitled to tuition-free admission to the McAllen schools. Section 21.031(b) and (c) of the Texas Education Code would require the local school authorities to admit him if he or "his parent, guardian, or the person having lawful control of him" resided in the school district, but

§ 21.031(d) denies tuition-free admission for a minor who lives apart from a "parent, guardian, or other person having lawful control of him under an order of a court" if his presence in the school district is "for the primary purpose of attending the public free schools." Respondent McAllen Independent School District therefore denied Morales's application for admission in the fall of 1977.

In December 1977 Martinez, as next friend of Morales, and four other adult custodians of school-age children instituted the present action in the United States District Court for the Southern District of Texas against the Texas Commissioner of Education, the Texas Education Agency, four local school districts, and various local school officials in those districts. Plaintiffs initially alleged that § 21.031(d), both on its face and as applied by defendants, violated certain provisions of the Constitution, including the Equal Protection Clause, the Due Process Clause, and the Privileges and Immunities Clause. Plaintiffs also sought preliminary and permanent injunctive relief.

The District Court denied a preliminary injunction in August 1978. It found "that the school boards . . . have been more than liberal in finding that certain children are not living away from parents and residing in the school district for the sole purpose of attending school." App. 20a. The evidence "conclusively" showed "that children living within the school districts with someone other than their parents or legal guardians will be admitted to school if *any* reason exists for such situation other than that of attending school only." *Ibid.* (emphasis in original).

Plaintiffs subsequently amended the complaint to narrow their claims. They now seek only "a declaration that . . . § 21.031(d) is unconstitutional on its face," App. 3a, an injunction prohibiting defendants from denying the children admission to school pursuant to § 21.031(d), restitution of certain tuition payments, costs, and attorney's fees. After a hearing on the merits, the District Court granted judgment for the defendants. The court concluded that § 21.031(d) was justified by the State's "legitimate interest in protecting and preserving the quality of its educational system and the right of its own bona fide residents to attend state schools on a preferred tuition basis." In an appeal by two plaintiffs, the United States Court of Appeals for the Fifth Circuit affirmed. In view of the importance of the issue, we granted Martinez's petition for certiorari. We now affirm.

II

This Court frequently has considered constitutional challenges to residence requirements. On several occasions the Court has invalidated requirements that condition receipt of a benefit on a minimum period of residence within a jurisdiction, but it always has been careful to distinguish such durational residence requirements from bona fide residence requirements. In *Shapiro v. Thompson,* for example, the Court invalidated one-year durational residence requirements that applicants for public assistance benefits were required to satisfy despite the fact that they otherwise had "met the test for residence in their jurisdictions." Justice BRENNAN, writing for the Court, stressed that "[t]he residence requirement and the one-year waiting-period requirement are distinct and independent prerequisites for assistance," and carefully "impl[ied] no view of the validity of waiting-period *or* residence requirements determining eligibility to vote, eligibility for tuition-free education, to obtain a license to practice a profession, to hunt or fish, and so forth." In *Dunn v. Blumstein,* the Court similarly invalidated Tennessee laws requiring a prospective voter to have been a state resident for one year and a county resident for three months, but it explicitly distinguished these durational residence requirements from bona fide residence requirements. This was not an empty distinction. Justice MARSHALL, writing for the Court, again emphasized that "States have the power to require that voters be bona fide residents of the relevant political subdivision."

We specifically have approved bona fide residence requirements in the field of public education. The Connecticut statute before us in *Vlandis v. Kline,* for example, was unconstitutional because it created an irrebuttable presumption of nonresidency for state university students whose legal addresses were outside of the State before they applied for admission. The statute violated the Due Process Clause because it in effect classified some bona fide state residents as nonresidents for tuition purposes. But we "fully recognize[d] that a State has a legitimate interest in protecting and preserving . . . the right of its own bona fide residents to attend [its colleges and universities] on a preferential tuition basis." This "legitimate interest" permits a "State [to] establish such reasonable criteria for in-state status as to make virtually certain that students who are not, in fact, bona fide residents of the State, but who have come there solely for educational purposes, cannot take advantage of the in-state rates." Last Term, in *Plyler v. Doe,* we reviewed an aspect of . . . the statute at issue in this case. Although we

invalidated the portion of the statute that excluded undocumented alien children from the public free schools, we recognized the school districts' right "to apply . . . established criteria for determining residence."

A bona fide residence requirement, appropriately defined and uniformly applied, furthers the substantial state interest in assuring that services provided for its residents are enjoyed only by residents. Such a requirement with respect to attendance in public free schools does not violate the Equal Protection Clause of the Fourteenth Amendment. It does not burden or penalize the constitutional right of interstate travel, for any person is free to move to a State and to establish residence there. A bona fide residence requirement simply requires that the person *does* establish residence before demanding the services that are restricted to residents.

There is a further, independent justification for local residence requirements in the public-school context. As we explained in *Milliken v. Bradley*: "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for education excellence.'"

The provision of primary and secondary education, of course, is one of the most important functions of local government. Absent residence requirements, there can be little doubt that the proper planning and operation of the schools would suffer significantly. The State thus has a substantial interest in imposing bona fide residence requirements to maintain the quality of local public schools.

III

The central question we must decide here is whether § 21.031(d) is a bona fide residence requirement. Although the meaning may vary according to context, "residence" generally requires both physical presence and an intention to remain. As the Supreme Court of Maine explained over a century ago: "When . . . a person voluntarily takes up his abode in a given place, with intention to remain permanently, or for an indefinite period of time; or, to speak more accurately, when a person takes up his abode in a given place, without any present intention to remove therefrom, such place of abode becomes his residence. . . ." This classic two-part definition of residence has been recognized as a minimum standard in a wide range of contexts time and time again.

In *Vlandis v. Kline, supra,* we approved a more rigorous domicile test as a "reasonable standard for determining the residential status of a student." That standard was described as follows: "'In reviewing a claim of in-state status, the issue becomes essentially one of domicile. In general, the domicile of an individual is his true, fixed and permanent home and place of habitation. It is the place to which, whenever he is absent, he has the intention of returning.'" This standard could not be applied to school-age children in the same way that it was applied to college students. But at the very least, a school district generally would be justified in requiring school-age children or their parents to satisfy the traditional, basic residence criteria-*i.e.,* to live in the district with a bona fide intention of remaining there—before it treated them as residents.

Section 21.031 is far more generous than this traditional standard. It compels a school district to permit a child such as Morales to attend school without paying tuition if he has a bona fide intention to remain in the school district indefinitely, for he then would have a reason for being there other than his desire to attend school: his intention to make his home in the district. Thus § 21.031 grants the benefits of residency to all who satisfy the traditional requirements. The statute goes further and extends these benefits to many children even if they (or their families) do not intend to remain in the district indefinitely. As long as the child is not living in the district for the sole purpose of attending school, he satisfies the statutory test. For example, if a person comes to Texas to work for a year, his children will be eligible for tuition-free admission to the public schools. Or if a child comes to Texas for six months for health reasons, he would qualify for tuition-free education. In short, § 21.031 grants the benefits of residency to everyone who satisfies the traditional residence definition and to some who legitimately could be classified as nonresidents. Since there is no indication that this extension of the traditional definition has any impermissible basis, we certainly cannot say that § 21.031(d) violates the Constitution.

IV

The Constitution permits a State to restrict eligibility for tuition-free education to its bona fide residents. We hold that § 21.031 is a bona fide residence requirement that satisfies constitutional standards. The judgment of the Court of Appeals accordingly is

Affirmed.

Citation: *Martinez v. Bynum,* 461 U.S. 321 (1983).

McDaniel v. Barresi

In *McDaniel v. Barresi* (1971), the U.S. Supreme Court was asked to determine whether a school board that was found to have maintained an unconstitutionally segregated system could implement a desegregation plan by affirmatively redrawing geographic attendance zones for the specific purpose of establishing a greater racial balance in its schools. The primary issue in *McDaniel* was whether school officials could constitutionally take race into account when assigning elementary school children to specified schools in order to effectuate a desegregation order. The Supreme Court said yes.

Facts of the Case

The school desegregation plan at issue in *McDaniel* involved reassigning African American students who resided in heavily segregated areas to other school attendance zones, which necessitated that they walk further distances to school or be transported by bus. Opponents contended that the plan violated the Equal Protection Clause of the Fourteenth Amendment by treating students differently based on race, and the plan also violated the Civil Rights Act of 1964, because it required busing students from one school to another school located farther from the students' residence.

On further review of a judgment from the Supreme Court of Georgia, a unanimous U.S. Supreme Court approved the school board's student desegregation assignment plan. Reversing in favor of the proponents of the plan, the Court held that it violated neither the Equal Protection Clause of the Fourteenth Amendment nor the Civil Rights Act of 1964.

The Court's Ruling

The Supreme Court reasoned that the school board acted within its affirmative duty to replace its segregated school system with a unitary racially balanced school system when it established attendance lines and reassigned students based solely on race. While the Equal Protection Clause typically prohibits any disparate treatment on the basis of race, here the Court was of the opinion that the classification was permissible. The Court explained that the formulation of such a remedy for unconstitutional racial segregation invariably required that the students be treated differently based on their races. The Court acknowledged that "any other approach would freeze the status quo that is the very target of all desegregation" (p. 41).

Barresi sets forth parameters within which school boards may exercise discretion in voluntarily desegregating their school systems. The Court, by approving the board's redistricting based on race, granted other boards broad remedial power to desegregate their school systems. The Court first acknowledged this expansive remedial power of school boards to rectify past segregation in *Green v. County School Board of New Kent County* (1968), which permitted school boards to "take whatever steps might be necessary" to eradicate segregation. *McDaniel* is illustrative of this broad remedial power and permits within its purview race-conscious geographical redistricting and busing to desegregate school systems. Prior to this recognition that race could serve as a legitimate factor in reapportioning pupil school attendance to end segregation, such disparate treatment of individuals based solely on race was deemed unconstitutional in violation of the Fourteenth Amendment's Equal Protection Clause. However, it is well established that while school officials must not consider race in providing equal educational opportunity to all students, they may take race into account for the purposes of crafting remedies for historical unconstitutional racial discrimination.

McDaniel is most often cited with respect to the authoritative ability of local school boards to utilize race as a factor in student assignments to specified schools in order to rectify unlawful segregation. Moreover, state school boards have the unequivocal discretion to assign students within their school systems and can consider race in seeking to achieve racial balance. While *McDaniel* stands firm for the proposition that boards may take race into consideration when assigning students in the system to ameliorate the detrimental effects of past segregation, more recent litigation at the Supreme Court posed a somewhat different legal question that was not ultimately resolved.

In *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), a consolidation of suits from Seattle, Washington, and, Louisville Kentucky, a majority of justices on the Supreme Court, in a plurality ruling, struck down race conscious assignment plans. The plurality invalidated the plans, which were designed to achieve racial balance and the benefits of diversity, not only because neither system was operating under desegregation orders (Seattle never had, and the one in Louisville had been terminated), but also because race was the only factor used in student assignments. However, insofar as this judgment was a plurality, questions remain about the constitutionality of the use of race in making student assignments in K–12 public schools.

Aimee R. Vergon

See also *Brown v. Board of Education of Topeka;* Civil Rights Act of 1964; Dual and Unitary Systems; *Green v. County School Board of New Kent County; Parents Involved in Community Schools v. Seattle School District No. 1; Swann v. Charlotte-Mecklenburg Board of Education*

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Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

McDonnell Douglas Corporation v. Green

In *McDonnell Douglas Corporation v. Green* (1973), the U.S. Supreme Court explained how to prove a case of employment discrimination under Title VII of the Civil Rights Act of 1964 when evidence of discrimination is circumstantial. Rarely do job seekers or employees have direct evidence of discrimination, such as policies that specifically exclude members of particular races. Recognizing this, in *McDonnell Douglas* the Court provided a framework for proving disparate treatment when circumstantial evidence is all that is available.

Most cases of discrimination filed under Title VII allege disparate treatment discrimination even though the law also covers policies that have a disparate impact. Disparate treatment occurs when employers treat specified job seekers, employees, or particular workers differently on the basis of impermissible factors such as race, religion, or sex. Moreover, disparate treatment is referred to as intentional discrimination, because employers knowingly treat one person, or group of persons, differently than others.

While the Mc*Donnell Douglas* Court found that a job application may have violated Title VII, the judiciary applies the same framework to other types of discriminatory treatment, including hiring, dismissal, discipline, promotion, and tenure in the educational context. Likewise, although Title VII prohibits discrimination on the basis of race, color, national origin, religion, or sex, the courts employ the same framework in other federal discrimination cases, including age and disability discrimination.

The Initial Decision

At issue in *McDonnell Douglas* was a claim that the plaintiff's former employer relied on racially motivated hiring practices. The suit began after the plaintiff engaged in disruptive and illegal activity due to his having been fired. In a disparate treatment case where only circumstantial evidence is available, the court found, an employee first must establish a prima facie case of discrimination. *Prima facie* means that a court will presume that an employee's discrimination claim is true unless contrary evidence is provided. The employee need only show facts that give rise to an inference of intentional discrimination.

In order to establish a prima facie case of discrimination in hiring, for example, applicants must show that they are members of a protected group covered by the law, applied for an available position, were qualified, and were rejected, and that the job remained open and the employer continued to seek qualified applicants, or the job was filled by someone who was

not in a protected group. If job seekers or employees establish prima facie cases and employers do not come up with any nondiscriminatory reasons for their action, then employees will prevail.

After employees or job applicants establish prima facie cases, employers can rebut their claims by articulating legitimate, nondiscriminatory reasons for their employment actions. At the same time, employers do not have to prove these facts; they merely have to offer explanations why plaintiffs were not hired. Once employers offer explanations, it is up to plaintiffs to prove that those justifications were untrue pretexts for discrimination.

Clarifying Cases

The Supreme Court clarified what happens once an employer's justification is proved to be untrue. In *St. Mary's Honor Center v. Hicks* (1993), the Court held that employees or job seekers do not automatically prove their cases of disparate treatment discrimination when they show that the reasons offered by employers for adverse employment actions are mere pretexts. In *Hicks,* the Court expressed its concern that large corporations might not be able to ascertain the exact reason why someone was not hired or promoted or was fired and that in this context an employer's failure to provide the true reason for an employment decision should not automatically impose liability without additional facts. However, in a case in which the individual offering the reason is the same person who made the employment decision, evidence of pretext may be strong circumstantial evidence. There was some confusion in the lower courts that *Hicks* required additional independent evidence of employment discrimination.

In *Reeves v. Sanderson Plumbing Products* (2000), an age discrimination case, the Supreme Court clarified *Hicks* by explaining judges should weigh a number of factors to determine whether discrimination occurred, including the strength of the prima facie case and the fact that an employer's reason for the adverse action was proven to be a mere pretext. Even though employees always bear the burden of proving discrimination, the Court explained in *Reeves* that it did not require additional independent evidence of discrimination.

Karen Miksch

See also Disparate Impact; Equal Employment Opportunity Commission; *Griggs v. Duke Power Company;* Title VII

Legal Citations

Griggs v. Duke Power Company, 401 U.S. 424 (1971).
McDonnell Douglas Corporation v. Green, 411 U.S. 792 (1973).
Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000).
St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993).

McLaurin v. Oklahoma State Regents for Higher Education

McLaurin v. Oklahoma State Regents for Higher Education (1950), like *Sweatt v. Painter* (1950), is a landmark case in civil rights law that demonstrated that because the "separate but equal" doctrine was eroding, it was not possible to provide a separate but equal education in graduate and professional schools as well as in K–12 education.

Facts of the Case

George McLaurin, an African American man, applied for admission to the all-White University of Oklahoma to obtain a doctoral degree in education. McLaurin was denied admission to the university solely due to his race under a state law that made it a misdemeanor to teach African American and White students in the same facility. When McLaurin pursued legal action to be admitted to the university, a federal court in Oklahoma was of the opinion that the state, through university officials, had the constitutional duty to provide him with the education that was provided for members of other populations.

Further, the court declared that to the extent the Oklahoma statutes denied McLaurin admission, they were unconstitutional and void. Following the litigation, the state legislature amended its statutes to permit the admission of African Americans to institutions of higher learning attended by White students as long as these programs were administered "upon a segregation basis." McLaurin was thus accepted to study at the university.

Once McLaurin began attending classes, he realized that university officials segregated him from the White students. The classes that McLaurin attended were purposely scheduled for classrooms that had adjoining anterooms, in which he was forced to sit. In the library, McLaurin was required to sit at a designated desk on the mezzanine floor, and in the cafeteria, he had to eat at different times than White students. McLaurin objected to this treatment and sought a remedy from the lower federal court. When a federal trial court denied McLaurin's motion for relief on the basis that he was denied equal protection under the law, he appealed to the Supreme Court.

In the interim, university officials adjusted the institution's segregation policies in a very limited way. University officials began allowing McLaurin to sit at a desk in the main classroom, but only in a row designated for African Americans. McLaurin also began to be able to study on the main floor of the library, but he was still only allowed to use specified desks. Similarly, officials allowed him the privilege of being able to eat at the same time as White students, but he was still not permitted to sit at the same tables as those students.

The university contended that these restrictions did not affect McLaurin's ability to study, learn, or interact with other students in preparing for his profession. McLaurin disagreed with the university's position, pressing his claim that officials infringed on his Fourteenth Amendment Equal Protection Rights. The core of his claim was that the restrictions negatively affected his educational achievement and his education was unequal to that of White students.

The Court's Ruling

On further review, the U.S. Supreme Court, in a brief opinion, reversed in favor of McLaurin. In writing for the unanimous court, Chief Justice Fred Vinson stated,

> Those who will come under [McLaurin's] guidance and influence must be directly affected by the education he receives. Their own education and development will necessarily suffer to the extent that his training is unequal to that of his classmates. State-imposed restrictions which produce such inequalities cannot be sustained. (p. 641)

In buttressing the Court's analysis, he added that

> the conditions under which [McLaurin] is required to receive his education deprive him of his personal and present right to the equal protection of the laws. . . . We hold that under these circumstances the Fourteenth Amendment precludes differences in treatment by the state based upon race. [McLaurin], having been admitted to a state-supported graduate school, must receive the same treatment at the hands of the state as students of other races. (p. 641)

Viewed together, *McLaurin* and *Sweatt* demonstrated that there were intangible social aspects to education that could never be equal in segregated facilities. Further, these victories in higher education bolstered efforts to focus attention on the inequalities of segregated elementary and secondary public schools. Needless to say, *McLaurin* and *Sweatt* foreshadowed the legal strategy and judicial analysis that would become well known in *Brown v. Board of Education of Topeka* (1954).

Aaron Cooley

See also *Brown v. Board of Education of Topeka: Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Fourteenth Amendment; *Plessy v. Ferguson;* Segregation, De Jure; *Sweatt v. Painter*

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Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).

McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).

Sweatt v. Painter, 339 U.S. 629 (1950).

Mediation

Public policy in the United States favors alternative dispute resolution as an effective means of resolving labor disputes instead of litigation. For this reason, the majority

of states with collective bargaining agreements between public school teachers and their boards of education mandate the use of formal grievance procedures to settle labor disputes. Three famous U.S. Supreme Court labor cases, referred to as the steelworkers' trilogy (*United Steelworkers of America v. American Manufacturing Company* [1960], *United Steelworkers of America v. Warrior and Gulf Navigation Company* [1960], and *United Steelworkers of America v. Enterprise Wheel and Car Company* [1960]) reflect the connection between federal labor law and state collective bargaining law.

Along with fact-finding and arbitration, mediation is one of the three primary methods of dispute resolution used in the collective bargaining process when parties fail to reach mutually acceptable agreements. The process of mediation involves the use of neutral third-party mediators, who work closely with the parties to facilitate their reaching mutually acceptable agreements; it is regulated by state statute. In practice, individual mediators are chosen either by state labor relations boards or through the mutual agreement of local school boards and the bargaining units of their employees.

In contrast to arbitrators' recommendations, those rendered by mediators are usually not disclosed to the public. At the same time, while the legal authority of mediators is limited, a number of states require that parties exhaust formal mediation efforts before they can proceed to other alternative means of dispute resolution, such as fact-finding, arbitration, or the termination of bargaining altogether.

Labor topics that are often subjects of mediation include those areas that are bargainable subjects under state collective bargaining agreements. In most states, labor issues surrounding wages, hours of employment, and contractual issues related to the terms and conditions of employment represent issues that are subject to mediation if the parties cannot reach agreements under their collective bargaining agreements. If school boards and unions ultimately fail to reach agreement after exhausting the dispute negotiation remedies of mediation, fact-finding, and arbitration, the majority, but certainly not all, of the states that allow bargaining require the parties to maintain the terms and conditions of the previous collective bargaining contract.

Kevin P. Brady

See also Arbitration; Collective Bargaining; Contracts; Impasse in Bargaining; Unions

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Meek v. Pittenger

In *Meek v. Pittenger* (1975), the plaintiffs, three individuals and four organizations, filed suit alleging that two Pennsylvania statutes violated the Establishment Clause of the First Amendment by authorizing the use of state purchased books, materials, and equipment in religious schools. One of the statutes, Act 194, authorized commonwealth officials to provide auxiliary services, including counseling, testing, and psychological services, to all children in Pennsylvania's nonpublic schools, free of charge. The other law, Act 195, provided that the commonwealth would loan textbooks, instructional materials, and equipment to these same children.

On direct appeal from a federal trial court in Pennsylvania, the U.S. Supreme Court held that Act 195, only as it relates to the loan of textbooks, did not violate the Establishment Clause. Affirming the constitutionality of the textbook loan statute, the Court referred to *Board of Education v. Allen* (1967), in which the justices upheld a law from New York that required public school authorities to lend textbooks to all students in Grades 7 through 12, including children who attended nonpublic, including religiously affiliated, schools. As in *Allen,* in a manner consistent with

the child benefit test, the Court observed that loans of the textbooks were constitutionally acceptable, because they went to the students, not to their nonpublic schools. Further, the Court pointed out that the program withstood constitutional scrutiny insofar as ownership of the textbooks remained with the commonwealth.

Central to the analysis of the application of both Pennsylvania statutes was the three-part test established in *Lemon v. Kurtzman* (1971), which requires governmental action to have a secular legislative purpose and a principal or primary effect that neither advances nor inhibits religion; the action also must not result in excessive entanglement between religion and the government.

In applying this test, the Court concluded that Act 194, and its auxiliary services provision, violated *Lemon's* excessive entanglement prong. More specifically, insofar as the services were to be provided by public employees in the setting of nonpublic schools, the Court was concerned about the possible advancement of religion using public resources. The Court thus determined that the continued surveillance necessary to ensure that the teachers did not further the religious mission of religiously affiliated nonpublic schools violated the Establishment Clause.

Turning to Act 194 and the loan of instructional materials, the Court acknowledged that it resulted in "massive aid provided [to] the church-related nonpublic schools" (p. 635). In finding this act unconstitutional, the Court invalidated provisions that allowed the commonwealth to loan periodicals, films, recordings, and laboratory equipment along with equipment for recording and projecting to nonpublic schools. Although the Court conceded that the aid was secular in purpose, the aid had the primary effect of advancing religion, because it was largely provided on site in religiously affiliated nonpublic schools. In addition, the Court thought that the great amount of aid sent to educational environments where religious instruction was so omnipresent meant that it would have inevitably been used to further the religious missions of the schools in violation of the Establishment Clause.

In *Mitchell v. Helms* (2000), the Supreme Court partially invalidated *Meek.* Holding that governmental funds utilized for the purchase of instructional and educational materials in sectarian schools did not violate the Establishment Clause, the court admitted that, in that respect, *Meek* was no longer good law. However, insofar as *Helms* was a plurality decision, the status of *Meek* and similar loan programs for nonpublic schools is in some doubt.

Mark Littleton

See also *Agostini v. Felton; Board of Education v. Allen;* Child Benefit Test; *Lemon v. Kurtzman; Mitchell v. Helms;* Nonpublic Schools; State Aid and the Establishment Clause; *Wolman v. Walter; Zobrest v. Catalina Foothills School District*

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Meek v. Pittenger, 421 U.S. 349 (1975).
Mitchell v. Helms, 530 U.S. 793 (2000). *reh'g denied,* 530 U.S. 1296 (2000), o*n remand sub nom. Helms v. Picard,* 229 F.3d 467 (5th Cir. 2000).

Mendez v. Westminster School District

Called the *Brown v. Board of Education of Topeka* (1954) for Mexican Americans and other Latinos in California, *Mendez v. Westminster School District* (1947) stands out as the case that ended legally sanctioned segregation for Mexican American students. *Mendez* was a test case in which social science data were introduced as evidence showing how Mexican American children developed an inferiority complex caused by racial segregation in schools. At the same time, *Mendez* is additionally noteworthy because it helped to pave the way for the use of a similar line of reasoning in *Brown.*

In a touch of irony, the then-governor of California and later chief justice of the U.S. Supreme Court who authored the unanimous opinion in *Brown,* Earl Warren, took *Mendez* and used it to push laws through the legislature repealing school segregation for Asian and Native American school children.

Facts of the Case

Mexicans lived in California before the Gold Rush days of the mid-19th century. However, the problem of segregation did not arise until 1910, when large numbers of Mexicans began appearing to work in the citrus groves. By 1920, the Mexican population in California had tripled. To the extent that the burgeoning Mexican population created great anxiety among the Anglo communities, social segregation practices soon began appearing that prohibited Mexicans from sitting with Whites in movie theaters and swimming with them in pools. These practices also led to the establishment of segregated housing patterns.

In Orange County, the center of a large citrus industry, Gonzalo Mendez and his wife, Felicitas, who was from Puerto Rico, formed a group to battle against school segregation based on race. In 1945, the plaintiffs filed suit in the federal trial court in Southern California against four school districts (Westminster, Santa Ana, Garden Grove, and El Modena), seeking an injunction that would end racial segregation of the schools.

The Mexican American parents turned to the courts in their attempt to end racial segregation, because their petitions to the boards of education and their superintendents received muted responses. The prevailing belief among educational officials was that the Mexican American children were dirty, unkempt, and not as intelligent as the White students. The "proof" was offered in the familiar IQ test data, which showed that Mexicans were intellectually inferior to Whites. Insofar as IQ scores were considered genetic and not mutable, this difference fueled resistance by White educators to integrating Mexican children in the schools.

The Court's Rulings

At trial, when the school superintendents testified, they portrayed Mexican children as decidedly inferior because of their poor personal hygiene and their language deficits. However, the attorney for the Mendez group fought back by calling in social scientists as expert witnesses who put the question of the need for separate schools clearly in the court's view.

The judge in the trial court took a year to render a judgment. The trial court was then of the opinion that racial segregation was not only unjustifiable under the Constitution of the State of California but was also a clear violation of the Equal Protection Clause of the Fourteenth Amendment. On further review, the Ninth Circuit affirmed in favor of the plaintiffs.

In its analysis, the Ninth Circuit began by pointing out that the trial court properly assumed jurisdiction in Mendez. The court next pointed out that the acts of officials in the state department of education were under the color of state law, meaning that they behaved as if they had the apparent authority to do as they did. The court reasoned that when officials placed children of Mexican descent in segregated schools against their wills, they violated both state law and the Equal Protection Clause, because doing so deprived them of equal protection and of liberty and property without due process of the laws.

Fenwick W. English

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment; Social Sciences and the Law

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Meritor Savings Bank v. Vinson

Meritor Savings Bank v. Vinson (1986) was the first case wherein the U.S. Supreme Court addressed sexual harassment in the workplace under Title VII. Although *Meritor* did not occur in a school context, it

should be of interest to educators at all levels, because the Court established criteria for judging claims that relate to a hostile work environment.

Facts of the Case

Michelle Vinson began working for Meritor Savings Bank in 1974 as a teller-trainee. Her immediate supervisor, Sidney Taylor, was a vice president of the bank. Over the next four years, Vinson was promoted to teller, head teller, and then assistant branch manager. It was undisputed that her promotions were based on merit alone. In 1978, Vinson's employment was terminated for excessive use of sick leave. Vinson then filed suit under Title VII against Taylor and the bank, alleging that she was subject to sexual harassment during her tenure in the job.

At trial, Vinson alleged that she had had sexual intercourse with Taylor on multiple occasions, out of fear of losing her job, and that he fondled her and made suggestive remarks to her any number of times. Taylor denied the allegations in their entirety and argued that Vinson's accusations arose from a business-related dispute. The bank also denied Vinson's allegations while specifically avowing that officials were unaware of Taylor's behavior and that if he acted as Vinson alleged, he did so of his own volition.

The federal trial court for the District of Columbia held that Vinson was not the victim of sexual harassment, because the sexual relationship, if it existed, was voluntary. The District of Columbia Circuit reversed in favor of Vinson on the basis that if Taylor made Vinson's toleration of sexual harassment a condition of her employment, the voluntary nature of the sexual relationship was irrelevant. The court also recognized that there were two categories of actionable sexual harassment under Title VII: harassment that conditions employment benefits on sexual favors (quid pro quo sexual harassment) and harassment that, while not affecting economic benefits, creates a hostile or offensive working environment (hostile work environment harassment). Applying agency principles, the court decided that the bank was absolutely liable for sexual harassment arising from the actions of its supervisor, regardless of whether officials knew or should have known about the harassment.

The Court's Ruling

On further review, the Supreme Court, in an opinion by Justice Rehnquist, affirmed that allegations of sexual harassment under Title VII may include hostile work environment claims and are not limited to economic benefits. The Court thus decided that a claim of "hostile work environment" sex discrimination is actionable under Title VII. At the heart of its analysis, the Supreme Court noted that there are five elements in claims of sex discrimination based on the existence of a hostile work environment, an offense that is ordinarily established by a series of incidents. The criteria can also apply in cases of quid pro quo harassment.

The Court noted that the first element in hostile work environment sex discrimination claims is that plaintiffs must belong to a protected category. Insofar as most suits are filed by women, the Court indicated that this element is satisfied when women file claims. Second, the Court explained that plaintiffs must have been subjected to unwelcome sexual advances. The Court added that the correct inquiry into sexual harassment claims is not based on whether plaintiffs' participation was voluntary but whether it was unwelcome. To this end, the justices were thus satisfied that the trial court had not erred in allowing evidence about Vinson's sexually provocative dress and speech, because such evidence could prove useful in evaluating whether the sexual behaviors at the center of the dispute were welcome or unwelcome.

Third, the Supreme Court indicated that the harassment must have been based on sex. Fourth, the Court was of the opinion that the harassment must have affected a term, condition, or privilege of employment to such a degree that it created a hostile work environment. In other words, the treatment must have been so pervasive as to alter working conditions to the point that, under the totality of the circumstances, it seriously affects plaintiffs' psychological well-being. The fifth element that the Court identified was that employers knew or should have known of the harassment but failed to take prompt remedial action to resolve situations.

Even though the Supreme Court set the standards for evaluating whether hostile work environment harassment occurred, it stopped short of definitely imposing liability on the bank. Insofar as it rejected the

appellate panel's disregard for the general principles of agency in imposing absolute liability on the bank for the acts of one of its supervisors, the Court remanded this part of the dispute for further consideration

David L. Dagley

See also Hostile Work Environment; *Robinson v. Jacksonville Shipyards;* Sexual Harassment, Quid Pro Quo; Title VII

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Mexican American Legal Defense and Educational Fund (MALDEF)

The Mexican American Legal Defense and Educational Fund (MALDEF) was incorporated in Texas in 1968. MALDEF was modeled after the National Association for the Advancement of Colored People, Legal Defense Fund (NAACP/LDF) as a civil rights organization to protect the rights of Mexican Americans using the judicial system. MALDEF has evolved from a grassroots first-generation Mexican American legal organization to a diverse, more corporate law firm protecting the rights of all Latino groups. MALDEF's civil rights legal history is grounded in the protection of voting rights, educational rights, employment protections related to national origin and citizenship status, language issues, and hate crimes. MALDEF'S mission is to foster sound public policies, laws, and programs to safeguard the civil rights of all Latinos living in the United States. This entry summarizes its history and achievements.

Background

MALDEF was incorporated by a group of attorneys committed to protecting the civil rights of an emerging, nationally significant population. The early leaders in MALDEF were later appointed by governors and presidents to more globally serve the United States. Among these were James De Anda, who was appointed to serve as a federal judge in the Southern District of Texas; Pete Tijerina, who served in the Texas legislature; Mario Obledo, who was appointed secretary of health and welfare in California; Dan Sosa, who later served as a justice on the Supreme Court of New Mexico; Carlos Cadena, who later became an appellate court judge in Texas; Gregory Luna, who served in the Texas senate; and Alex Armendariz, who became an immigration judge in El Paso. MALDEF's former executive director and its general counsels transitioned into private practice and served on prominent private corporate boards. MALDEF has become a national organization that provides opportunities for service-oriented lawyers to protect the civil rights of its constituents while distinguishing themselves as leaders.

MALDEF was incorporated in Texas but expanded throughout the United States, where significant numbers of Latinos have emerged. Originally headquartered in San Antonio, Texas, the organization expanded to include offices in Los Angeles (now the national headquarters), Chicago, Atlanta, and Washington, D.C. MALDEF operates on a substantial annual budget that is supported by private national fundraising efforts and attorney's fees. Its emerging corporate image is that of a self-sufficient organization that engages in responsible fundraising and meets its management goals. The organization has development efforts to provide ongoing financial and public support.

Original MALDEF litigation focused on education, employment, and police brutality cases of the 1960s and the 1970s. Litigation became more focused under the leadership of Mario Obledo, who targeted Supreme Court cases by filing friend-of-the-court briefs.

School-Related Litigation

The only U.S. Supreme Court case that addresses school finance, *San Antonio Independent School District v. Rodriguez* (1973) directly affected the legal strategy that MALDEF would later use in school finance litigation. Although it was not a MALDEF case, *Rodriguez* was based on the legal theory that school finance was a Fourteenth Amendment equal

access issue. However, the Supreme Court ruled that education is not a fundamental right under the federal Constitution. Using *Rodriguez,* the MALDEF legal staff refocused school finance litigation strategies using state constitutions and state courts to file equity finance cases in Texas and other states.

In 1989, MALDEF won a major school finance equity case when the Supreme Court of Texas ruled that because the state's public school financing structure was unconstitutional, the legislature had to formulate an equitable school finance plan. After an intermediate appellate court in Texas reversed in favor of the state, the plaintiffs sought further review. On July 5, 1989, the Supreme Court of Texas, in a unanimous opinion in *Edgewood Independent School District v. Kirby,* reinstated the trial court's opinion, thereby ordering the legislature to implement an equitable school finance system by the start of the 1990–1991 school year. Like a Russian novel, the *Edgewood* litigation continued until May 28, 1998, when the Texas legislature enacted a finance plan that offered property-rich school districts one of five voluntary options to redistribute wealth using a wealth equalization formula.

Rights to an education and educational opportunities are a major litigation area for MALDEF. In *Plyler v. Doe* (1982), the Supreme Court decided that an education statute from Texas violated the Equal Protection Clause of the Fourteenth Amendment; this statute withheld state funds for the education of children who were not "legally admitted" into the United States and authorized local school boards to refuse to enroll these students. *Plyler* confirmed that the Equal Protection Clause applies to all, regardless of whether they are citizens who are subject to the laws of the United States. At the heart of its rationale, the Court acknowledged that children should not have been denied the right to education based on the status of their parents. MALDEF has also litigated cases that prevent school systems from engaging in discrimination in public elementary and secondary education.

As the number of Latino students increases in American public schools, issues of educational equality, adequacy, and barriers to fair and equal education opportunities will continue to be a challenge for MALDEF. There are 41 million Latinos in the United States; they compose 20% of the K–12 student enrollment, include 5.5 million English Language Learning students (ELL), and compose 33% of U.S. children under the age of 18. These numbers suggest a drastic change in the American population that calls for transitional support and protection of the civil rights of a class of people.

Other Actions

Voter rights and participation are two areas in which MALDEF has been involved since 1970. MALDEF joined forces with the Southwest Voter Registration Education Project to litigate voting inequities. The two organizations filed 88 suits and successfully lobbied to ensure that the 1975 extension of the Voting Rights Act of 1965 included Spanish-surnamed citizens in the Southwest. In November 2006, MALDEF defended the voting rights of Latinos in Orange County, California; Tucson, Arizona; and Texas. In an Orange County case, a legislative candidate mailed a letter to 14,000 registered Spanish-surnamed voters. The letter, which was written in Spanish, falsely stated that immigrants were not allowed to vote and that there was no benefit to voting in American elections. While eligible naturalized immigrants may freely participate in American elections, the real intent of the letter was to intimidate Latino voters. MALDEF contacted the attorney general providing notification of the voter intimidation effort and instigated an investigation by the U.S. Civil Rights Division.

In another 2006 U.S. civil rights incident, MALDEF witnessed anti-immigrant activists aggressively intimidating Latino voters at the election polls, pushing a video camera in front of approaching Latino voters and requesting personal information. As it does with most American civil rights incidents, MALDEF refers these incidents to the United States Attorney and the U.S. Office for Civil Rights. In its litigation, MALDEF works cooperatively with organizations such as the NAACP, the ACLU, and the League of United Latin American Citizens (LULAC). In 2006, LULAC and MALDEF worked cooperatively in *League of United Latin American Citizens v. Perry* as Nina Perales, a MALDEF attorney, successfully argued before the Supreme Court that the redistricting plan from Texas amounted to a vote dilution plan in violation of the Voting Rights Act. In addition to these

voting rights cases, MALDEF has argued school board and other redistricting claims throughout the United States. In fact, MALDEF attorneys have argued five cases before the Supreme Court.

Augustina H. Reyes

See also Equal Protection Analysis; National Association for the Advancement of Colored People; *Plyler v. Doe; San Antonio Independent School District v. Rodriguez;* U.S. Supreme Court Cases in Education

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Meyer v. Nebraska

Meyer v. Nebraska (full title *Meyer v. State of Nebraska*) (1923) was the first of three Supreme Court cases, the other two being *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) and *Wisconsin v. Yoder* (1972), that shaped the right of parents, under the Fourteenth Amendment Liberty Clause, to direct the education of their children. In its first application of the Fourteenth Amendment's Liberty Clause to education, the Court ruled in *Meyer* that the state exceeded its power in an unreasonable law dictating both to a teacher and to students' parents the language that must be used in instruction.

Facts of the Case

Meyer involved the constitutionality of a post–World War I statute that the legislature of Nebraska enacted prohibiting instruction in any language other than English to any student who had not passed the eighth grade. This prohibition applied to all private, denominational, parochial, and public schools in the state. Any teacher who violated this statute could be charged with a misdemeanor and, if convicted, fined from $25 to $100 and confined in the county jail for up to 30 days.

Meyer, a teacher in a Nebraska parochial school, was charged and convicted under the statute for teaching reading in the German language to a 10-year-old student who had not yet completed the eighth grade. The Supreme Court of Nebraska upheld Meyer's conviction, determining that the statute under which he was convicted was a valid exercise of state police power. The court affirmed as reasonable the statute's purpose of requiring that "the English language should become the mother tongue of all children reared in this state." By seeking to prevent foreigners who had taken residence in this country from rearing and educating their children in the language of their native land, the court said, the state was trying to prevent the harmful effect that children taught in their native language might be inculcated in "ideas and sentiments foreign to the best interests of this country" (pp. 397–398).

The Court's Ruling

The U.S. Supreme Court granted certiorari and reversed Meyer's criminal conviction. In effect, the Court found two separate but related liberty clause claims, that of Meyer to practice his occupation of teaching and that of the parents to engage Meyer as the teacher for their children. While the Court recognized that a state's police power includes the physical, mental, and moral improvement of its citizens, it observed that protection under the U.S. Constitution extends to those who speak other languages as well as to those born with English as their native tongue. Although the Court acknowledged that the State of Nebraska framed its concern for a homogeneous people by a post–World War I aversion "toward every character of truculent adversaries" (p. 402), it nonetheless held that the state's chosen statutory means to accomplish its purpose, infringing on the Liberty

Clause rights of the teacher and the parents, exceeded its police power.

The Supreme Court later cited *Meyer* as a precedent in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* and *Wisconsin v. Yoder* for its recognition of the Liberty Clause right of parents to direct their children's education. However, the Court also quoted *Meyer* for its statement regarding the Tenth Amendment's implied power of states to regulate education. In *Meyer,* the Court expressed the view in dictum that

> the power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. (p. 402)

In post–*Wisconsin v. Yoder* litigation, states sought to impose the same curricular and teacher qualification regulations on nonpublic schools that applied to their public school counterparts, thereby compelling state and federal courts to consider whether state regulations that satisfied the *Meyer* reasonableness standard could counter parent and private school liberty and free exercise claims. The results of the litigation varied, with some courts thinking that the reasonableness standard was sufficient to offset parental and school constitutional claims, while others added that states needed to demonstrate a higher compelling interest against these claims. By the end of the 20th century, though, most states had resolved the conflict by exempting nonpublic schools from many of the more onerous regulations at issue.

Ralph D. Mawdsley

See also Fourteenth Amendment; Nonpublic schools; Parental Rights; *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary; Wisconsin v. Yoder*

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Wisconsin v. Yoder, 406 U.S. 205 (1972).

Meyer v. Nebraska (Excerpts)

In Meyer v. Nebraska, *the Supreme Court invalidated a law against teaching a foreign language to students who had not yet reached the ninth grade on the grounds that it limited the rights of modern language teachers to teach, students to learn, and parents to direct the education of their children.*

Supreme Court of the United States.

MEYER

v.

STATE OF NEBRASKA.

262 U.S. 390

Argued Feb. 23, 1923.

Decided June 4, 1923.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

Plaintiff in error was tried and convicted in the district court for Hamilton county, Nebraska, under an information which charged that on May 25, 1920, while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to Raymond Parpart, a child of 10 years, who had not attained and successfully passed the eighth grade. The information is based upon 'An act relating to the teaching of foreign languages in the state of Nebraska,' approved April 9, 1919. . . .

The Supreme Court of the state affirmed the judgment of conviction. It declared the offense charged and established was 'the direct and intentional teaching of the German language as a distinct subject to a child who had not passed the eighth grade,' in the parochial school maintained by Zion Evangelical Lutheran Congregation, a collection of Biblical stories being used therefore. And it

held that the statute forbidding this did not conflict with the Fourteenth Amendment, but was a valid exercise of the police power. The following excerpts from the opinion sufficiently indicate the reasons advanced to support the conclusion: 'The salutary purpose of the statute is clear. The Legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country. The statute, therefore, was intended not only to require that the education of all children be conducted in the English language, but that, until they had grown into that language and until it had become a part of them, they should not in the schools be taught any other language. The obvious purpose of this statute was that the English language should be and become the mother tongue of all children reared in this state. The enactment of such a statute comes reasonably within the police power of the state.

. . . .

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment: 'No state . . . shall deprive any person of life, liberty or property without due process of law.'

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the state to effect. Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted. The Ordinance of 1787 declares: 'Religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged.'

Corresponding to the right of control, it is the natural duty of the parent to give his children education suitable to their station in life; and nearly all the states, including Nebraska, enforce this obligation by compulsory laws.

Practically, education of the young is only possible in schools conducted by especially qualified persons who devote themselves thereto. The calling always has been regarded as useful and honorable, essential, indeed, to the public welfare. Mere knowledge of the German language cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable. Plaintiff in error taught this language in school as part of his occupation. His right thus to teach and the right of parents to engage him so to instruct their children, we think, are within the liberty of the amendment.

The challenged statute forbids the teaching in school of any subject except in English; also the teaching of any other language until the pupil has attained and successfully passed the eighth grade, which is not usually accomplished before the age of twelve. The Supreme Court of the state has held that 'the so-called ancient or dead languages' are not 'within the spirit or the purpose of the act.' Latin, Greek, Hebrew are not proscribed; but German, French, Spanish, Italian, and every other alien speech are within the ban. Evidently the Legislature has attempted materially to interfere with the calling of modern language teachers, with the opportunities of pupils to acquire knowledge, and with the power of parents to control the education of their own.

It is said the purpose of the legislation was to promote civic development by inhibiting training and education of the immature in foreign tongues and ideals before they could learn English and acquire American ideals, and 'that the English language should be and become the mother tongue of all children reared in this state.' It is also affirmed that the foreign born population is very large, that certain communities commonly use foreign words, follow foreign leaders, move in a foreign atmosphere, and that the children are thereby hindered from becoming citizens of the most useful type and the public safety is imperiled.

That the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

. . . .

The desire of the Legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. Unfortunate experiences during the late war and aversion toward every character of truculent adversaries were certainly enough to quicken that aspiration. But the means adopted, we think, exceed the limitations upon the power of the state and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

The power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports. Those matters are not within the present controversy. Our concern is with the prohibition approved by the Supreme Court. *Adams v. Tanner* pointed out that mere abuse incident to an occupation ordinarily useful is not enough to justify its abolition, although regulation may be entirely proper. No emergency has arisen which renders knowledge by a child of some language other than English so clearly harmful as to justify its inhibition with the consequent infringement of rights long freely enjoyed. We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the state.

As the statute undertakes to interfere only with teaching which involves a modern language, leaving complete freedom as to other matters, there seems no adequate foundation for the suggestion that the purpose was to protect the child's health by limiting his mental activities. It is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child.

The judgment of the court below must be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

Citation: *Meyer v. State of Nebraska,* 187 N.W. 100 (Neb. 1922), 262 U.S. 390 (1923).

Milliken v. Bradley

At issue in *Milliken v. Bradley, I, II* (1974, 1977) was the implementation of school desegregation plans for the city of Detroit. The significance of the U.S. Supreme Court's rulings in *Milliken I* and *II* was that the plans involved a school system that was seeking to remedy an educational system that operated under de jure, as opposed to de facto, segregation, the usual condition in northern cities.

Background

School desegregation has been the subject of judicial scrutiny for over a century. The challenge of maintaining a diverse student body within each school building is complicated by various legal, social, political, and

educational contexts. In *Brown v. Board of Education of Topeka* (1954), the Court revisited the previously held separate-but-equal doctrine, finding that the separation of children by race was a deliberate violation of the Fourteenth Amendment to the U.S. Constitution. While *Brown* abolished laws requiring or permitting segregated schools, it did not address de facto segregation until almost 20 years later in *Keyes v. School District No. 1, Denver, Colorado* (1973). Moreover, school desegregation was not uniformly implemented following the decision. Attempts to implement the promises of *Brown* created controversy in educational circles.

In light of *Brown,* two decades of civil rights legislation and judicial opinions ensued in an attempt to desegregate schools. The expansion of desegregation rights ended with the Supreme Court's decision in *Milliken I.* In *Milliken I,* the school board in Detroit sought to remedy official acts of racial discrimination that were committed by both local officials and the state. The local board's violations included the improper use of attendance zones, racially based transportation of school children, and improper use of grade structures. Michigan, through various agencies, acted directly to maintain the pattern of segregation in the Detroit schools. As a means of remedy, the board in Detroit sought to integrate students in the largely minority city schools with those in the surrounding metropolitan suburban schools by utilizing an interdistrict city-suburban desegregation remedy.

The Milliken I Ruling

In *Milliken I,* the first major defeat for proponents of desegregation, the Supreme Court ruled that surrounding suburban districts could not be ordered to help desegregate the city's schools unless plaintiffs could prove that the suburban systems were involved in illegally segregating city schools in the first place. The Court reasoned that it was improper to impose a multidistrict remedy for an individual board's de jure segregation in the absence of a finding that the other systems included in the interdistrict desegregation plan either failed to operate unitary school systems or committed acts that affected segregation within the other districts.

Reversing in favor of the suburban school systems in *Milliken I,* the Supreme Court determined that a federal trial court and the Sixth Circuit erred in upholding the desegregation plan insofar as there was no evidence that district boundary lines were established with the purpose of fostering racial segregation. The Court established that the plaintiffs failed to prove that the State of Michigan acted with a specific intent to segregate or that these actions caused the segregation before the judiciary could have applied interdistrict remedies such as busing. The Court added that it was troubled by the fact that the neighboring suburban school boards were not afforded any meaningful opportunities to be included in the plan to present evidence or to be heard on the suitability of the multidistrict remedy or on the constitutional violations that may have been imposed on them as a result of the plan. The Court concluded that because there was no interdistrict violation, there could be no interdistrict remedy.

Justice Thurgood Marshall's dissent in *Milliken I* admonished the Court for perpetuating the very action that Brown sought to remedy. In this way, he lamented the prospect of White flight coupled with the rapidly increasing percentage of students of color in the Detroit system that would ensue as a result of the Court's decision.

Many subsequent Supreme Court cases have invoked *Milliken I,* including *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), wherein a plurality rejected a race conscious admissions plan. The Court continuously reaffirms *Milliken I*'s judgment that racial imbalances alone are not unconstitutional in and of themselves even in metropolitan areas where desegregation cannot be achieved within existing school district boundaries. At the same time, the Court continues to stress the underlying premise presented in *Milliken I:* that local school boards, rather than the judiciary, are better suited to understand their own communities and have a better knowledge of what in practice will best meet the educational needs of their students. *Milliken I* ultimately has blocked lower courts from accepting interdistrict desegregation remedy plans absent a showing of intentional segregation practices.

The *Milliken II* Ruling

On remand from *Milliken I,* the trial court immediately ordered the Detroit school board to resubmit a desegregation plan that was limited to the Detroit school system. Along with proposing a student reassignment strategy that would have eliminated racially identifiable schools, the new plan included 13 remedial programs, called educational components, in the areas of reading, teacher in-service training, testing, and counseling. According to its revised plan, all costs for these additional programs were to be shared between the board in Detroit and the State of Michigan. However, the state filed objections to the board's plan, contending that the remedy should be limited to student reassignments for the purpose of achieving desegregation. State officials argued that the educational components were excessive.

In a measure of vindication following *Milliken I,* in *Milliken II,* the Supreme Court affirmed the orders of the trial court and Sixth Circuit that directed the State of Michigan to fund the additional educational programs that were designed to remedy the negative educational effects of imposed segregation. The Court observed that insofar as student reassignments did not automatically remedy the impact of prior educational isolation, public officials had to deal with the consequences of segregation through various measures.

In *Milliken II,* the Court advanced three holdings. First, the justices were of the opinion that the lower court appropriately approved the remedial educational plan. Second, the Court pointed out that consistent with the Eleventh Amendment, the State of Michigan had to pay one half of the costs of implementing the educational components of its order. Third, the Court was satisfied that the earlier judicial orders to remedy the segregative student assignments did not violate the Tenth Amendment.

Rachel Pereira

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Dual and Unitary Systems; Federalism and the Tenth Amendment; Segregation, De Facto; Segregation, De Jure; White Flight

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Keyes v. School District No. 1, Denver, Colorado, 433 U.S. 267 (1977).
Milliken v. Bradley I, 418 U.S. 717 (1974).
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Plessy v. Ferguson, 163 U.S. 537 (1896).

Mills v. Board of Education of the District of Columbia

Mills v. Board of Education of District of Columbia (1972) was one of two important federal trial court rulings that helped to lay the foundation that eventually led to the passage of Section 504 of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act (IDEA), laws that changed the face of American education. Prior to 1975 and the enactment of these laws, many schools did not offer special education for students with disabilities. As such, millions of students were denied appropriate services or excluded from public education entirely. The other case was *Pennsylvania Association of Retarded Children v. Commonwealth of Pennsylvania* (1971, 1972).

Facts of the Case

Mills was a class action suit that was brought on behalf of seven children and other similarly situated students who resided in the District of Columbia. The students in the plaintiff class had been identified as having behavioral problems or being mentally

retarded, emotionally disturbed, and/or hyperactive. All of the students had been excluded from school or denied educational services that would have addressed the needs that arose from their identified disabilities. The parents and guardians of the students successfully filed suit, arguing that the failure of the school board in the District of Columbia to provide them with a public school education constituted a denial of their right to an education.

The Court's Ruling

In a painstaking decision, the federal district court in the District of Columbia first made clear that the deprivation suffered by the children clearly violated their right to a public school education under the laws of the District of Columbia. Quoting liberally from *Brown v. Board of Education of Topeka* (1954), the court likened the treatment of the plaintiff students to the segregation outlawed by the Supreme Court in *Brown.*

The court reasoned that because the children would have been entitled under the school code in the District of Columbia to attend free public schools, each child had a right to such an education. The court explained that the school board's failure to meet its mandate could not be excused by its argument that there were insufficient funds available to pay for the services that the children needed. Instead, the court was of the opinion that the board's duty to educate the children had to outweigh its interest in preserving its resources.

The court added that if there were not enough funds available to provide all of the needed programming, then the board had to do its best to apportion the monies in such a way as to ensure that no child was denied the opportunity to benefit from a public school education. In sum, the court pointed out that the inadequacies present in the school system, whether caused by insufficient funding or poor administration, could not be allowed to impact more heavily on students with disabilities. To this end, the court ordered the board to adopt a detailed remedial plan in order to ensure that the children received their right to equal protection under the law.

The court-ordered comprehensive remedial plan included many elements that eventually made their way into the EAHCA/IDEA. Among these provisions, the court order included a provision mandating a free public education for each child with a disability, documentation delineating the individual special education services that would be necessary for each child who was identified as having a disability, the development of due process procedures when students faced suspensions or expulsions from school, the creation of procedures that granted parents the right to challenge the system if they disagreed with any aspect of the placement of their children, and a requirement that children suspected of having disabilities be identified and evaluated.

Julie F. Mead

See also Disabled Persons, Rights of; *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania;* Rehabilitation Act of 1973, Section 504

Legal Citations

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Mills v. Board of Education of District of Columbia, 348 F. Supp. 866 (D.D.C. 1972).

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Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).

Minersville School District v. Gobitis

At issue in *Minersville School District v. Gobitis* (1940) was the constitutionality of a mandatory flag salute ceremony in school. A local board of education required that both students and teachers participate in a daily flag salute ceremony that included the Pledge of Allegiance and extended hand to salute the American flag. Two children who were Jehovah's Witnesses refused to salute the national flag based on their religious beliefs and were expelled. Insofar as Pennsylvania law made school attendance compulsory, the parents placed their children in a private school. The father then filed suit on behalf of his children and himself challenging the flag salute on the ground that it infringed on their religious beliefs in violation of the Fourteenth Amendment. After a federal trial court ruled

in favor of the plaintiffs, and the Third Circuit affirmed, the school board and various officials appealed.

On further review, the U.S. Supreme Court reversed in favor of the defendants. In reviewing the case, the Court identified the issue as whether the requirement of participating in the ceremony by children, who refused to do so because of their religious convictions, violated the Due Process Clause of the Fourteenth Amendment. Insofar as the Court viewed the school board's action as that of the legislature, the justices analyzed the legislature's constitutional authority to mandate the flag salute ceremony. The Court was of the opinion that individual liberties are not absolute and that the flag salute ceremony promoted national unity, which was the basis for national security. To this end, the Court determined that the legislature had the right to select appropriate means to accomplish this goal.

The Supreme Court thus found that the mandatory flag salute ceremony, with expulsion as the penalty for students who refused to participate, did not violate the Due Process Clause of the Fourteenth Amendment. Explaining that the ceremony was a reasonable exercise of legislative power, the Court urged judicial restraint in matters of education policy, which the justices thought was outside of the purview of their consideration. Insofar as it did not want to become the school board for the country, the Court pointed out, other remedial processes remained open to individuals who wished to change the policy and the law.

As the Supreme Court noted in its analysis, *Gobitis* represented an issue of reconciling conflicting claims about liberty and authority. Yet, the holding in *Gobitis* was short lived, because three years later, in *West Virginia State Board of Education v. Barnette* (1943), the Court reconsidered its opinion and reached a different result. In *Barnette,* the Court decided that the Free Speech Clause of the First Amendment and the Fourteenth Amendment prohibited the government from compelling the flag salute and the Pledge of Allegiance. In so ruling, the Court clearly rejected the due process reasonableness test of *Gobitis* and viewed the Free Speech Clause, applicable by the Fourteenth Amendment, as a direct limitation on legislative action.

Deborah Curry

See also *Elk Grove Unified School District v. Newdow;* Fourteenth Amendment

Legal Citations

Elk Grove Unified School District v. Newdow, 542 U.S. 1 (2004).
Minersville School District v. Gobitis, 310 U.S. 586 (1940).
Newdow v. U.S. Congress, 328 F.3d 466 (9th Cir.) (2002).
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Minimum Competency Testing

Student competency testing, although often controversial, has become the centerpiece of school reform legislation. Testing policies are widely supported by the general population and are used to raise academic standards. Conceptually, tests are designed to promote better teaching and learning, increase student motivation, increase graduation rates, lead to a more productive workforce, and instill greater confidence in the public schools system. However, the research regarding the effectiveness of competency testing is mixed.

Legal analysis of public school competency tests began with *Debra P. v. Turlington* (1984), a case involving a 1978 Florida statute requiring students to pass a functional literacy test prior to obtaining high school diplomas. Plaintiffs challenged the law, alleging a disproportionate impact on Black students. Initially, the Fifth Circuit upheld an injunction for the students, because the law violated Title VI of the Civil Rights Act of 1964 "by perpetuating past discrimination against black students who had attended segregated schools for the first four years of their education" (p. 1407).

On remand to a federal trial court, the Eleventh Circuit (since the Fifth Circuit was split, Florida was part of the new Eleventh Circuit) considered the legality of the test. The court held that the competency testing program was a valid measure of the instructional program and provided adequate notice for the students to pass the test. Additionally, the court ruled that there was no link between the disproportionate number of Black students failing the test and a history or prior discrimination. The Eleventh Circuit court acknowledged the state's right to deny diplomas to failing students.

In a more recent decision, the State Board of Education of Louisiana implemented a requirement that all public school students pass an exit examination prior to receiving high school diplomas. In *Rankins v. State Board of Education* (1994), five students who failed the test filed suit claiming that their equal protection rights were violated, because private school students were not held to the same requirement. The court upheld the testing requirement on the basis that it was rationally related to the state's interest of ensuring minimum competency for students who were awarded diplomas.

Although there is substantial evidence that competency testing has a disproportionate effect on children who are of limited English proficiency, minority students, and those with disabilities, the courts have not directed states to abandon their use of the tests for these students. For students with disabilities, the courts generally have supported the use of examinations as a criterion for graduation as long as there are accommodations and modifications available.

In *GI Forum v. Texas Education Agency* (2000), a federal trial court in Texas was of the opinion that although minority students performed significantly worse on a state competency examination than nonminority students, the former were rapidly closing the achievement gap as measured by the test. Consequently, the court found that because minority students were not disadvantaged, the examination did not violate their due process rights, because it was not unfair. In upholding the test, the court noted that the examination met the requirements of curricular validity by measuring what it purported to measure. In sum, the court ruled in favor of the state educational agency, permitting the use of the exit examination as a valid requirement for obtaining a diploma.

Some authors suggest that the use of minimum competency tests will bring about the resegregation of the public schools. The first argument proposes that children from historically low socioeconomic backgrounds, typically minority students, are unfairly tested alongside students from more affluent backgrounds. *Debra P.* and *G.I. Forum* appear to dismiss this argument. The second argument holds that these same students will be placed in special remedial classes, which will, in essence, resegregate student populations. This second argument is yet to be used as a challenge in court.

As the backbone of educational accountability and the subsequent teaching and curricular reforms, policymakers have become enamored with competency testing programs. Performance on competency tests often determines whether students are promoted from one grade level to another or are awarded high school diplomas. The courts tend to support the policy of competency testing as long as the system provides for validity (measures what it purports to measure) and reliability (consistently measures what it purports to measure) and the students have the opportunity to learn the material to be tested.

Mark Littleton

See also *Debra P. v. Turlington;* Graduation Requirements; Testing, High-Stakes

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G.I. Forum v. Texas Education Agency, 87 F. Supp.2d 667 (W.D. Tex. 2000).

Rankins v. State Board of Education, 637 So. 2d 548 (La. Ct. App. 1994), *write denied,* 635 So. 2d 250 (La. 2004), *cert. denied,* 513 U.S. 871 (1994).

Mississippi University for Women v. Hogan

At issue in *Mississippi University for Women v. Hogan* (1982) was whether a state-supported nursing program could deny admission to a male applicant based

on his sex. The Supreme Court found the school's policy unconstitutional and used its decision to develop the standards that it continues to apply in sex discrimination cases.

Facts of the Case

The Mississippi University for Women (MUW), from its inception in 1884, had limited its enrollment to women. In the early 1970s, MUW started a four-year baccalaureate nursing program with its own faculty and admission process. Joe Hogan, a registered nurse without a baccalaureate degree, applied to the School of Nursing. Even though Hogan was otherwise qualified, officials denied him admission solely due to his sex.

Hogan filed a suit claiming that the MUW policy violated the Equal Protection Clause of the Fourteenth Amendment. The U.S. Supreme Court ultimately agreed with Hogan, ruling that the gender-based policy was not substantially related to the state's significant interest in providing educational opportunities.

The Court's Ruling

In *Mississippi University for Women,* the Supreme Court noted that insofar as MUW's policy discriminated on the basis of sex, it was subject to scrutiny under the Equal Protection Clause. Over the years, the Court developed three tests to determine whether state policies are unconstitutional. Strict scrutiny, applied in cases involving fundamental rights such as those protected under the federal Constitution for suspect classes such as those composed of members of a certain race, is the most difficult test for a state to overcome, because it requires a compelling governmental interest that is narrowly tailored. Rational basis, on the other hand, requires a state only to demonstrate the presence of a rational relationship to a legitimate state interest; it is usually easy for states to meet this burden. A third test, intermediate scrutiny, is discussed below.

As the dispute made its way to court, a federal trial court in *Mississippi University for Women* applied the rational basis test in upholding the female-only admission policy. However, the Supreme Court reasoned that the proper test was not rational basis, but rather, the so-called intermediate scrutiny test. Intermediate scrutiny requires that a state show that a gender-based classification is substantially related to an important government objective. By using the intermediate test, the Court recognized there might be limited circumstances that would allow a state to treat men and women differently. The Court was of the opinion that the judiciary will attempt to look at gender-based classifications without resorting to stereotypes about the proper roles for men and women in society.

Utilizing the intermediate scrutiny test, the Court determined that the admission policy at MUW was unconstitutional. First, the Court found that the Equal Protection Clause prohibits any discrimination on the basis of sex, whether manifested in unequal treatment of men or women. Thus, to the Court, the fact Hogan was male was inconsequential. Second, the Court explained that a defending institution has the burden of demonstrating an "exceedingly persuasive justification" for the discrimination. The Court rejected Mississippi's argument that it was justified in admitting only women to compensate for discrimination against women. In rejecting this claim, the Court determined that this was not a persuasive justification, because women were not being discriminated against in the nursing profession, and the policy, in fact, perpetuated the stereotype that nursing was "women's work."

Third, the Court indicated that an institution must prove that the actions serve "important governmental objectives" and that the actions are "substantially related to the achievement of the goal." The Court observed that the record showed that males were allowed to attend and audit nursing classes but not allowed to take course work for credit. This fact, according to the Court, undermined MUW's argument because there was a lack of evidence that the presence of men in the classroom negatively impacted women.

In a more recent case, *U.S. v. Virginia* (1996), the Supreme Court considered whether a state military, all-male school unconstitutionally discriminated against women. Using the intermediate scrutiny test and reasoning similar to the analysis it applied in *Mississippi University for Women,* the Court declared the male-only admission policy violated the Equal Protection Clause.

Mississippi University for Women, along with more recent Court cases regarding male-only military

schools, provides insight on gender discrimination. Even so, it is important to keep in mind that Title IX, the primary vehicle for combating gender-based discrimination, explicitly limits what types of educational institutions are allowed to have single-sex admission policies. Private undergraduate programs are generally exempt from Title IX's prohibition of single-sex admission policies as are religious institutions if they obtain waivers. For most institutions, Title IX provides more guidance regarding discrimination based on sex and gender equity.

Karen Miksch

See also Civil Rights Act of 1964; Equal Protection Analysis; Title IX and Sexual Harassment; *United States v. Virginia*

Legal Citations

Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).
Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681.
United States v. Virginia, 518 U.S. 515 (1996).

Missouri v. Jenkins

Long-running litigation involving the Kansas City, Missouri, School District (KCMSD) made its way to the U.S. Supreme Court on three occasions. In 1989, the Court decided that the school board could be responsible for attorney fees. In 1990, the Court affirmed that the federal judiciary could require the board to levy property taxes that were sufficient to fund a desegregation remedy. However, in 1995, the Court decreed that lower federal courts exceeded their discretion in mandating a costly desegregation remedy that required the state to pay for salary increases for almost all school personnel and quality education programs.

The First Round

In 1977, the KCMSD, its school board, and the children of two school board members sued the state, surrounding suburban school systems, and various federal agencies, alleging that the defendants created and continued a system of racially segregated schools in the Kansas City area. A federal trial court realigned the parties, making the KCMSD a defendant, finding that the state and KCMSD were liable for operating a segregated school system. The plaintiffs had sought an order affecting the entire metropolitan area. However, the court limited its orders to the area within the borders of KCMSD while dismissing the surrounding school systems and federal agencies from the litigation.

In its first remedial order in 1985, a federal trial court directed officials to reduce class sizes and to expand expensive programs, such as full-day kindergarten, summer school, early childhood offerings, and tutoring programs to increase educational opportunities for all students in the KCMSD. In addition, the court ordered cash grants for schools and a return of all schools to an AAA rating, the highest state accreditation standard. These improvements cost over $220 million.

When the case first arrived before the Supreme Court, the justices held that the Eleventh Amendment did not prohibit the award of attorney fees and that they could include payments for the work of paralegals, clerks, and recent law school graduates (*Missouri v. Jenkins I,* 1989).

The Second Round

In another aspect of the case, in 1986, a federal trial court embarked on a plan to retain and attract nonminority students back to the KCMSD by creating world-class facilities and converting its secondary schools and half of its elementary schools into magnet schools with specialized programs. The court-ordered improvements in school facilities eventually cost over $540 million. The court noted that the substantial expenditures financed air-conditioned high schools with 15 computers in every classroom, a planetarium, radio and television studios with an editing and animation lab, a model United Nations wired to allow language translation, an art gallery, movie editing and screening rooms, vocational facilities, swimming pools, and many other facilities exceeding those available in other school districts.

A year later, in 1987, the trial court ordered the state to fund increased salaries for KCMSD personnel

at a cost of over $200 million per year. In 1990, the Supreme Court approved the method used in paying for the expensive improvements in the KCMSD educational system in upholding an order that required the board to increase a school levy to pay for the costs of desegregation (*Missouri v. Jenkins II,* 1990).

The Third Round

The Supreme Court agreed to hear arguments in this case for a third time when the state contended that the trial court's order to fund salary increases for KCMSD employees and to continue to pay for remedial quality education programs exceeded its desegregation remedial authority. The Eighth Circuit affirmed the trial court's order, observing that the funding increases were necessary for making the schools attractive for the purposes of desegregation and to reverse "White flight" to the suburbs. Further, the Eighth Circuit affirmed the rejection of the state's request that the KCMSD be awarded partial unitary status, under *Freeman v. Pitts* (1992), with respect to the high-quality education programs. The importance of this aspect of the case is that it would have released the state from its obligations to fund the programs.

On further review, a closely divided Supreme Court, in a 5-to-4 judgment, reversed in favor of the state (*Missouri v. Jenkins, III*). In its analysis, the Supreme Court reviewed and reconstructed the methodology for measuring the remedial authority of federal trial courts in desegregation actions. For example, the Court pointed out that in *Swann v. Charlotte-Mecklenburg Board of Education* (1971), it recognized the power of federal trial courts to fashion remedies for segregation while cautioning against their attempting to achieve purposes beyond the scope of the wrongs or purposes that lay outside the power of school officials.

At the same time, the Supreme Court grounded its rationale in *Milliken v. Bradley I,* wherein it rejected a trial court's order calling for an interdistrict remedy to eliminate segregation of Detroit's schools as beyond its remedial power, because the nature of the harm was intradistrict. The Court recognized that in *Milliken I* it also rejected the notion that having schools with a majority of minority students was a means of measuring whether they were desegregated, instead asserting that such an inquiry should begin with a measure of the proportions of minority students in individual schools as compared with the proportions of the races in the school district as a whole.

Further, the Court explained that in *Milliken v. Bradley II* (1977), it had addressed the limits of federal trial courts in the exercise of their remedial authority in desegregation actions. Moreover, it is also worth noting that in *Freeman v. Pitts* (1992), the Court provided another test to guide federal trial courts in ordering a partial withdrawal from federal oversight in desegregation actions.

Continuing on with its analysis, the Supreme Court viewed the trial court's order for salary supplements and expensive programs in KCMSD as an attempt to right an intradistrict wrong, the vestiges of prior de jure segregation within KCMSD, with an interdistrict remedy. Consequently, the Court reasoned that the orders approving the salary increases and requiring the state to continue funding the expensive educational programs were beyond the trial court's authority. The justices concluded by directing the federal trial court to use the precedent provided by *Freeman v. Pitts* (1992), namely that it could relinquish its control over a desegregation plan incrementally once it was satisfied that officials made a good faith commitment to comply with its order, in determining when to terminate judicial supervision.

David L. Dagley

See also *Freeman v. Pitts; Milliken v. Bradley; Swann v. Charlotte-Mecklenburg Board of Education;* Segregation, De Jure; White Flight

Legal Citations

Freeman v. Pitts, 503 U.S. 467 (1992), *on remand,* 979 F.2d 1472 (11th Cir. 1992), *on remand,* 942 F. Supp. 1449 (N.D. Ga. 1996), *aff'd,* 118 F.3d 727 (11th Cir. 1997).
Milliken v. Bradley I, 418 U.S. 717 (1974).
Milliken v. Bradley II, 433 U.S. 267 (1977).
Missouri v. Jenkins I, 491 U.S. 274 (1989).
Missouri v. Jenkins II, 495 U.S. 33 (1990), *subsequent appeal, Jenkins v. Missouri,* 949 F.2d 1052 (8th Cir. 1991).
Missouri v. Jenkins III, 515 U.S. 70 (1995); *appeal after remand, Jenkins v. Missouri,* 103 F.3d 731 (8th Cir. 1997).
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Mitchell v. Helms

Mitchell v. Helms (2000) stands out as the case in which the U.S. Supreme Court held that a federal program that loaned instructional materials and equipment to schools, including those that were religiously affiliated, was permissible under the Establishment Clause of the First Amendment of the U.S. Constitution. The program, known as Chapter 2 of the Education Consolidation and Improvement Act of 1981 (Chapter 2), provided a mechanism for local educational agencies, usually public school boards, to use federal monies to purchase secular, neutral, and nonideological materials and equipment and lend them to nonpublic schools. The amount of federal funds spent on the schools was based on the number of children enrolled in each school.

Facts of the Case

At issue in *Mitchell* was implementation of Chapter 2 in Jefferson Parish, Louisiana. During an average year in Jefferson Parish, about 30% of the federal Chapter 2 monies were allocated for nonpublic schools. Officials at the local educational agency (LEA), a public entity, used the funds to purchase library and media materials and instructional equipment, such as books; computers; computer software; slide, movie, and overhead projectors; maps; globes; and films that were then lent to the private schools. The nonpublic schools were selected for participation based on the applications they submitted to the LEA. The vast majority of the nonpublic schools that benefited from the program were religiously affiliated.

After a federal trial court upheld the constitutionality of Chapter 2, the Fifth Circuit reversed in favor of its opponents. On further review, a plurality of the Supreme Court upheld the statute as constitutional.

The Court's Ruling

In its analysis, the four-justice plurality in *Mitchell* focused on the effects prong of the *Lemon v. Kurtzman* (1971) test, the long-time standard in disputes over the parameters of permissible state aid to religiously affiliated schools and their students, as modified by *Agostini v. Felton* (1997). The justices specifically considered whether the government assistance was neutral toward religion.

As the plurality explained, a court must answer two fundamental questions in evaluating whether governmental assistance is permissible under the Establishment Clause. The first question that the justices posed was whether the aid was offered to a broad range of groups or persons without regard to religion and, if so, whether it reached private institutions only as a result of genuine, independent private choices, so that it did not result in governmental indoctrination. The second question that the plurality identified was whether the criteria for allocating the aid were neutral and secular, so that they did not define recipients by reference to religion and thereby create financial incentives to undertake religious indoctrination.

The plurality in *Mitchell* found that Chapter 2 was constitutionally permissible for two reasons. First, the justices agreed that the program was constitutional, because all public and nonpublic schools were eligible to participate in it, while the amount of aid provided to individual schools was determined by the number of students enrolled in them. The plurality considered this to be factor that was controlled by the independent choices of parents and students, not state actors, such that any resulting religious indoctrination could not have been attributed to the government. Second, the plurality decided that the program was acceptable because it used neutral, secular eligibility criteria that neither favored nor disfavored religion. The plurality observed that this did not create a financial incentive to undertake religious indoctrination, because the aid was offered to a broad array of both public and private schools without regard to their religious affiliations.

Mitchell is significant for four reasons. First, it broadened the scope of permissible aid to religiously affiliated nonpublic schools by allowing governmental entities to purchase and loan instructional materials and equipment to those schools. Second, the plurality expressly reversed those parts of *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977) that were contrary to its opinion on the types of instructional materials and equipment that could be loaned to religiously affiliated nonpublic schools. However,

because the *Mitchell* decision was made by a plurality, its impact in this regard is limited.

Third, *Mitchell* moved the Supreme Court closer to a formal neutrality test in light of the plurality's reliance on neutrality. This trend continued in *Zelman v. Simmons-Harris* (2002), wherein the Court applied the formal neutrality test to uphold a voucher program for poor students in Cleveland, Ohio. Finally, *Mitchell* rejected some factors that were significant in deciding earlier Establishment Clause cases. In particular, the justices noted that nonpublic schools could receive aid even if they were pervasively sectarian, thereby rejecting the distinction between direct and indirect aid under which direct aid to religious schools was prohibited but indirect aid was permitted.

Regina R. Umpstead

See also *Agostini v. Felton;* Establishment Clause; *Lemon v. Kurtzman; Meek v. Pittenger; Wolman v. Walter*

Legal Citations

Agostini v. Felton, 521 U.S. 203 (1997).
Chapter 2 of the Education Consolidation and Improvement Act of 1981, 20 U.S.C. §§ 7301 *et seq.*
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Meek v. Pittenger, 421 U.S. 349 (1975).
Mitchell v. Helms, 530 U.S. 793 (2000) *reh'g denied,* 530 U.S. 1296 (2000), *on remand sub nom. Helms v. Picard,* 229 F.3d 467 (5th Cir. 2000).
Wolman v. Walter, 433 U.S. 229 (1977).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

Monroe v. Board of Commissioners

Monroe v. Board of Commissioners (1968) involved the adequacy of the city of Jackson, Tennessee's, plan to desegregate its public schools in the wake of *Brown v. Board of Education of Topeka. Monroe* is another one of the cases in which the Supreme Court reviewed the efforts of school boards, finding that it developed and administered a plan that allowed it to remain segregated. The Court remanded *Monroe* for modifications to create a unitary school system.

Facts of the Case

A state law from 1954 required racially segregated schools in Tennessee. The city had eight elementary schools, three junior high schools, and two senior high schools. Five elementary schools, two junior high schools, and one senior high school were for Whites. After *Brown,* the state adopted a pupil placement law. Basically, the law allowed current students to stay put and gave local school boards the authority to approve pupil placement and transfer requests. Under this plan, no White students enrolled in African American schools, and only seven African American students applied for enrollment in the White schools.

In 1962, the Sixth Circuit ruled that the placement plan was inadequate when it came to dismantling a segregated school system. After the plaintiffs filed action in the district court in 1963, a plan with court-ordered modifications was adopted. Elementary students living within attendance zones were automatically assigned to schools in zones that had geographic or neutral boundaries; however, the plan also included a free transfer provision. Citing evidence that the African American schools had remained one-race schools and that only 118 African American students attended White schools, the court held that the plan had been administered in a racially discriminatory manner.

The board also filed its plan for desegregating the junior high schools. In 1964, all three junior high schools retained their traditional racial identities. The faculties of the schools were also segregated. Despite parental protests that the board had gerrymandered school attendance zones, the district court ruled for the board. The court further held that a feeder system recommended by expert witnesses did not have to be adopted. The court of appeals affirmed the decision but remanded for further proceedings on the issue of faculty desegregation.

The Court's Ruling

The Supreme Court granted certiorari and rendered its decision on the same day as the decision in *Green v. County School Board of New Kent County.* Reviewing the evidence and the holding in *Green,* the Supreme

Court concluded that the Jackson schools had remained one-race schools. After three years, Merry Junior High School was still a one-race school, for example. White students who had been assigned to Merry Junior High School transferred elsewhere. There were only seven African American students in the mainly White Tigrett Junior High School. The only exception was the Jackson School, where there were a substantial number of African American students. The same pattern was maintained in the elementary schools in the district.

The free transfer plan had not allowed the board to meet its affirmative duty to create a unitary school system "in which racial discrimination would be eliminated root and branch," the Supreme Court ruled. Until the district court intervened, the board had administered the plan in a discriminatory manner, the court said, and this resulted in a lengthy delay in the desegregation of the schools. Furthermore, the court asserted that no plan can have racial segregation as its consequence. The Court made no bones about the fact that the board had administered a plan that allowed it to remain comfortable and unchanged with regard to racial segregation.

The Court stopped short of saying that a board could never adopt a free choice plan. The key issue is whether the plan furthers the goal of achieving a unitary school system. The Supreme Court reversed the court of appeals with regard to its affirmation of the plan for the junior high schools. The case was remanded for proceedings consistent with the Court's decision in *Green.*

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Fourteenth Amendment

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Green v. County School Board of New Kent County, 391 U.S. 430 (1968).
Monroe v. Board of Commissioners, 391 U.S. 450 (1968).

Morse v. Frederick

Morse v. Frederick (2007) is the most recent of the U.S. Supreme Court's four cases on the free speech rights of K–12 students. In *Morse,* the Court upheld the authority of educators to discipline a student who displayed a banner at a school event that promoted illegal drug use.

Facts of the Case

The dispute in *Morse* arose when a principal suspended a high school student who, with friends, displayed a 14-foot banner reading "BONG HiTS [sic] 4 JESUS" as they watched the winter Olympics torch relay pass through Juneau, Alaska. The principal had allowed students and staff, who supervised the activity, to leave class to watch the relay as an approved social event. Although the student had not made it to school that day due to snowy weather, he positioned himself on a sidewalk across from the school. On seeing the banner, the principal destroyed it and suspended the student, because she thought that the sign advocated illegal drug use by smoking marijuana.

The federal trial court in Alaska rejected the student's request for an injunction and damages in agreeing that the principal did not violate his First Amendment right to free speech. The Ninth Circuit reversed in favor of the student on the speech claim, adding that the principal was not entitled to qualified immunity from personal liability for destroying the banner.

The Court's Ruling

On further review, the Supreme Court, in an opinion by Chief Justice Roberts, reversed in favor of the principal and board. Chief Justice Roberts began his analysis by noting that the Court agreed to hear an appeal on "whether [the student] had a First Amendment right to wield his banner and, if so, whether that right was so clearly established that the principal may be liable for damages" (p. 2624). Consequently, he indicated that because the Court rejected the student's claim that he had such an established right, it was unnecessary to address the second question.

Roberts noted his reliance on the Supreme Court's precedent in its three other student speech cases, *Tinker v. Des Moines Independent Community School District* (1969), *Bethel School District No. 403 v. Fraser* (1986), and *Hazelwood School District v. Kuhlmeier* (1988). Beginning with *Tinker,* Roberts conceded that while students have rights in schools that are not equal to those of adults, they must be considered in light of the special circumstances in schools. To this end, he observed that educators may limit student speech that they think encourages illegal drug use.

Chief Justice Roberts next rejected the student's allegation that the admittedly cryptic banner was not school speech, because the display occurred during the day at a school-approved and supervised event. In finding that the principal had the power to act as she did, Roberts clarified that under *Tinker,* the free speech rights of students must be examined in light of the special characteristics of schools. Turning to *Fraser,* Roberts interpreted it as meaning both that student rights are not equal to those of adults and that *Tinker* was neither absolute nor the only justification on which officials can limit student speech. In differentiating *Fraser* from *Hazelwood,* because the banner could not reasonably have been viewed as having the approval of school officials, Roberts rejected the former's "plainly offensive" standard, because it gave educators too much discretion. Roberts thus concluded that the principal did not violate the student's right to free speech, because she disciplined him based on her legitimate concern of preventing him from promoting illegal drug use.

In his concurrence, Justice Thomas maintained that because the First Amendment does not confer any defense for the free speech rights of students, *Tinker* has no basis in the Constitution. Justice Alito, joined by Justice Kennedy, concurred because he agreed with the Court's wanting to restrict speech advocating illegal drug use, but he would not have expanded the ban to political or social issues. In his partial concurrence and partial dissent, which also joined the judgment of the Court, Justice Breyer would have limited the holding to the extent that the student's damages claim against the principal was barred by qualified immunity. Justice Stevens's dissent argued that the student's nonsensical banner was protected speech that neither violated a permissible school rule nor advocated conduct that was either illegal or harmful. He also agreed with the Court that the principal should not have been personally liable for destroying the banner.

Charles J. Russo

See also *Bethel School District No. 403 v. Fraser;* Free Speech and Expression Rights of Students; *Hazelwood School District v. Kuhlmeier; Tinker v. Des Moines Independent Community School District*

Legal Citations

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 273 (1988).
Morse v. Frederick, 127 S. Ct. 2618 (2007).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Morse v. Frederick (Excerpts)

In Morse v. Frederick, *the Supreme Court's most recent case on student free speech, the Justices upheld the right of educational officials to discipline a student for displaying a pro-drug message at a school-related activity.*

Supreme Court of the United States

Deborah MORSE et al., Petitioners,

v.

Joseph FREDERICK.

127 S. Ct. 2618

Argued March 19, 2007.

Decided June 25, 2007.

Chief Justice ROBERTS delivered the opinion of the Court.

At a school-sanctioned and school-supervised event, a high school principal saw some of her students unfurl a large banner conveying a message she reasonably regarded as promoting illegal drug use. Consistent with established school policy prohibiting such messages at school events, the principal directed the students to take down the banner. One student—among those who had brought the banner to the event—refused to do so. The principal confiscated the banner and later suspended the student. The Ninth Circuit held that the principal's actions violated the First Amendment, and that the student could sue the principal for damages.

Our cases make clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." At the same time, we have held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," and that the rights of students "must be 'applied in light of the special characteristics of the school environment.'" Consistent with these principles, we hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use. We conclude that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it.

I

On January 24, 2002, the Olympic Torch Relay passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. The torchbearers were to proceed along a street in front of Juneau-Douglas High School (JDHS) while school was in session. Petitioner Deborah Morse, the school principal, decided to permit staff and students to participate in the Torch Relay as an approved social event or class trip. Students were allowed to leave class to observe the relay from either side of the street. Teachers and administrative officials monitored the students' actions.

Respondent Joseph Frederick, a JDHS senior, was late to school that day. When he arrived, he joined his friends (all but one of whom were JDHS students) across the street from the school to watch the event. Not all the students waited patiently. Some became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates. As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase: "BONG HiTS 4 JESUS." The large banner was easily readable by the students on the other side of the street.

Principal Morse immediately crossed the street and demanded that the banner be taken down. Everyone but Frederick complied. Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days. Morse later explained that she told Frederick to take the banner down because she thought it encouraged illegal drug use, in violation of established school policy. Juneau School Board Policy No. 5520 states: "The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors. . . ." In addition, Juneau School Board Policy No. 5850 subjects "[p]upils who participate in approved social events and class trips" to the same student conduct rules that apply during the regular school program.

Frederick administratively appealed his suspension, but the Juneau School District Superintendent upheld it, limiting it to time served (8 days). In a memorandum setting forth his reasons, the superintendent determined that Frederick had displayed his banner "in the midst of his fellow students, during school hours, at a school-sanctioned activity." He further explained that Frederick "was not disciplined because the principal of the school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs."

. . . .

Relying on our decision in [*Bethel School District No. 403 v. Fraser*], the superintendent concluded that the principal's actions were permissible because Frederick's banner was "speech or action that intrudes upon the work of the schools." The Juneau School District Board of Education upheld the suspension.

Frederick then filed suit under 42 U.S.C. § 1983, alleging that the school board and Morse had violated his First Amendment rights. He sought declaratory and injunctive relief, unspecified compensatory damages, punitive damages, and attorney's fees. The District Court granted summary judgment for the school board and Morse, ruling that they were entitled to qualified immunity and that they had not infringed Frederick's First

Amendment rights. The court found that Morse reasonably interpreted the banner as promoting illegal drug use—a message that "directly contravened the Board's policies relating to drug abuse prevention." Under the circumstances, the court held that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity."

The Ninth Circuit reversed. Deciding that Frederick acted during a "school-authorized activit[y]," and "proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," the court nonetheless found a violation of Frederick's First Amendment rights because the school punished Frederick without demonstrating that his speech gave rise to a "risk of substantial disruption." The court further concluded that Frederick's right to display his banner was so "clearly established" that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity.

We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. We resolve the first question against Frederick, and therefore have no occasion to reach the second.

II

At the outset, we reject Frederick's argument that this is not a school speech case—as has every other authority to address the question. The event occurred during normal school hours. It was sanctioned by Principal Morse "as an approved social event or class trip" and the school district's rules expressly provide that pupils in "approved social events and class trips are subject to district rules for student conduct." Teachers and administrators were interspersed among the students and charged with supervising them. The high school band and cheerleaders performed. Frederick, standing among other JDHS students across the street from the school, directed his banner toward the school, making it plainly visible to most students. Under these circumstances, we agree with the superintendent that Frederick cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school." There is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents, but not on these facts.

III

The message on Frederick's banner is cryptic. It is no doubt offensive to some, perhaps amusing to others. To still others, it probably means nothing at all. Frederick himself claimed "that the words were just nonsense meant to attract television cameras." But Principal Morse thought the banner would be interpreted by those viewing it as promoting illegal drug use, and that interpretation is plainly a reasonable one.

As Morse later explained in a declaration, when she saw the sign, she thought that "the reference to a 'bong hit' would be widely understood by high school students and others as referring to smoking marijuana." She further believed that "display of the banner would be construed by students, District personnel, parents and others witnessing the display of the banner, as advocating or promoting illegal drug use"—in violation of school policy.

We agree with Morse. At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: "[Take] bong hits . . ."—a message equivalent, as Morse explained in her declaration, to "smoke marijuana" or "use an illegal drug." Alternatively, the phrase could be viewed as celebrating drug use—"bong hits [are a good thing]," or "[we take] bong hits"—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.

The pro-drug interpretation of the banner gains further plausibility given the paucity of alternative meanings the banner might bear. The best Frederick can come up with is that the banner is "meaningless and funny." The dissent similarly refers to the sign's message as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid." Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs.

The dissent mentions Frederick's "credible and uncontradicted explanation for the message—he just wanted to get on television." But that is a description of Frederick's *motive* for displaying the banner; it is not an interpretation of what the banner says. The *way* Frederick was going to fulfill his ambition of appearing on television was by unfurling a pro-drug banner at a school event, in the presence of teachers and fellow students.

Elsewhere in its opinion, the dissent emphasizes the importance of political speech and the need to foster "national debate about a serious issue," as if to suggest that the banner is political speech. But not even Frederick argues that the banner conveys any sort of political or religious message. Contrary to the dissent's suggestion, this is plainly not a case about political debate over the criminalization of drug use or possession.

IV

The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may.

In *Tinker,* this Court made clear that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Tinker* involved a group of high school students who decided to wear black armbands to protest the Vietnam War. School officials learned of the plan and then adopted a policy prohibiting students from wearing armbands. When several students nonetheless wore armbands to school, they were suspended. The students sued, claiming that their First Amendment rights had been violated, and this Court agreed.

Tinker held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." The essential facts of *Tinker* are quite stark, implicating concerns at the heart of the First Amendment. The students sought to engage in political speech, using the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them." Political speech, of course, is "at the core of what the First Amendment is designed to protect." The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

This Court's next student speech case was *Fraser.* Matthew Fraser was suspended for delivering a speech before a high school assembly in which he employed what this Court called "an elaborate, graphic, and explicit sexual metaphor." Analyzing the case under *Tinker,* the District Court and Court of Appeals found no disruption, and therefore no basis for disciplining Fraser. This Court reversed, holding that the "School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech."

The mode of analysis employed in *Fraser* is not entirely clear. The Court was plainly attuned to the content of Fraser's speech, citing the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [Fraser's] speech." But the Court also reasoned that school boards have the authority to determine "what manner of speech in the classroom or in school assembly is inappropriate."

We need not resolve this debate to decide this case. For present purposes, it is enough to distill from *Fraser* two basic principles. First, *Fraser*'s holding demonstrates that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings." Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed "in light of the special characteristics of the school environment." Second, *Fraser* established that the mode of analysis set forth in *Tinker* is not absolute. Whatever approach *Fraser* employed, it certainly did not conduct the "substantial disruption" analysis prescribed by *Tinker.*

Our most recent student speech case, [*Hazelwood School District v.*] *Kuhlmeier,* concerned "expressive activities that students, parents, and members of the public might

reasonably perceive to bear the imprimatur of the school." Staff members of a high school newspaper sued their school when it chose not to publish two of their articles. The Court of Appeals analyzed the case under *Tinker,* ruling in favor of the students because it found no evidence of material disruption to classwork or school discipline. This Court reversed, holding that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Kuhlmeier does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur. The case is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech "even though the government could not censor similar speech outside the school." And, like *Fraser,* it confirms that the rule of *Tinker* is not the only basis for restricting student speech.

Drawing on the principles applied in our student speech cases, we have held in the Fourth Amendment context that "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' . . . the nature of those rights is what is appropriate for children in school." In particular, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject."

Even more to the point, these cases also recognize that deterring drug use by schoolchildren is an "important—indeed, perhaps compelling" interest. Drug abuse can cause severe and permanent damage to the health and well-being of young people: "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."

Just five years ago, we wrote: "The drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse."

The problem remains serious today. About half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and about one-fifth of 8th graders. Nearly one in four 12th graders has used an illicit drug in the past month. Some 25% of high schoolers say that they have been offered, sold, or given an illegal drug on school property within the past year.

Congress has declared that part of a school's job is educating students about the dangers of illegal drug use. It has provided billions of dollars to support state and local drug-prevention programs, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug prevention programs "convey a clear and consistent message that . . . the illegal use of drugs [is] wrong and harmful."

Thousands of school boards throughout the country—including JDHS—have adopted policies aimed at effectuating this message. Those school boards know that peer pressure is perhaps "the single most important factor leading schoolchildren to take drugs," and that students are more likely to use drugs when the norms in school appear to tolerate such behavior. Student speech celebrating illegal drug use at a school event, in the presence of school administrators and teachers, thus poses a particular challenge for school officials working to protect those entrusted to their care from the dangers of drug abuse.

The "special characteristics of the school environment," *Tinker,* and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards, including JDHS—allow schools to restrict student expression that they reasonably regard as promoting illegal drug use. *Tinker* warned that schools may not prohibit student speech because of "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The danger here is far more serious and palpable. The particular concern to prevent student drug abuse at issue here, embodied in established school policy, extends well beyond an abstract desire to avoid controversy.

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to

encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Although accusing this decision of doing "serious violence to the First Amendment" by authorizing "viewpoint discrimination," the dissent concludes that "it might well be appropriate to tolerate some targeted viewpoint discrimination in this unique setting" Nor do we understand the dissent to take the position that schools are required to tolerate student advocacy of illegal drug use at school events, even if that advocacy falls short of inviting "imminent" lawless action. And even the dissent recognizes that the issues here are close enough that the principal should not be held liable in damages, but should instead enjoy qualified immunity for her actions. Stripped of rhetorical flourishes, then, the debate between the dissent and this opinion is less about constitutional first principles than about whether Frederick's banner constitutes promotion of illegal drug use. We have explained our view that it does. The dissent's contrary view on that relatively narrow question hardly justifies sounding the First Amendment bugle.

. . . .

School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.

The judgment of the United States Court of Appeals for the Ninth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Citation: *Morse v. Frederick,* 127 S. Ct. 2618 (2007).

Mt. Healthy City Board of Education v. Doyle

At issue in *Mt. Healthy City Board of Education v. Doyle* (1977) was whether a school board could defend itself in a First Amendment retaliation claim by proving that it would have made the same employment decision in the absence of a teacher's allegedly protected free speech activity.

Facts of the Case

The dispute arose when a nontenured Ohio high school teacher, Doyle, sent a local radio station a copy of his principal's memo about a school dress code and included his own opinions. Doyle was employed under a series of one- and two-year teaching contracts between 1966 and 1971. Elected president of the teachers association in 1970, Doyle sought to expand direct negotiations between the association and the school board. During the same year, Doyle engaged in an argument with another teacher who slapped him, resulting in their both being suspended for a day. Shortly thereafter, several teachers staged a walkout to protest the suspensions.

On other occasions, Doyle became involved in an argument with school cafeteria employees over the amount of spaghetti he was served. In a disciplinary report, the board noted that Doyle referred to students as "sons of bitches" (p. 573) and made an obscene gesture to two girls after they failed to obey commands he gave in his capacity as cafeteria supervisor.

The board said that Doyle conducted himself in a nonprofessional manner on several occasions, leading to its recommendation that his contract not be renewed. Doyle later apologized to the principal for contacting the radio station without discussing the policy with administrators. When he asked for reasons for the nonrenewal of his contract, board officials told

Doyle that he demonstrated a lack of tact in handling professional matters; used obscene gestures to correct students in the cafeteria, resulting in their discomfort; and notified the local radio station about the board's suggestions of an appropriate dress code for professional staff.

In response to the board's action, Doyle filed suit, alleging that it violated his First Amendment protected free speech rights. A federal trial court in Ohio, affirmed by the Sixth Circuit, was of the opinion that Doyle's telephone call to the radio station was protected First Amendment speech and that it played a substantial part in the nonrenewal of his contract. The court awarded Doyle $5,158 in back pay and reinstatement, even though he had accepted another job in a different school system paying $2,000 less.

The Court's Ruling

On appeal to the Supreme Court, in addition to the free speech claims, the school board raised the issue of immunity from suits under the Eleventh Amendment to the U.S. Constitution. The Court ruled the board was not entitled to the protection of sovereign immunity, because it is a political subdivision, not an arm of the state. The Court explained that while local school boards are subject to some guidance from the state board of education and receive state funds, they have extensive power to issue bonds and to levy taxes within specified restrictions of state law.

Turning to the issue of free speech, the Court pointed out that in *Board of Regents v. Roth* (1972), it ruled that while a nontenured employee may be dismissed without cause, if issues of constitutionally protected free speech play major roles in the termination of their contracts, they may have grounds for reinstatement. The Court observed that Doyle's behavior patterns played a major role in the dispute, because he offended other teachers and students.

The Court also acknowledged that in *Pickering v. Board of Education of Township High School District 205, Will County* (1968), it maintained that the question of free speech issues involves finding a balance between the interests of public school teachers as citizens in commenting on matters of public concern and the interest of the state qua school boards as employers in promoting the efficiency of the public service they provide through their employees.

In its analysis, the Court determined that there were other factors in decisions to grant tenure to or rehire a borderline or marginal teacher such as Doyle, along with the First Amendment claims. The Court thus remanded the dispute for a consideration of whether factors other than the First Amendment issue would have led the board not to renew Doyle's contract.

On remand, the Sixth Circuit (*Doyle,* 1982) affirmed that the board demonstrated by a preponderance of the evidence that it would not have renewed Doyle's contract even if he had not contacted the radio station.

James Van Patten

See also *Board of Regents v. Roth; Connick v. Myers;* Eleventh Amendment; *Pickering v. Board of Education of Township High School District 205, Will County;* Teacher Rights

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Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).
Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).

Mueller v. Allen

Mueller v. Allen (1983) involved a challenge to the State of Minnesota's allowance of tuition deductions for specified educational expenses, filed under the Establishment Clause, which prohibits government making laws "respecting an establishment of religion." The Supreme Court's landmark decision in *Mueller* to let the state law stand provided an important precedent for other cases involving state support for religious schools.

Facts of the Case

The Minnesota statute allowed all state taxpayers, in computing their state income taxes, to deduct

expenses incurred in providing "tuition, textbooks, and transportation" for their children attending public or nonpublic elementary or secondary schools. Insofar as the statute permitted the deductions to be used for children attending sectarian schools, state taxpayers challenged the constitutionality of the statute both facially and in its application.

The federal trial court granted the state's motion for summary judgment, holding that the statute was neutral on its face and in its application and did not have a primary effect of either advancing or inhibiting religion. The Eighth Circuit affirmed.

The Court's Ruling

The Supreme Court granted certiorari and upheld the Eighth Circuit, relying on the three-part *Lemon v. Kurtzman* (1971) test. Regarding the first part of test, that of *secular purpose,* the Court observed that the tax deduction had the secular purpose of ensuring that the state's citizenry was well educated as well as of assuring the continued financial health of private schools, both sectarian and nonsectarian. More broadly, the Court noted that "a state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable" (p. 395).

Concerning the second, or *effects* test, the Court decided that the deduction did not have the primary effect of advancing the sectarian aims of nonpublic schools, because it was only one of many deductions—such as those for medical expenses and charitable contributions—available under the Minnesota tax laws. In addition, the Court noted that the deduction was available "for educational expenses incurred by *all* parents, whether their children attend public schools or private sectarian or nonsectarian private schools" (p. 397, emphasis in original). The Court distinguished *Mueller* from its earlier decision in *Committee for Public Education & Religious Liberty v. Nyquist* (1973), which had invalidated a tax deduction only for students in nonpublic schools, by observing that no state imprimatur of religious schools could exist where "aid to parochial schools is available only as a result of decisions of individual parents," in this case to enroll students in either public or nonpublic schools (p. 399).

The Court explained that the state deduction statute was facially neutral in ignoring the plaintiffs' claim that "96% of the children in private schools in 1978–1979 attended religiously-affiliated institutions," in effect pointedly declaring that "the fact that private persons fail in a particular year to claim the tax relief to which they are entitled—under a facially neutral statute—should be of little importance in determining the constitutionality of the statute permitting such relief" (p. 401).

Finally, the Court refused to find a violation of the third part of the *Lemon* test, excessive entanglement. The Court found that evaluating whether textbooks qualified for tax deductions was not significantly different from the loaning of secular textbooks to religious schools, a process that the Court had upheld 35 years earlier in *Board of Education v. Allen* (1968).

Mueller was a landmark judgment, because it was the first Supreme Court education case to invoke neutrality as a way to block the *Lemon* "effects" test. In effect, *Mueller* allowed state and federal government to frame statutes neutral in their design without having to be unduly concerned about the numerical impact of the statutes. Eventually, *Mueller* was to have a significant impact on the Supreme Court's upholding the provision of special education services on site in religious schools (*Zobrest,* 1993), the provision of on-site Title I services at religious schools (*Agostini,* 1997), and the loaning of instructional materials and supplies (*Mitchell,* 2000) to religious schools.

In the broadest understanding of *Mueller,* though, the case stands for more than just facial neutrality; the *Mueller* Court acknowledged "the positive contributions of sectarian schools" (p.400). In so doing the Court rejected the "[risk] of deep political division along religious lines" (p. 400) that had formed part of the Supreme Court's "political divisiveness" rationale in *Lemon* (p. 622), used 12 years earlier to invalidate a variety of forms of governmental support for students and the religiously affiliated nonpublic schools that they attended.

Ralph D. Mawdsley

See also *Agostini v. Felton; Board of Education v. Allen; Committee for Public Education & Religious Liberty v. Nyquist; Lemon v. Kurtzman; Mitchell v. Helms;* State Aid and the Establishment Clause; *Zobrest v. Catalina Foothills School District*

Legal Citations

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Mueller v. Allen, 463 U.S. 388 (1983).
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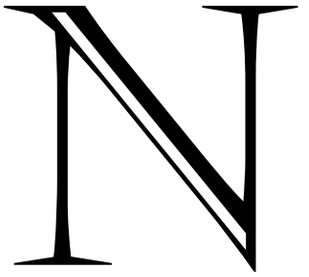

Nabozny v. Podlesny

At issue in *Nabozny v. Podlesny* (1996) was whether a student who was gay could proceed with a claim that school officials in Wisconsin violated his rights to equal protection and due process in light of their failure to protect him from harassment and harm by peers on account of his sexual orientation. The Seventh Circuit ruled that the student presented an actionable claim for violations of his right to equal protection but not due process.

Facts of the Case

Jamie Nabozny sued his school board in federal trial court under Title IX of the Education Amendments of 1972. Nabozny was a gay student who was subjected to such severe harassment and physical abuse that he left school before he graduated. Prior to *Nabozny,* queer (lesbian, gay, bisexual, transgendered, transsexual, and/or intersexual) students had little legal recourse in federal court to challenge the abuse they received in public school settings.

The record reflected the fact that beginning in seventh grade, the plaintiff was routinely and continually harassed, beaten, and called "fag" and "faggot." He was spat on, punched, urinated on, and even subjected to a mock rape where 20 students watched and even laughed but did not come to his aid. All of this harassment and bullying happened on school grounds, and almost all of this abuse was at the hands of fellow students. When the student's parents tried to intervene with school administrators after the mock rape, they were informed that if their son was going to act like a queer, then they should have expected that he would be subjected to this type of harassment.

In many instances, teachers and administrators witnessed the student being abused but failed to intervene. In fact, one teacher called the plaintiff a "fag," and a high school assistant principal told him he deserved to be abused because he was gay. During his sophomore year, the student was so savagely beaten and kicked in one attack that he needed extensive abdominal surgery to repair the damage. The constant abuse also led the student to attempt suicide twice. By eleventh grade, the student had dropped out of school, and administrators recommended that he should attend school somewhere else.

The student's subsequent successful suit in federal court against his middle school principal and the school board was the first such federal action in the United States. On further review of a grant of summary judgment in favor of school officials, the Seventh Circuit partially reversed in favor of the student.

The Court's Ruling

In its analysis, the Seventh Circuit found that school officials violated the student's Title IX right to be free of gender-based violence and to equal protection. However, the court affirmed the denial of the student's due process claim. As part of its judgment, the court pointed out that the board had antibullying policies in

place and enforced them if the victims of harassment were female, but not male. To this end, the court awarded the student $900,000 in damages, a striking judgment against the board, especially because it added that the school officials were not entitled to qualified immunity with respect to equal protection claims because of their failure to protect him. Clearly, *Nabozny* sent a loud message that officials in public schools could be liable for serious financial damages if they failed to protect the homosexual students within their walls.

Catherine A. Lugg

See also Equal Protection Analysis; Sexual Harassment, Peer-to-Peer; Title IX and Sexual Harassment

Further readings

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National Association for the Advancement of Colored People (NAACP)

The National Association for the Advancement of Colored People (NAACP), founded in 1909, is the oldest and the largest civil rights organization in the United States. The NAACP seeks to ensure the political, educational, social, and economic equality of minority group citizens in the United States. The NAACP uses nonviolence and relies on the press, the petition, the ballot, and the courts to achieve its objectives. This entry looks at the history of the organization and its litigation efforts.

Historical Background

The NAACP, a membership organization with 2,200 local chapters in all 50 states and the District of Columbia, has approximately 500,000 members. Local chapters are managed by a national board of directors located in Baltimore, Maryland. In 1940, the NAACP established a new independent organization to pursue legal actions through the courts via its legal arm, the NAACP Legal Defense Fund (LDF). Thurgood Marshall became its first director and chief legal counsel. The LDF, a nonmembership organization, is located in New York City. When the name *NAACP* is mentioned, it refers to both organizations, the NAACP and the NAACP Legal Defense Fund.

In addition to making its stance on public issues known in its publication, *The Crisis,* the NAACP sponsors two important events annually. The first is its annual convention, which typically is addressed by the U.S. president; the second is the annual NAACP Image Awards ceremony that takes place in Hollywood, California.

The NAACP was patterned after the Niagara Movement, a group with an all Black membership that was founded by W. E. B. DuBois, a Black scholar from Atlanta University. The charter members of the NAACP included 53 Whites and 7 African Americans. The NAACP's first officers included five Whites and one Black, W. E. B. DuBois, who was elected director of publicity and research and editor of *The Crisis.*

Education Litigation

Prior to *Brown v. Board of Education of Topeka* (1954), the NAACP had set the stage for an attack on the U.S. Supreme Court's ruling in *Plessy v. Ferguson* (1896). In *Plessy,* the Court upheld the notion that states could satisfy the Equal Protection Clause of the Fourteenth Amendment by providing "separate but equal" public facilities for Black and White citizens. The NAACP first focused on higher education, based on the belief that it would be easier to prove inequality between Black and White graduate higher education programs.

The pre-*Brown* cases that the NAACP won, such as *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Regents for Higher Education* (1950), wherein the Supreme Court struck down inter- and intrainstitution segregation, respectively, in higher education, led Thurgood Marshall to believe that the Court would

uphold the rights of Blacks to attend desegregated K–12 public schools. In fact, the NAACP's strategy originated in 1930 when Nathan Margold devised a plan to eliminate school segregation.

The NAACP's years of planning achieved success in *Brown I* (1954). In *Brown I,* the Court reasoned that because separate educational facilities were inherently unequal, they violated the Equal Protection Clause. A year later, in *Brown II* (1955), the justices set a schedule for the lower courts to implement *Brown I* with "all deliberate speed." Yet, 10 years after *Brown I,* only a small percentage of the Black students in the 11 Southern states attended desegregated public schools.

Other Efforts

In addition to legal action to achieve equality between the races, the NAACP sought other means to advance the cause of equal justice for all Americans. The NAACP led marches and demonstrations and lobbied for a better life for African Americans. In addition, the NAACP produced research on issues such as lynching, Jim Crow laws, and discrimination in employment, educational institutions, and the armed forces. The NAACP also encouraged and continues to encourage voter registration and grassroots protests of injustice.

The modern NAACP is not as popular today as in the past when it won many important legal cases before the Supreme Court. Part of this may stem from the fact that insofar as the NAACP is a nonprofit organization, it is barred from direct political involvement. This limitation is necessary, however, because, following *Brown,* the NAACP needed more funds and manpower to help to ensure that the more than 2,500 individual school systems that had been segregated achieved unitary status. In addition, the NAACP needed funds to litigate local cases of police brutality, employment discrimination, and voting rights. What happened in Alabama is a good example of how the NAACP became involved. The leaders of the Montgomery bus boycott were all members of the local NAACP, as several held office in the local chapter when they decided to organize the bus boycott. The Alabama group also won six race-related cases before the Supreme Court, beginning with the bus boycott. Similar local and state organizations were established across the country to handle similar situations. The NAACP and LDF continue to conduct research on race-related political and legal issues, making the results available to local civil rights organizations.

Frank Brown

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *McLaurin v. Oklahoma State Regents for Higher Education; Sweatt v. Painter*

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National Collegiate Athletic Association (NCAA)

The National Collegiate Athletic Association (NCAA) is a voluntary association of approximately 1,200 institutions, organizations, and individuals committed to the administration and regulation of intercollegiate athletics. The history of the NCAA spans a little over one century. While the NCAA is neither the first nor the only intercollegiate athletic association, it is the largest collegiate athletic association in the world and arguably the most influential. This entry looks at the organization and key issues it faces.

Background

According to the organization's Web site, multiple injuries and deaths related to the use of the "flying wedge" formation in college football spurred the organization's formation in 1905. That year, President Theodore Roosevelt summoned college athletic leaders to two separate White House conferences on the reform of collegiate athletics, specifically football. Later in 1905, Henry MacCracken, chancellor of New York University, convened a meeting of 13 institutions to initiate changes in the rules governing college football. At a subsequent meeting in New York on December 28, the Intercollegiate Athletic Association of the United States (IAAUS) was founded with 62 members. Four years later in 1910, the IAAUS took its present name.

In 1973, the NCAA's membership was separated into three legislative divisions: divisions I, II, and III. In 1978, Division I members voted to create subdivisions I-A and I-AA in the sport of football. The NCAA began administering women's athletics programs in 1980. A year later, at its historic 75th convention, the organization adopted an extensive governance plan to include women's athletics programs, services, and representation. The delegates expanded the women's championships program with the addition of 19 events.

The basic underlying distinctions between Division I, II, and III schools are the number of sports that member institution must offer and the levels of athletic scholarship awards. For example, Division I schools are the leaders in collegiate athletic programs, with larger budgets, more elaborate facilities, and significantly more athletic scholarships than the other two divisions. Division II schools tend to include smaller public universities and many private institutions. Athletic scholarships are offered in most sponsored sports at most institutions, but there are more stringent limits as to the numbers offered in any one sport than at the Division I level. For example, Division II schools may give up to 36 football scholarships (whereas Division I-A, the highest level, is allowed 85 football scholarships). Division III schools range in size from less than 500 to over 10,000 students. Division III schools compete in athletics as a non–revenue-making, extracurricular activity for students; for this reason, they may not offer athletic scholarships but only academic and need-based financial aid to their student-athletes.

Similar to the separate legislative divisions, the NCAA also offers four categories of membership, each with different requirements, voting rights, and dues payments. These categories are active membership, conference membership, affiliated membership, and corresponding membership. Of the four, active membership schools are eligible to compete in NCAA championships in their respective divisions and have a single vote on NCAA legislation.

Key Policies

The NCAA has played a significant role in shaping collegiate athletics since its inception, providing leadership on issues ranging from athletic recruitment and eligibility to drug testing, sports wagering, and student-athlete reinstatement. Three recent policies provide evidence of the organization's influence and of the authority of the NCAA. These policies focus on issues of gender, student-athlete academic performance, and diversity.

Gender and Title IX

Congress approved Title IX of The Educational Amendments of 1972, and President Richard M. Nixon signed the statute into law, on June 23, 1972. On July 21, 1975, Congress reviewed and approved Title IX regulations. Title IX requires educational institutions to maintain policies, practices, and programs that do not discriminate against anyone based on sex. Under this law, males and females are expected to receive fair and equal treatment in all arenas of public schooling: recruitment, admissions, educational programs and activities, course offerings and access, scholarships, sexual harassment, and athletics. In the area of athletics, compliance with Title IX is evaluated on three issues: athletic financial assistance, accommodation of athletic interests and abilities, and other program areas.

When the regulations were adopted, high schools and colleges were given three years, and elementary

schools one year, to comply. On February 17, 1976, the NCAA challenged the legality of Title IX. In 1978, the Department of Health, Education and Welfare issued a formal policy on Title IX and intercollegiate athletics for notice and comment. July 21, 1978, was the deadline for all high schools and colleges to have policies and practices in place that complied with Title IX athletic requirements.

Academic Reform

In April, 2004, the NCAA Division I Management Council approved the academic reform package. This program, commonly referred to as the incentives/disincentives program, is designed to punish institutions and teams that fail to demonstrate commitment toward the academic progress, retention, and graduation of student-athletes. This program forces institutions to submit annual documentation demonstrating compliance with a minimum academic progress rate, which will be determined after the collection of data during the academic year. The program includes measurements that account for variances in institutional mission, sport, culture, and gender while holding institutions accountable for their academic progress. Institutions or teams that excel academically are recognized, while those failing to meet established minimums are penalized through a loss of athletic scholarships and eligibility to play in sanctioned NCAA postseason venues such as bowl games and national championships.

Indian Mascots

In 2005, the NCAA Executive Committee issued guidelines for the use of Native American mascots at championship events. According to the NCAA Web site, "The presidents and chancellors who serve on the NCAA Executive Committee adopted a new policy prohibiting NCAA colleges and universities from displaying hostile and abusive racial/ethnic/national-origin mascots, nicknames, or imagery at any of the 88 NCAA championships." The decision was based on the articulated core values of the NCAA Constitution pertaining to cultural diversity, ethical sportsmanship, and nondiscrimination. The NCAA's final policy change, effective August 1, 2008, prohibits colleges and universities that display American Indian references on their mascots, cheerleaders, dance teams, and band uniforms from displaying them at any championship event.

George J. Petersen

See also Title IX and Athletics

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National Defense Education Act

The National Defense Education Act of 1958 (NDEA), enacted by the 85th Congress as Public Law 85–864 on September 2, 1958, was the principal federal support program for public education in the 1950s. This legislation, like federal policy at the time, was based on the belief that because education at all levels was directly linked with military research, it was an essential component of cold war strategies. The law provided federal funds in targeted areas. This

entry summarizes the law's historical background, its content, and its impact.

Historical Background

With the start of the cold war at the end of World War II, members of scientific organizations were concerned with the lack of science, engineering, and mathematics majors in American universities. Insofar as these individuals placed the blame for this dearth of students in the technical fields directly on the public schools, they issued a call for a greater federal role in education. Even so, in light of the fact that education is a responsibility of states under the Tenth Amendment, the states and local school boards were reluctant to give up their control over education.

The national situation began to change when, on October 4, 1957, the Soviet Union launched *Sputnik I,* prompting fears that the United States was losing the cold war. Using the bully pulpit, President Eisenhower warned that national security was at risk. In speeches, he stated that in just 40 years the Soviet Union had gone from a nation of peasants to one that was technologically advanced. Eisenhower credited this transformation to the Soviet educational system, which was highly adept at identifying and educating talented students. To this end, Eisenhower stressed that the United States needed to gain superiority in military power, technological advancement, and research. Moreover, he pointed out that making such a transformation would require specialized education. According to Eisenhower, the improvement of the educational system was imperative to national defense, quelling many of the objections to federal intervention from those who supported local control of education.

What the Law Said

Perhaps the greatest fear that critics of federal intervention, who were also proponents of local control, raised was the imposition of a national curriculum. Title I of NDEA quelled this fear, because it prohibited federal control over curriculum, administration, and personnel.

Title II of the NDEA provided low-interest federal loans for college students. As an added incentive, the loan program included funds for students who demonstrated superior capacity for mathematics, science, engineering, and modern foreign languages. The purpose of this Title was to ensure an adequate flow of qualified graduates. Title III of the NDEA provided federal funds for staff development of teachers in mathematics, science, and modern languages. This was to ensure that students in public schools were adequately prepared to take on rigorous courses of study in these areas at the university level.

Title IV provided funds for graduate fellowships. This was premised on the need to ensure an adequate number of college faculties in mathematics, science, engineering, and modern languages. In order to ensure that promising students were identified, Title V provided funds for testing and counseling in public schools. It also allocated funds for guidance training institutes for secondary school guidance counselors. The role of the guidance counselor changed as a consequence of Title V insofar as it placed an emphasis on identifying and counseling talented students into curricular areas that were important to national defense. At the same time, there was a subsequent reduction in their role in caring for students with personality problems.

Title VI of the NDEA provided funds for language institutes as well as language centers and research, because there was a growing concern that the Soviet Union was surpassing the United States in world influence due to an American lack of knowledge about many areas of the world. Title VI also allocated funds for studies of history, anthropology, political science, economics, geography, and geology, to ensure satisfactory teaching in these areas.

In sum, the purpose of NDEA was for the federal government to assist states in shoring up weaker areas of education. In furtherance of this effort, the NDEA also provided grant funds for collecting statistical data in the assessment of science, math, and language education. These data were also to be reported to the Office of Education.

The Law's Impact

At its heart, the NDEA offered categorical aid to local school boards, funds that were allocated for specific

programs, materials, and curricula. In this way, the federal government was able to impose significant control on schools. This strategy would be used again in the authorizations of the Elementary and Secondary Education Act, now reauthorized as the No Child Left Behind Act.

Another significant legacy of NDEA was the federal government's reliance on the views of members of the scientific community over those of education professionals in its development. This not only eroded the power of national education groups, such as the National Education Association, but also allowed the federal government greater control over educational priorities and practices. Finally, in light of the NDEA, because education was linked to the interests of both national security and economic prosperity, its main focus was perceived as being designed to support these interests.

Patricia A. L. Ehrensal

See also Federalism and the Tenth Amendment; No Child Left Behind Act

Legal Citations

National Defense Education Act of 1958, P.L. 85–864.

National Labor Relations Act

The National Labor Relations Act was passed during the Great Depression in an effort to define employer practices that would be considered unfair, thus protecting workers and in particular their right to organize and bargain collectively. What some consider to be the *Magna Carta* of American Labor, the law changed the workplace environment and led to a series of other laws that added restraints on workers and expanded existing laws to cover public employees. This entry describes the law and its impact.

The Law and Its Context

The Great Depression had settled across the country bringing with it anxiety, loss, and fear. The economic hard times produced uncertainty, resulting in a quest for security. There were more workers than jobs, and workers that had jobs sought to protect them. Strikes, lockouts, and violence marred labor relations. Employers punished, interrogated, blacklisted, and fired workers who joined unions. Workers and union leaders shut down factories and businesses. News stories regularly reported the clash of workers, intent on organizing, with employers and their private security forces, often backed by the police, equally intent on breaking the union. In 1933 and 1934, the nation was rocked by large-scale work stoppages, citywide strikes, and the occupation of factories as workers sought to organize.

Against this backdrop of deepening labor unrest and growing militant organizing, Senator Robert F. Wagner, a Democrat from New York, submitted a bill in 1933 titled the National Labor Relations Act (NLRA). Secretary of Labor Frances Perkins backed the NLRA. The NLRA became known as the Wagner Act when, on July 5, 1935, Congress enacted it. President Roosevelt signed the act, but he did not take part in its development. The NLRA was designed to diminish labor disputes by protecting the rights of employees to organize and bargain collectively with the employer. Further, the NLRA sought to safeguard "commerce from injury, impairment, or interruption, and promote the flow of commerce by removing certain recognized sources of industrial strife and unrest."

The NLRA protects workers who seek to form and join unions through self-organizing efforts, with the goal of selecting a representative of their choice. According to the NLRA, employers must meet with the exclusive representatives of their employees to bargain in good faith over wages, benefits, and terms and conditions of employment. The NLRA, in essence, altered the unilateral decision-making power that employers enjoyed, replacing it with bilateral negotiations over issues that were subject to bargaining. Under the NLRA, workers gained the full right of freedom of association and with it the protection to seek mutual aid and protection. In addition, the NLRA prohibited management from interfering with or restraining employees from exercising their right to organize and bargain; it also prohibited management from dominating or influencing a labor union.

The NLRA created the National Labor Relations Board (NLRB), a quasi-judicial body, to administer its provisions. The NLRB conducts elections for exclusive representatives, determining who is in the unit through a process of evaluating which employees have a "community of interest" in their positions, and investigates charges of unfair labor practices in violation of its provisions. The NLRB can also issue "cease and desist" orders against unfair labor practices. While the NLRB has no enforcement mechanism of its own, it can seek enforcement of its orders in the U.S. Court of Appeals. Similarly, parties to disputes that come before the NLRB may seek relief through the courts. The NLRB currently consists of five members and its general counsel selected by the president of the United States subject to approval by the Senate. Thirty-three regional directors assist the board.

Impact and Evolution

Prior to the passage of the NLRA, only about 10% of the private sector workforce was organized. After the NLRA was enacted, there was a dramatic surge in union membership, including both men and women. Industries such as automakers, manufacturing, steel, and rubber saw a significant increase in union membership. As their membership increased, so did the political clout of unions. Strikes over union recognition were reduced as the union movement's fight for recognition moved from the economic arena, characterized by such concerted actions as strikes, lockouts, and strife, to the political arena, in which the rights of employees were resolved through a quasi-judicial process.

The NLRA faced a legal challenge, but the Supreme Court upheld its constitutionality in *National Labor Relations Board v. Jones & Laughlin Steel Corporation* in 1937. While the NLRA survived this legal challenge, it changed 10 years later. The legislation responded to employers' and labor opponents' concern that the NLRA had gone too far in giving power to unions. Some asserted that the unions were corrupt and riddled with Communists.

In 1947, at the start of the cold war, Congress enacted the Labor-Management Relations Act, commonly known as the Taft-Hartley Act. A Republican-controlled Congress passed the act over the veto of President Truman. Opponents of the bill dubbed it the "slave labor bill," arguing that it would usher in an era of industrial slavery.

The NLRA envisioned a restraint only on management's action. There were no union activities that could be considered unfair labor practices. Taft-Hartley leveled the playing field by adding prohibitions on labor while retaining the prohibitions on management. Taft-Hartley classified such union acts as secondary boycotts; sympathy strikes, which anti-union groups called "blackmail strikes"; and closed shops as unfair labor practices. Another course correction of Taft-Hartley was a move toward individualistic rights and a diminishment of group rights. For example, the Taft-Hartley bill outlawed closed shops and protected employees from coercive and discriminatory acts committed by the union. The act also compelled union officials to take an oath that they were not Communists.

The NLRA and the Taft-Hartley Act both pertain to the private sector. Neither extended the rights granted to private employees to government workers. However, starting in 1962, with President John F. Kennedy's Executive Order 10988, public sector bargaining took root. The resulting public sector collective bargaining laws were largely grafts from the NLRA and the Taft-Hartley Act. This wholesale importation of law developed for the private-sector, largely industrial, union workplace has had and still has wide-reaching ramifications for states, local school boards, and teachers in public schools.

Todd A. DeMitchell

See also Agency Shop; Arbitration; Closed Shop; Collective Bargaining; Impasse in Bargaining; *National Labor Relations Board v. Catholic Bishop of Chicago;* Unions

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National Labor Relations Board v. Catholic Bishop of Chicago

In *National Labor Relations Board v. Catholic Bishop of Chicago* (1979), the only case on the legal issue of unions in Roman Catholic schools, a closely divided U.S. Supreme Court affirmed an earlier ruling from the Seventh Circuit that the National Labor Relations Board (NLRB) lacked jurisdiction to mandate collective bargaining between teachers and their secondary school employers. The dispute in *Catholic Bishop* mirrored, in many respects, developments in the then-recent growth of unions in public education.

The controversy arose after the seemingly bright future of labor relations in Roman Catholic schools received an unexpected boost in 1975, when the NLRB asserted its jurisdiction over union organizing activities in two Catholic secondary schools, one in the Archdiocese of Chicago, Illinois, and the other in the Diocese of Fort Wayne–South Bend, Indiana. Yet, despite an order from the NLRB that the boards and the leadership in the schools recognize, and meet, with the bargaining representatives selected by their teachers, officials refused to comply with the directive. Instead, school officials appealed to the Seventh Circuit, which held that the NLRB improperly exercised its discretion in light of the religious nature of the schools and that related First Amendment considerations precluded it from asserting its jurisdiction. When the NLRB sought further review, the U.S. Supreme Court agreed to hear an appeal.

On March 24, 1979, the U.S. Supreme Court, in a 5-to-4 judgment that was destined to become a landmark in the history of teacher organizations and labor relations in Roman Catholic schools, affirmed that the NLRB lacked the authority to mandate collective bargaining between teachers and their religious employers. In its analysis, the Court framed two issues for consideration. The first question was whether Congress intended to grant the NLRB jurisdiction over teachers in religiously affiliated nonpublic schools. The second issue asked that if Congress had intended to confer such authority on the NLRB, whether its doing so would have violated the constitutionally sensitive First Amendment Religion Clause questions by engaging in impermissible and excessive governmental entanglement with the religious missions and day to-day-activities of the schools.

Sidestepping the thorny First Amendment Religion Clause issues, the Court relied on long-established precedent that it should not interpret an act of Congress as violating the Constitution if any other possible interpretation of a law remains available. Based on a review of the legislative history of the National Labor Relations Act (NLRA), the Court answered the initial question by pointing out that Congress did not display a clear and affirmative intent to extend the NLRB's jurisdiction to Roman Catholic and other religiously affiliated nonpublic schools. Accordingly, the Court found it unnecessary to resolve what would have been highly contentious First Amendment Religion Clause issues.

This case's impact on labor relations in Roman Catholic and, by extension, other religiously affiliated nonpublic schools is legally significant in two important ways. First, the Court's opinion created a void, leaving educators in religious schools without legal recourse to neutral third-party decision makers who could resolve labor disputes where governing bodies and/or educational officials refused to consent to the jurisdiction of appropriate agencies designed to protect the employment rights of teachers. Second, although the Court challenged leaders in Roman Catholic schools, in particular, the largest group of religiously affiliated nonpublic schools in the United States, to devise an alternative plan to provide some form of representations for their teachers in disputes about labor relations, those leaders failed to act and have yet to do so.

Charles J. Russo

See also Collective Bargaining; First Amendment; Nonpublic schools; Unions

Further Readings

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Legal Citations

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National League of Cities v. Usery

National League of Cities v. Usery (1976) is an important case in the long debate over the division of powers between the U.S. government and the governments of the individual states. Although the U.S. Supreme Court's ruling in *Usery,* favoring state powers, was overruled just a few years later, the decision is often cited as one of the first to signal the new era of states' rights that has existed since the last quarter of the 20th century. This movement toward states' rights reached a high water mark under the Rehnquist Court and in a particular decision, *United States v. Lopez* (1995), where the Court ruled that federal rules limiting gun possession in school zones did not relate closely enough to commerce to be justified under the Commerce Clause. This entry discusses *Usery* and its impact.

Usery concerned amendments to the Fair Labor Standards Act (FLSA), which set out minimum wage and maximum hour provisions for state employees. Traditionally, the states have controlled their own employees without federal intervention over wages and hours. Thus, the states, along with the National League of Cities and the National Governors Association, challenged the new provisions adopted by Congress as unconstitutional.

The central issue in *Usery* was to weigh the Commerce Power given to the federal government in Article I of the Constitution against the essential sovereignty the states retained: specifically, whether the ability of states to determine the wages and hours of state employees was essential to their independence, to the degree that federal involvement would undermine their very existence.

The case has implications for education, because the latter is traditionally a function of the states. Thus, when controversies between the power of the federal government and the sovereignty of the states arise, these decisions directly impact the possible control over education that the federal government may seek to wrest from the states.

Ultimately, the majority of the Supreme Court concluded that the FLSA's minimum wage and maximum hour requirements for public employees were unconstitutional. The law's provisions undermined traditional practices of the states and would imperil their independent identities and existence, the court said. Although the Tenth Amendment was not specifically used as a justification for the decision, the court found that is was more than a truism and contained some limits on Congress's power to act against interests reserved for the states. Such functions as building and maintaining hospitals, fire and police departments, and schools were clearly and traditionally within the purview of the states, the Court ruled. Thus, the interests inherent in traditional governmental functions of the states were found to override the federal authority granted to Congress in the Commerce Clause.

The *Usery* decision lasted only eight years before being explicitly overruled in *Garcia v. San Antonio Metropolitan Transit Authority* (1985). In that case, the Supreme Court found that the "traditional governmental functions" rule was too unwieldy to serve any practical purpose. It was extremely difficult to identify what governmental functions were traditionally allotted to the states, even though some such functions, including education, were found to be state functions by the court in *Usery.* Further, the Court found that the Tenth Amendment had little practical meaning and did not limit the Commerce Clause, because the political process is sufficient to ensure states' rights.

In the recent cases discussed in this entry, including the overruled *Usery,* the Supreme Court has indicated there are limitations to the reach of the Commerce Clause of Article I of the Constitution. Thus, while the General Welfare Clause of Article I

has allowed for substantial federal involvement in education under its spending powers, the application of the Commerce Clause to education has been very limited, partly as a result of these cases.

Justin M. Bathon

See also Federalism and the Tenth Amendment; *United States v. Lopez*

Further Readings

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United States. v. Lopez, 514 U.S. 549 (1995).

National Treasury Employees Union v. Von Raab

National Treasury Employees Union v. Von Raab (1989), along with its companion case of *Skinner v. Railway Labor Executives' Association* (1989), stands out for the proposition that under some circumstances, public employers may be able to require staff members to submit to suspicionless drug testing. Although Von Raab was not set in a school context, it raises interesting implications for employees of public school systems.

Facts of the Case

In Von Raab, employees of the U.S. Customs Service and their union filed suit on behalf of employees who were preparing to apply for "covered" positions. The suit challenged the Customs Service's urinalysis drug testing program, alleging that it violated, among other things, their Fourth Amendment rights, because it called for suspicionless drug searches.

It is worth noting that the Customs Service, whose function is to monitor and seize illegal drugs being smuggled or otherwise brought into the United States, began a drug testing program for employees who wished to apply for transfers or promotions to positions having more responsibilities, namely covered positions. The program mandated that if applicants sought to work in the areas of direct involvement with drug interdiction, possession and/or use of firearms, or classified materials, then they had to have been tested for five illegal drugs. Among other things, the program required that applicants be notified that their selection was contingent on successful completion of drug screening; it set forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy. In addition, the program provided that test results were not to be turned over to any other agencies, including criminal prosecutors, without the employees' written consent. Passing the urinalysis tests was the final determinant for promotion to these covered positions. Employees who failed the urinalysis tests without plausible explanations were subject to dismissal from the Customs Service.

A federal trial court in Louisiana rejected the government's motion to dismiss. Instead, the court called for the testing to stop, because it found that the suspicionless nature of the program violated the employees' expectations of privacy. However, the Fifth Circuit reversed in favor of the Customs Service on the basis that although the urinalysis drug testing program was a search within the meaning of the Fourth Amendment, it was reasonable because of its limited scope. The court also justified the search in light of the mission of the Customs Service and the government's strong interest in detecting drug use among employees in covered positions.

The Court's Ruling

At the outset of its analysis in *Von Raab,* the Supreme Court noted that the program had to satisfy the Fourth Amendment's reasonableness requirement. The *Von Raab* Court created a three-pronged test for determining reasonableness. First, the Court noted that it was

necessary to evaluate whether a search provides the basis for a special need that goes beyond the regular need for law enforcement. Here the Court acknowledged that because the program was designed to deter drug use among selected Customs agents, and not to meet the ordinary needs of criminal prosecution, it presented a special need that justified departing from the usual warrant and probable cause requirements. Second, the Court indicated that it had to decide whether it was necessary to obtain a warrant for the search or if there was any level of suspicion that was needed to balance the individual privacy rights against the governmental interest in context. Third, the Court pointed out that it had to establish whether the intrusion was reasonable and would obtain the desired information. As such, the Court eliminated any subjectivity as a measure for reasonableness, instead establishing a balancing test as long as the positive characteristics justifying its application were present.

Insofar as the Supreme Court was unable to address the reasonableness of testing for agents who handled classified materials, it remanded for further proceedings to clarify the scope of employees subject to testing. *Von Raab*'s significance lies in the fact that the Supreme Court abolished the need for suspicion as a prerequisite for justifying the search from the beginning as was the original standard.

Marilyn J. Bartlett

See also Drug Testing of Teachers; *O'Connor v. Ortega*

Legal Citations

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
O'Connor v. Ortega, 480 U.S. 709 (1987).
Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

Negligence

Educators, including teachers and school administrators, are often concerned about the extent of their legal liability for injuries sustained by children who are under their direct supervision as students. When educators are sued for injuries to children, it is under the broad rubric of the tort of negligence. Torts are civil wrongs that occur when persons suffer harms or losses as a direct consequence of the improper conduct of others.

One type of tort, intentional torts, such as assault, battery, and defamation, are expressly characterized as the intent to do harm to others. For example, while assault is the threat of an unwanted touch, battery is the actual unwanted intentional contact with another person, such as striking a child while in the act of imposing corporal punishment.

By far, the most common tort occurring in schools is negligence. Negligence occurs when accidents take place resulting in injuries to others because one failed to act reasonably. In determining liability for negligence, courts and others such as insurance companies must assess whether the persons alleged to have been responsible acted as reasonable and prudent persons would have acted under the same or similar circumstances.

In order to present valid causes of action for negligence, plaintiffs, the parties filing suit, must prove the four legal elements of this tort: duty of care (along with the related notion of foreseeability), breach of duty, actual injury or loss, and cause, meaning that the defendant was the proximate cause of the resulting injury. To escape full or partial liability, defendants must assert all or parts of the three defenses: immunity, comparative or contributory negligence, and assumption of risk. This entry describes these legal elements and defenses in the education context.

Causes of Action

In school settings, educators have a duty of care to act as "reasonable and prudent" persons under the circumstances toward others, particularly students, with whom they have either common-law or statutory relationships. In other words, teachers must adequately supervise their students in order to satisfy their legal responsibility of duty of care. However, the degree of this supervision depends on a multitude of factors, including the ages of the students as well as the nature of their activities. For instance, courts impose higher duties of care on educators in potentially dangerous classroom settings such as a chemistry laboratory when compared to traditional classroom environments. Moreover, courts have consistently ruled that educators owe higher duties of care to younger students or

those who have diminished mental capacities and lesser duties of care to older students and those who are not disabled.

Under their responsibility of duty of care, educators have a legal duty to anticipate reasonably foreseeable injuries or risks to students and take reasonably proactive steps to protect students from harm. Educators can be liable only for those negligent acts that were reasonably foreseeable or those acts of which they were aware.

In terms of the second element of negligence, breach of duty, there are generally two legal conditions that are taken into account in assessing whether educators breached their duty of care. The first addresses how educators performed their duties. Teachers can breach their duty in one of two ways: either by nonfeasance, or not acting when there is a duty to do so (such as not breaking up a fight), or by misfeasance, acting incorrectly under the circumstances (such as using too much force in breaking up a fight).

When evaluating whether individuals met the second element under breach, the appropriate standard of care, the courts have adopted the legal standard of reasonableness, also referred to as "the reasonably prudent person" standard. Increasingly, courts are moving toward the adoption of a standard for educators that requires them to provide a level of care based on factors such as age, training, education, and experience. Put another way, under the reasonable educator standard, courts ordinarily expect teachers and other school staff to provide a higher duty of care than the "reasonable persons" who are not educators but less than the degree of care that "reasonable parents" might perform.

The third element of negligence is the proof of actual loss or injury. In order for injured parties to prevail in negligence suits and receive compensation, they must prove that their injuries were the direct result of negligent acts of others. Courts may award three kinds of damages to injured parties in negligence suits. The most common award in a negligence suit is compensatory damages that compensate injured parties for their actual losses, including medical expenses, lost salary, and court-related costs. Even so, in most negligence actions, attorneys work on the basis of contingency fee arrangements, meaning that they are not paid unless they prevail in court for their clients or are able to procure so-called out-of-court settlements. Nominal damages refer to small, symbolic awards that courts grant where injured parties were wronged but were unable to prove they suffered any legal damages. Punitive damages, which courts rarely award, are designed to compensate injured parties when there is evidence of reckless disregard of the safety or constitutional rights of injured persons.

The final element of negligence, proximate cause, indicates that a causal connection must exist between educators' conduct and the resulting injuries for legally valid claims of negligence to prevail. Courts consistently agree that negligent liability may be mitigated if the defense can prove that the cause of the injury was the result of an intervening act, for example, if a child ignored orders not to run out of a school yard to chase a ball and was injured on being struck by a car.

Legal Defenses

In negligence suits, the legal burden of proof is usually on the injured persons, or plaintiffs, to prove that the defendants were negligent. Despite instances where the injured parties have successfully established that the four elements of negligence were present, the three defenses are available in negligence suits. In the educational environment, these legal defenses recognize that while school officials have a legal duty of care to protect students, they cannot be legally responsible for all unintentional harms that occur within school settings.

Immunity is the defense that school boards and their employees may use in negligence actions. The immunity defense is premised on the notion that because public school boards are agents of the state, they should not be liable for corporate activity unless the state legislature has specifically ruled otherwise.

A second pair of defenses, contributory and comparative negligence, are based on the premise that injured parties played an integral part in contributing toward their injuries. Contributory and comparative negligence defenses, which not only sound very much alike but also apply in an almost equal number of jurisdictions, produce very different results. Under contributory negligence, parties whose actions led to the cause of their injuries are unable to recover for the harm that they suffered. Yet, insofar as this approach

has led to inequitable results, a growing number of states have adopted comparative negligence, which allows courts to direct juries to apportion fault between the parties. As such, the recoveries that injured parties make may be reduced by the degree to which they played a part in causing their own injuries.

According to the third, and final, defense, assumption of risk, if injured parties understood and appreciated the risks associated with their activities and resulting injuries, their recoveries may be limited or eliminated. Such a limitation is based on the degree to which their conduct contributed to their accident as well as on whether they exposed themselves to a known or appreciated risk of harm. In school environments, the assumption of risk defense is most often applied in negligence suits involving students who are injured while participating in sports-related activities.

Kevin P. Brady

See also Assault and Battery, Civil; Attorney Fees; Immunity

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New Jersey v. T. L. O.

The U.S. Supreme Court's decision in *New Jersey v. T. L. O.* (1985) was a landmark opinion concerning the Fourth Amendment rights of students, protecting them from unreasonable searches and seizures while in schools. In *T. L. O.,* the Court ruled that when carrying out searches or other disciplinary procedures, school officials act as agents of the state, that students do have a legitimate expectation of privacy but that it must be balanced against the needs of educators to maintain order and safety, and that the "reasonable suspicion" standard applies when school officials choose to search students.

Facts of the Case

At issue in *T. L. O.* was a vice principal's search of a student's purse for cigarettes while investigating a smoking violation. Uncovering cigarettes in the student's purse, the vice principal also discovered rolling papers. Suspecting drug use by T. L. O., the vice principal continued his search of the purse, discovering a small amount of marijuana, a pipe, plastic bags, a substantial quantity of money in one-dollar bills, a list containing the names of students who owed T. L. O. money, and two letters implicating her in marijuana dealing.

T. L. O. was turned over to the police and confessed that she had been dealing drugs. On the basis of the confession and the evidence seized by the vice principal, the state brought delinquency charges against T. L. O. Seeking to suppress the evidence found in her purse, T. L. O. contended that the vice principal violated her Fourth Amendment rights.

A juvenile court in New Jersey, finding that the search was reasonable, adjudicated T. L. O. delinquent. An appellate court affirmed as to the Fourth Amendment, but remanded on other grounds. The Supreme Court of New Jersey reversed and ordered the suppression of the evidence found in T. L. O.'s purse on the basis that the search was unreasonable.

The Court's Ruling

The case was appealed to the U.S. Supreme Court, which reversed the order of the Supreme Court of New Jersey. At issue before the Court was whether the Fourth Amendment restricted the actions of public school officials in school settings. The Court ruled that when conducting searches and disciplinary actions, school officials act as agents of the state and therefore are restricted by the Fourth Amendment. Additionally, the Court explained that while students have a legitimate expectation of privacy while in school, this needs to be balanced with school officials' need to maintain safety and order. Therefore, the Court decided that the school setting requires some easing of the restrictions usually applied to searches by public authorities. The Court pointed out that the warrant requirement was unsuited to schools, as it would have overly impeded the disciplinary procedures needed in that situation.

The Court was of the opinion that the school setting required some modification of the level of suspicion of illicit activity needed to justify a search. The Court noted that school officials only need "reasonable suspicion" to conduct a search of a student, a standard that is much lower than the "probable cause" requirement that applies to the police. The Court was of the opinion that a search is justified at its inception when there is reasonable basis for suspecting that a search will produce evidence that a student has or is violating either the law or school rules. The Court added that a search is reasonable in its scope as long as the intrusiveness of the search is justified given the object of the search and is not excessively intrusive in light of the age and sex of the child. The Court hoped that this standard would at once facilitate school officials' need to maintain order and safety and not intrude on students' expectation of privacy.

T. L. O. was a narrow judgment that left three questions unresolved, because they were not at issue. The first unanswered question dealt with the need for individualized suspicion when applying the reasonable suspicion standard. In this case, because T. L. O. was accused of smoking, and there was individualized suspicion, the Court found it unnecessary to address whether the reasonableness standard applied to cases without individualized suspicion. The second unresolved issue was whether the reasonableness standard applies in more intrusive searches, such as strip searches. Insofar as it did not think that the search of T. L. O.'s purse was intrusive, the Court did not have to resolve this issue. Third, because only school officials took part in the search, the Court did not consider whether the reasonableness standard applied to searches conducted by nonschool officials such as the police.

Other Justices Speak

In his concurrence, Justice Lewis F. Powell, Jr., emphasized that the nature of the institution favors the use of the reasonable suspicion standard in school settings. For Powell, schools are different from other public institutions, because their mission is the educating and training of young people. Powell acknowledged that such activity takes place in an environment where students and teachers daily spend many hours in close association, which gives rise to a unique relationship between the students and school officials. Owing to the unique relationships and the state's compelling interest in the activities that occur within school, Powell determined that students have a lesser expectation of privacy. In addition, Powell believed that the Fourth Amendment did not restrict school officials in their relationships with students to the extent that it does law enforcement agents in their dealings with criminals.

Justice Harry Blackmun's concurrence emphasized the need for the reasonableness standard in making three points. First, he acknowledged that the disciplinary problems posed by the increase in the presence of drugs and weapons in schools require immediate responses. Second, Blackmun indicated that school officials are not trained in the complexities of probable cause. Third, he wrote that requiring school officials to rely on probable cause would have severely disrupted the educational process.

In dissenting in part, Justice William Brennan argued that full-scale searches, including those of students by school officials, unaccompanied by probable cause violated the Fourth Amendment. Based on the close association of school officials and students in the schoolhouse and the "untechnical" nature of determining probable cause, he asserted that searches in schools should have been based on probable cause. Brennan posited that the establishment of the lesser "reasonableness" standard was not only unnecessary but improper.

Justice John Paul Stevens's dissent claimed that one needs to distinguish between minor and serious offenses in evaluating the reasonableness of a school search. Additionally, he contended that the reasonable suspicion standard taught children the wrong lesson about the nature and power of the government.

Patricia A. L. Ehrensal

See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drugs, Dog Searches for; Juvenile Courts; Locker Searches; Strip Searches; *Vernonia School District 47J v. Acton*

Legal Citations

Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002), *on remand,* 300 F.3d 1222 (10th Cir. 2002)

New Jersey v. T. L. O., 469 U.S. 325 (1985).

New Jersey v. T. L. O. (Excerpts)

New Jersey v. T. L. O. *is noteworthy as the first case wherein the Supreme Court addressed the Fourth Amendment rights of students in school settings.*

Supreme Court of the United States

NEW JERSEY

v.

T. L. O.

469 U.S. 325

Argued March 28, 1984.

Reargued Oct. 2, 1984.

Decided Jan. 15, 1985.

Justice WHITE delivered the opinion of the Court.

We granted certiorari in this case to examine the appropriateness of the exclusionary rule as a remedy for searches carried out in violation of the Fourth Amendment by public school authorities. Our consideration of the proper application of the Fourth Amendment to the public schools, however, has led us to conclude that the search that gave rise to the case now before us did not violate the Fourth Amendment. Accordingly, we here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case.

I

On March 7, 1980, a teacher at Piscataway High School in Middlesex County, N.J., discovered two girls smoking in a lavatory. One of the two girls was the respondent T. L. O., who at that time was a 14-year-old high school freshman. Because smoking in the lavatory was a violation of a school rule, the teacher took the two girls to the Principal's office, where they met with Assistant Vice Principal Theodore Choplick. In response to questioning by Mr. Choplick, T. L. O.'s companion admitted that she had violated the rule. T. L. O., however, denied that she had been smoking in the lavatory and claimed that she did not smoke at all.

Mr. Choplick asked T. L. O. to come into his private office and demanded to see her purse. Opening the purse, he found a pack of cigarettes, which he removed from the purse and held before T. L. O. as he accused her of having lied to him. As he reached into the purse for the cigarettes, Mr. Choplick also noticed a package of cigarette rolling papers. In his experience, possession of rolling papers by high school students was closely associated with the use of marihuana. Suspecting that a closer examination of the purse might yield further evidence of drug use, Mr. Choplick proceeded to search the purse thoroughly. The search revealed a small amount of marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money in one-dollar bills, an index card that appeared to be a list of students who owed T. L. O. money, and two letters that implicated T. L. O. in marihuana dealing.

Mr. Choplick notified T. L. O.'s mother and the police, and turned the evidence of drug dealing over to the police. At the request of the police, T. L. O.'s mother took her daughter to police headquarters, where T. L. O. confessed that she had been selling marihuana at the high school. On the basis of the confession and the evidence seized by Mr. Choplick, the State brought delinquency charges against T. L. O. in the Juvenile and Domestic Relations Court of Middlesex County. Contending that Mr. Choplick's search of her purse violated the Fourth Amendment, T. L. O. moved to suppress the evidence found in her purse as well as her confession, which, she argued, was tainted by the allegedly unlawful search. The Juvenile Court denied the motion to suppress. Although the court concluded that the Fourth Amendment did apply to searches carried out by school officials, it held that "a school official may properly conduct a search of a student's person if the official has a reasonable suspicion that a crime has been or is in the process of being committed, *or* reasonable cause to believe that the search is necessary to maintain school discipline or enforce school policies."

Applying this standard, the court concluded that the search conducted by Mr. Choplick was a reasonable one. The initial decision to open the purse was justified by Mr. Choplick's well-founded suspicion that T. L. O. had violated the rule forbidding smoking in the lavatory. Once the purse was open, evidence of marihuana violations was in plain view, and Mr. Choplick was entitled to conduct a thorough search to determine the nature and extent of T. L. O.'s drug-related activities. Having denied the motion to suppress, the court on March 23, 1981, found T. L. O. to be a delinquent and on January 8, 1982, sentenced her to a year's probation.

On appeal from the final judgment of the Juvenile Court, a divided Appellate Division affirmed the trial

court's finding that there had been no Fourth Amendment violation, but vacated the adjudication of delinquency and remanded for a determination whether T. L. O. had knowingly and voluntarily waived her Fifth Amendment rights before confessing. T. L. O. appealed the Fourth Amendment ruling, and the Supreme Court of New Jersey reversed the judgment of the Appellate Division and ordered the suppression of the evidence found in T. L. O.'s purse. . . .

. . . .

We granted the State of New Jersey's petition for certiorari. Although the State had argued in the Supreme Court of New Jersey that the search of T. L. O.'s purse did not violate the Fourth Amendment, the petition for certiorari raised only the question whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers. When this case was first argued last Term, the State conceded for the purpose of argument that the standard devised by the New Jersey Supreme Court for determining the legality of school searches was appropriate and that the court had correctly applied that standard; the State contended only that the remedial purposes of the exclusionary rule were not well served by applying it to searches conducted by public authorities not primarily engaged in law enforcement.

Although we originally granted certiorari to decide the issue of the appropriate remedy in juvenile court proceedings for unlawful school searches, our doubts regarding the wisdom of deciding that question in isolation from the broader question of what limits, if any, the Fourth Amendment places on the activities of school authorities prompted us to order reargument on that question. Having heard argument on the legality of the search of T. L. O.'s purse, we are satisfied that the search did not violate the Fourth Amendment.

II

In determining whether the search at issue in this case violated the Fourth Amendment, we are faced initially with the question whether that Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials. We hold that it does.

It is now beyond dispute that "the Federal Constitution, by virtue of the Fourteenth Amendment, prohibits unreasonable searches and seizures by state officers." Equally indisputable is the proposition that the Fourteenth Amendment protects the rights of students against encroachment by public school officials: "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

These two propositions—that the Fourth Amendment applies to the States through the Fourteenth Amendment, and that the actions of public school officials are subject to the limits placed on state action by the Fourteenth Amendment—might appear sufficient to answer the suggestion that the Fourth Amendment does not proscribe unreasonable searches by school officials. On reargument, however, the State of New Jersey has argued that the history of the Fourth Amendment indicates that the Amendment was intended to regulate only searches and seizures carried out by law enforcement officers; accordingly, although public school officials are concededly state agents for purposes of the Fourteenth Amendment, the Fourth Amendment creates no rights enforceable against them.

It may well be true that the evil toward which the Fourth Amendment was primarily directed was the resurrection of the pre-Revolutionary practice of using general warrants or "writs of assistance" to authorize searches for contraband by officers of the Crown. But this Court has never limited the Amendment's prohibition on unreasonable searches and seizures to operations conducted by the police. Rather, the Court has long spoken of the Fourth Amendment's strictures as restraints imposed upon "governmental action"—that is, "upon the activities of sovereign authority." Accordingly, we have held the Fourth Amendment applicable to the activities of civil as well as criminal authorities: building inspectors, Occupational Safety and Health Act inspectors, and even firemen entering privately owned premises to battle a fire are all subject to the restraints imposed by the Fourth Amendment. As we observed in *Camara v. Municipal Court*, "[t]he basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." Because

the individual's interest in privacy and personal security "suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards," it would be "anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior."

Notwithstanding the general applicability of the Fourth Amendment to the activities of civil authorities, a few courts have concluded that school officials are exempt from the dictates of the Fourth Amendment by virtue of the special nature of their authority over schoolchildren. Teachers and school administrators, it is said, act *in loco parentis* in their dealings with students: their authority is that of the parent, not the State, and is therefore not subject to the limits of the Fourth Amendment.

Such reasoning is in tension with contemporary reality and the teachings of this Court. We have held school officials subject to the commands of the First Amendment and the Due Process Clause of the Fourteenth Amendment. If school authorities are state actors for purposes of the constitutional guarantees of freedom of expression and due process, it is difficult to understand why they should be deemed to be exercising parental rather than public authority when conducting searches of their students. More generally, the Court has recognized that "the concept of parental delegation" as a source of school authority is not entirely "consonant with compulsory education laws." Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies. . . . In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment.

III

To hold that the Fourth Amendment applies to searches conducted by school authorities is only to begin the inquiry into the standards governing such searches. Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place. The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order.

We have recognized that even a limited search of the person is a substantial invasion of privacy. We have also recognized that searches of closed items of personal luggage are intrusions on protected privacy interests, for "the Fourth Amendment provides protection to the owner of every container that conceals its contents from plain view." A search of a child's person or of a closed purse or other bag carried on her person, no less than a similar search carried out on an adult, is undoubtedly a severe violation of subjective expectations of privacy.

Of course, the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise "illegitimate." To receive the protection of the Fourth Amendment, an expectation of privacy must be one that society is "prepared to recognize as legitimate." . . .

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that "[t]he prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration." We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.

Nor does the State's suggestion that children have no legitimate need to bring personal property into the schools seem well anchored in reality. Students at a minimum must bring to school not only the supplies needed for their studies, but also keys, money, and the necessaries of personal hygiene and grooming. In addition, students may carry on their persons or in purses or wallets such nondisruptive yet highly personal items as photographs, letters, and diaries. Finally, students may have perfectly legitimate reasons to carry with them articles of property needed in connection with extracurricular or recreational activities. In short, schoolchildren may find it necessary to carry with them a variety of legitimate, noncontraband items, and there is no reason to conclude that they have necessarily waived all rights to privacy in such items merely by bringing them onto school grounds.

Against the child's interest in privacy must be set the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds. Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems. Even in schools that have been spared the most severe disciplinary problems, the preservation of order and a proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult. "Events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Accordingly, we have recognized that maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.

How, then, should we strike the balance between the schoolchild's legitimate expectations of privacy and the school's equally legitimate need to maintain an environment in which learning can take place? It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools. Just as we have in other cases dispensed with the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," we hold today that school officials need not obtain a warrant before searching a student who is under their authority.

The school setting also requires some modification of the level of suspicion of illicit activity needed to justify a search. Ordinarily, a search—even one that may permissibly be carried out without a warrant—must be based upon "probable cause" to believe that a violation of the law has occurred. However, "probable cause" is not an irreducible requirement of a valid search. The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although "both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required." Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause. Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.

We join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the . . . action was justified at its inception;" second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

IV

There remains the question of the legality of the search in this case. We recognize that the "reasonable grounds"

standard applied by the New Jersey Supreme Court in its consideration of this question is not substantially different from the standard that we have adopted today. Nonetheless, we believe that the New Jersey court's application of that standard to strike down the search of T. L. O.'s purse reflects a somewhat crabbed notion of reasonableness. Our review of the facts surrounding the search leads us to conclude that the search was in no sense unreasonable for Fourth Amendment purposes.

The incident that gave rise to this case actually involved two separate searches, with the first—the search for cigarettes—providing the suspicion that gave rise to the second—the search for marihuana. Although it is the fruits of the second search that are at issue here, the validity of the search for marihuana must depend on the reasonableness of the initial search for cigarettes, as there would have been no reason to suspect that T. L. O. possessed marihuana had the first search not taken place. Accordingly, it is to the search for cigarettes that we first turn our attention.

The New Jersey Supreme Court pointed to two grounds for its holding that the search for cigarettes was unreasonable. First, the court observed that possession of cigarettes was not in itself illegal or a violation of school rules. Because the contents of T. L. O.'s purse would therefore have "no direct bearing on the infraction" of which she was accused (smoking in a lavatory where smoking was prohibited), there was no reason to search her purse. Second, even assuming that a search of T. L. O.'s purse might under some circumstances be reasonable in light of the accusation made against T. L. O., the New Jersey court concluded that Mr. Choplick in this particular case had no reasonable grounds to suspect that T. L. O. had cigarettes in her purse. At best, according to the court, Mr. Choplick had "a good hunch."

Both these conclusions are implausible. T. L. O. had been accused of smoking, and had denied the accusation in the strongest possible terms when she stated that she did not smoke at all. Surely it cannot be said that under these circumstances, T. L. O.'s possession of cigarettes would be irrelevant to the charges against her or to her response to those charges. T. L. O.'s possession of cigarettes, once it was discovered, would both corroborate the report that she had been smoking and undermine the credibility of her defense to the charge of smoking. To be sure, the discovery of the cigarettes would not prove that T. L. O. had been smoking in the lavatory; nor would it, strictly speaking, necessarily be inconsistent with her claim that she did not smoke at all. But it is universally recognized that evidence, to be relevant to an inquiry, need not conclusively prove the ultimate fact in issue, but only have "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The relevance of T. L. O.'s possession of cigarettes to the question whether she had been smoking and to the credibility of her denial that she smoked supplied the necessary "nexus" between the item searched for and the infraction under investigation. Thus, if Mr. Choplick in fact had a reasonable suspicion that T. L. O. had cigarettes in her purse, the search was justified despite the fact that the cigarettes, if found, would constitute "mere evidence" of a violation.

Of course, the New Jersey Supreme Court also held that Mr. Choplick had no reasonable suspicion that the purse would contain cigarettes. This conclusion is puzzling. A teacher had reported that T. L. O. was smoking in the lavatory. Certainly this report gave Mr. Choplick reason to suspect that T. L. O. was carrying cigarettes with her; and if she did have cigarettes, her purse was the obvious place in which to find them. Mr. Choplick's suspicion that there were cigarettes in the purse was not an "inchoate and unparticularized suspicion or 'hunch'"; rather, it was the sort of "common-sense conclusio[n] about human behavior" upon which "practical people"—including government officials—are entitled to rely. Of course, even if the teacher's report were true, T. L. O. *might* not have had a pack of cigarettes with her; she might have borrowed a cigarette from someone else or have been sharing a cigarette with another student. But the requirement of reasonable suspicion is not a requirement of absolute certainty: "sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . ." Because the hypothesis that T. L. O. was carrying cigarettes in her purse was itself not unreasonable, it is irrelevant that other hypotheses were also consistent with the teacher's accusation. Accordingly, it cannot be said that Mr. Choplick acted unreasonably when he examined T. L. O.'s purse to see if it contained cigarettes.

Our conclusion that Mr. Choplick's decision to open T. L. O.'s purse was reasonable brings us to the question of the further search for marihuana once the pack of cigarettes was located. The suspicion upon which the search for marihuana was founded was provided when Mr. Choplick observed a package of rolling papers in the purse as he removed the pack of cigarettes. Although T. L. O. does not dispute the reasonableness of Mr. Choplick's belief that the rolling papers indicated

the presence of marihuana, she does contend that the scope of the search Mr. Choplick conducted exceeded permissible bounds when he seized and read certain letters that implicated T. L. O. in drug dealing. This argument, too, is unpersuasive. The discovery of the rolling papers concededly gave rise to a reasonable suspicion that T. L. O. was carrying marihuana as well as cigarettes in her purse. This suspicion justified further exploration of T. L. O.'s purse, which turned up more evidence of drug-related activities: a pipe, a number of plastic bags of the type commonly used to store marihuana, a small quantity of marihuana, and a fairly substantial amount of money. Under these circumstances, it was not unreasonable to extend the search to a separate zippered compartment of the purse; and when a search of that compartment revealed an index card containing a list of "people who owe me money" as well as two letters, the inference that T. L. O. was involved in marihuana trafficking was substantial enough to justify Mr. Choplick in examining the letters to determine whether they contained any further evidence. In short, we cannot conclude that the search for marihuana was unreasonable in any respect.

Because the search resulting in the discovery of the evidence of marihuana dealing by T. L. O. was reasonable, the New Jersey Supreme Court's decision to exclude that evidence from T. L. O.'s juvenile delinquency proceedings on Fourth Amendment grounds was erroneous. Accordingly, the judgment of the Supreme Court of New Jersey is

Reversed.

Citation: *New Jersey v. T. L. O.*, 469 U.S. 325 (1985).

New York v. Cathedral Academy

As the U.S. Supreme Court underwent change in the latter part of the 20th century, the balance in its membership impacted the way that it resolved cases in many areas, not the least of which included the parameters of acceptable state aid to religiously affiliated nonpublic schools. The conflict that this transformation engendered was evident in *New York v. Cathedral Academy* (1977), a dispute over a statute that officials at religiously affiliated nonpublic schools relied on in good faith as a means of recovering payments for performing state-mandated sectarian services such as record keeping and testing. The Court stuck the statute down as unconstitutional.

Facts of the Case

The dispute in *Cathedral Academy* arose over a state statute that was enacted to provide an equitable remedy for religiously affiliated nonpublic schools. The statute was enacted in response to the Supreme Court's having struck down an earlier version of the law in *Committee for Public Education and Religious Liberty v. Levitt* (1973). Officials at a religiously affiliated nonpublic school unsuccessfully filed suit, seeking to obtain reimbursements under a statute that paid schools for the costs of specified state-mandated record keeping and testing services. On further review of a judgment of the Court of Appeals of New York in favor of the school, the Supreme Court reversed in declaring the statute unconstitutional.

At the heart of its analysis, the Supreme Court was of the opinion that the new statute violated the First Amendment, because it failed the *Lemon v. Kurtzman* (1971) test to the extent that it would necessarily have had the primary effect of aiding religion or would have resulted in excessive state involvement in religious affairs.

The Court's Ruling

In another aspect of its rationale, the Supreme Court rejected the notion that the revised statute was acceptable under *Lemon v. Kurtzman II* (*Lemon II,* 1973), wherein the justices were satisfied that school officials could accept good faith reimbursements based on a law's viability. The Court indicated that even though it might have been willing to tolerate some constitutional infirmities if other equitable considerations were present, this was simply not the situation in *Cathedral Academy.* Instead, because the revised statute was designed to reimburse the religious schools, the Court was convinced that it amounted to a new and independently significant infringement of constitutional rights such that the religious school could have relied on prior law only by spending its own funds for nonmandated,

and perhaps sectarian, activities that it might otherwise have been unable to afford.

Chief Justice Burger, joined by Justice Rehnquist, dissented on the basis that insofar as he believed that the dispute was controlled by *Lemon II,* he would have affirmed the judgment of the Court of Appeals of New York. Further, Justice White dissented in light of his assertion that "the Court continues to misconstrue the First Amendment in a manner that discriminates against religion and is contrary to the fundamental educational needs of the country" (pp. 134–135).

As a kind of postscript, it is worth noting that the situation that *Cathedral Academy* created in denying reimbursements to religiously affiliated nonpublic schools existed until 1980. At that time, the Supreme Court upheld another revision of the statute in *Committee for Public Education and Religious Liberty v. Regan* (1980), concluding that it passed constitutional muster under the *Lemon* test, because it included adequate safeguards to ensure that the reimbursements would not be spent for religious purposes.

James P. Wilson

See also *Committee for Public Education and Religious Liberty v. Regan; Lemon v. Kurtzman;* State Aid and the Establishment Clause

Legal Citations

Committee for Public Education and Religious Liberty v. Regan, 444 U.S. 646 (1980).
Lemon v. Kurtzman, 403 U.S. 602 (1971), 411 U.S. 192 (1973).
Levitt v. Committee for Public Education, 413 U.S. 472 (1973).
New York v. Cathedral Academy, 434 U.S. 125 (1977).

No Child Left Behind Act

Perhaps the most controversial of all federal education statutes is the No Child Left Behind Act (NCLB). Not long after taking office in 2001, President George W. Bush indicated that he would make the proposed NCLB Act the cornerstone of his administration's educational policy. About a year later, on January 8, 2002, Bush signed the NCLB into law. This entry describes the law's background and contents.

Background

The NCLB was actually enacted as part of the reauthorization of the Elementary and Secondary Education Act (ESEA), the most expansive federal education statute in history. The ESEA was initially enacted in 1965 during the height of the civil rights movement, and its later re-authorizations made federal funds available to provide support for states based on whether they complied with its provisions and those of the Civil Rights Act of 1964. At the same time, the ESEA was the first federal statute to provide large-scale support for education, both public and nonpublic.

Using its far-reaching provisions, the NCLB's congressional authors hoped to create a framework to improve the performance of America's elementary and secondary schools. Key elements included in the NCLB are intended to make school systems accountable for student achievement, especially by imposing standards for adequate yearly progress for students and districts; to require school systems to rely on teaching methods that are research based and that have been proven effective; to improve academic achievement among students who are economically disadvantaged; to assist in preparing, training, and recruiting highly qualified teachers; and to make better choices available for parents through innovative educational programs where local school boards are unresponsive to their needs.

The ESEA/NCLB, which was reauthorized as the almost 400-page Strengthening and Improvement of Elementary and Secondary Schools Act, is divided into nine subchapters. The remainder of this entry briefly reviews the contents of the NCLB's subchapters.

What the Law Says

Subchapter I, Improving the Academic Achievement of the Disadvantaged, perhaps the best known part of the ESEA, requires local educational agencies, typically local school boards that receive federal financial assistance, to improve academic achievement among students who are economically disadvantaged. The NCLB's various parts are designed to provide basic programmatic requirements such as remedial instruction for specifically identified children from poor families, grants in order to help them to improve the

reading skills, education for migratory children, and prevention and intervention programs for children and youth who are neglected, delinquent, or at risk. The Supreme Court's 1997 decision in *Agostini v. Felton,* which removed earlier barriers, now permits the on-site delivery of Title I services to students who attend religiously affiliated nonpublic schools.

Subchapter II, Preparing, Training, and Recruiting High Quality Teachers and Principals, contains some of the NCLB's most controversial and far-reaching provisions. The major sections in this part of the law address a teacher and principal training and recruiting fund; mathematics and science partnerships; innovations for enhancing teacher quality; and programs for enhancing education through technology.

Subchapter III, Language Instruction for Limited English Proficient and Immigrant Students, requires school officials to provide improved language instruction for the children who are in need of such programs.

Subchapter IV, 21st Century Schools, concerns safe and drug-free schools and communities while also focusing on 21st century learning centers.

Subchapter V, Promoting Informed Parental Choice and Innovative Programs, covers innovative programs, public charter schools, assistance for magnet schools, and funds for improving education. Among the initiatives identified under the funding provisions in this part of the NCLB are programs for partnerships in character education; students who are gifted and talented; foreign language assistance; physical education; and excellence in economic education; it also provides grants to improve the mental health of children and to combat domestic violence. These programs are intended to make better choices available to parents by creating innovative educational programs, especially if local school boards are unresponsive to their needs and those of their children.

Subchapter VI, Flexibility and Accountability, addresses improving academic achievement, rural education initiatives, and general provisions.

Subchapter VII, Indian, Native Hawaiian, and Alaska Native Education, supports the educational efforts of states, local school boards, and postsecondary educational institutions that serve the target populations.

Subchapter VIII, Impact Aid, offers financial aid to local school boards experiencing substantial and continuing financial burdens due to the acquisition of real property by the federal government. This part of the NCLB is supposed to provide education for children who live, and whose parents are employed, on federal property, and for those whose parents are in the military and live in low-rent housing. In addition, this part of the act covers students who are part of heavy concentrations of children whose parents are federal employees but do not reside on federal property; experience sudden and substantial increases or decreases in enrollments due to military realignments; and/or need special help with capital expenditures for construction projects.

Subchapter IX, General Provisions, largely contains operational details with regard to the NCLB's implementation, such as definitions, flexibility in the use of administrative and other funds, program coordination, waivers, uniform provisions that include participation by students and teachers in nonpublic schools, complaint processes for participating nonpublic schools, and evaluation procedures.

Insofar as controversy rages on about the future of the NCLB, it remains to be seen what changes Congress may make in its provisions. It is probably safe to assume that the basic elements of the ESEA/NCLB, such as programs designed to help children from economically deprived families as well as those who belong to specifically targeted groups, will survive. However, it remains to be seen whether the act's controversial features that include mandatory adequate yearly progress and requirements for highly qualified teachers will remain in the reauthorized version of the law.

Charles J. Russo

See also Adequate Yearly Progress; *Agostini v. Felton;* Civil Rights Act of 1964

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Nonpublic Schools

At the beginning of the republic, there were no public schools as they are known today. All children were schooled either in private venues or at home. However, fairly early in the 19th century, publicly supported schools became common. While they were indeed public schools, religion with a Protestant flavor was much in evidence. In response, in the late 19th century, Roman Catholics developed their own schools where their children could be educated in settings conducive to their religious convictions. Eventually, Lutherans, Seventh Day Adventists, and congregations of other faith traditions followed suit. In addition, a variety of private and proprietary schools sprang up around the country. Today, it is estimated that 10% to 12% of children in the U.S. attend nonpublic schools. Some of the principal legal issues faced by nonpublic schools are discussed in this entry.

At the most basic level, the legal right of nonpublic schools to exist was tested when Oregon enacted a law requiring all children there to attend public schools. The Supreme Court ruled the state law unconstitutional in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925) in upholding the right of parents to direct the education of their children. The Court also upheld the right of the state "reasonably to regulate all schools," including nonpublic schools, in matters dealing with health and safety.

Reasonable Regulation

What is a reasonable regulation of nonpublic schools has been well tested in the courts. Regulations frequently come in the form of compulsory school attendance laws, in which states mandate that all children of set ages attend either public or nonpublic schools. Most prominent is the requirement for teachers to have state teaching certificates. Courts consistently upheld teacher certification requirements for nonpublic schools as well as other regulations such as mandatory registration with the state education agency.

Administrators in religiously affiliated nonpublic schools are typically nervous about governmental attempts to regulate their operations, particularly worrying that such outside control might interfere with the religious aspects of their schools' missions. The courts recognize the dual role nonpublic schools play in having both religious and secular goals. Moreover, while the courts give religious schools much latitude in their operations, they acknowledge the state's compelling interest in the proper education of all children who reside within the state.

The Supreme Court of Nebraska upheld rigid, comprehensive regulations in *State of Nebraska v. Faith Baptist Church of Louisville* (1981). The regulations, which included a requirement for state-certified teachers, were, in the eyes of the court, "minimal in nature" and necessary for the state to carry out its compelling interest. Further, the Court took a dim view of the claim by the church that such regulations interfered with its religious freedom. The case generated so much negative publicity that the legislature enacted an exemption for parents whose "sincerely held religious beliefs" would have been violated by compliance with the regulations.

There are limits to the regulations state government may impose on nonpublic schools. The Supreme Court of Ohio, in *State of Ohio v. Whisner* (1976), struck down that state's minimum standards in finding that they went beyond the reasonable regulations that nonpublic schools may be required to meet. The regulations, which were so intrusive as to blur the distinction between public and nonpublic schools, would have interfered with the teaching of religion in religiously affiliated schools. The courts seem to have struck a balance between protecting the legitimate interest of the government to ensure an educated population and the interest of nonpublic schools in maintaining some degree of freedom from overly restrictive regulation by government. Insofar as education is a state concern under the American federal system of government, regulations affecting nonpublic schools vary from one jurisdiction to the next.

Finances and Contracts

As to government financial aid for nonpublic schools of a religious nature, the courts have forbidden direct aid because it violates the First Amendment's prohibition of the "establishment of religion." In *Lemon v. Kurtzman* (1971), the Supreme Court laid out a three-part test to evaluate whether or not impermissible establishment has occurred. To be acceptable, first, aid must have a secular purpose; second, it must have a principle or primary effect that neither advances nor inhibits religion; and, third, it must not foster an excessive entanglement between government and religion. Aid that is directed primarily toward children, such as transportation or the loan of textbooks, is usually considered permissible, while financial aid more directly benefiting school operations is usually unacceptable.

More recently, vouchers were subjected to judicial scrutiny. Vouchers allow parents to enroll their children in approved schools, including those that are nonpublic schools, at public expense. In *Zelman v. Simmons-Harris,* (2002) the Supreme Court upheld the Ohio voucher plan, even though it involved the state in making direct payments to religious schools, because the plan was broad based and not directed just to religious schools. While some supporters of nonpublic schools hope that *Zelman* will open the door to additional government financial support, others point to the narrowness of the Ohio program and suggest that a significant flow of government aid to religious schools is far in the future, if ever.

When parents enroll their children in nonpublic schools, they enter into contractual relationships. Because public schools are an integral part of state government, students are protected by the Constitution from unreasonable restrictions on their behavior. Students in public schools must be afforded due process when subject to major disciplinary procedures. This is not so in nonpublic schools. In *Bright v. Isenbarger* (1970), a federal trial court in Indiana ruled that because a nonpublic school was not involved in state action, it was not required to give due process to students prior to their expulsion from the school. Other courts have followed suit by requiring nonpublic schools to provide only fundamental fairness in disciplinary matters.

The contractual relationship between nonpublic schools and their students is guided by school bulletins and/or handbooks. Thus, school officials would be wise to spell out in clear terms just what services they will supply and what students may expect. The financial arrangements for payment of tuition and fees must also be clearly stated. In many cases, schools reserve the right to decline release of student records such as transcripts if the student's account is not paid in full. State laws vary on the legality of such an action.

Like their relationships with students, relationships between nonpublic schools and their employees are contractual. Accordingly, it is important for the provisions of the employment contract to be clearly stated in writing. In some cases, religiously affiliated schools have viewed teaching more as a ministry than a job and have not provided a written employment contract. If there is a dispute between schools and teachers, schools may be at the mercy of the court system to interpret what, by implication, is the contractual arrangement between the two parties.

Other Issues

Some disputes have arisen regarding the imposition of religious requirements for teachers in religiously affiliated schools. The courts have been reluctant to be involved in such disputes involving church doctrine, following the Supreme Court's refusal to do so in the nonschool case of *Serbian Eastern Orthodox Diocese v. Milivojevich* (1976). However, courts are not shy about interpreting the provisions of civil contracts or the application of civil law to employment issues in religious schools. An Ohio case provides a good example. In *Basinger v. Pilarczyk* (1997), two teachers were dismissed for being married in violation of church standards; the court refused to intervene. Yet, the court did address the teachers' age discrimination claim, remanding that part of the dispute for further consideration.

Nonpublic schools face legal concerns in the matter of tort liability and especially in relation to negligence, the failure to exercise a duty to care for another that results in injury or loss. Schools, including nonpublic schools, have a heightened duty to care for the

children under their control. School personnel must make every effort to foresee situations that might cause harm to a child and create an environment free of such conditions. This duty falls into three major categories: maintenance of facilities and equipment, proper instruction regarding the nature of activities or conditions that might cause harm, and proper supervision. The amount of supervision necessary depends on the age and maturity of children and the nature and condition of the activity. Young children or activities that might have inherent safety concerns require more supervision by adults than more mature children or activities that are more passive.

While this entry touched on the most common areas of law affecting nonpublic schools, there are other matters that are not discussed yet should be considered. Among these are the legal organization and incorporation of schools, ownership of property, zoning ordinances, building codes and health regulations, fire and safety regulations, and governing board liability; all of these matters must be considered by those who operate nonpublic schools. In addition, one must be constantly aware that laws vary from one state to the next. Thus, the old saw applies to nonpublic schools when it comes to matters of the law: eternal vigilance is the price of liberty.

Lyndon G. Furst

See also *Lemon v. Kurtzman; Pierce v. Society of Sisters of the Holy Names of Jesus and Mary;* State Aid and the Establishment Clause; Vouchers; *Zelman v. Simmons-Harris*

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Northcross v. Board of Education of the Memphis City Schools

At issue in the final iteration of the long-running dispute in *Northcross v. Board of Education of the Memphis City Schools* (1979) was whether a federal trial court could award attorney fees and costs in a school desegregation case. More specifically, after the U.S. Supreme Court directed the school board to operate a unitary system in 1970, litigation continued. The dispute in this final round of litigation in *Northcross* involved an appeal to the Sixth Circuit over two fee awards at the end of the long, convoluted history of a hotly contested school desegregation case.

Facts of the Case

Northcross was originally filed in 1960, but a federal trial court in Tennessee dismissed the action. The Sixth Circuit reinstated the claim and remanded for development of a desegregation plan. Once the school board adopted a limited plan in 1963, the Sixth Circuit again reversed, rebuffing it as inadequate. In 1966, the trial court tentatively approved a modified plan, bringing about a lull in the litigation. When the plaintiffs objected to some aspects of the plan, the trial court denied their motion for an injunction. Nevertheless, the court put the school board on notice that some aspects of the plan were in need of further study and that pending results, it might order additional relief. In 1970, the Supreme Court ruled that because the board had failed to operate a unitary schools system, the court had to do so.

In April 1974, the plaintiffs unsuccessfully petitioned the Supreme Court seeking a review of the Sixth Circuit's approval of what was termed "Plan Z," the board's proposed desegregation plan. Following this denial, *Northcross* entered another lull with an

effective desegregation plan finally in place. Soon after, the plaintiffs filed their application for attorney fees and costs. This first application was initially based on the Emergency School Aid Act, which became effective July 1, 1972. Five years later, the federal trial court entered its final order, partially granting the plaintiffs' request. Dissatisfied, the plaintiffs sought further review of the partial award.

In the meantime, the school board sought substantial modification of Plan Z, which would have undermined the progress of desegregation. At the end of a five-day trial in 1977, the court largely rejected the board's proposals. In 1978, the trial court awarded attorney fees to the plaintiffs to cover the services that had been rendered to them in connection with the 1977 hearing, but again, it only partially granted their request for fees and costs. Therefore, the plaintiffs sought further review, because they regarded the second award as inadequate. The related appeals stemming from questions of the two fee awards were consolidated insofar as they raised the same issues.

The Court's Ruling

In a closer examination of both the statute and its legislative history, the Sixth Circuit thought that the Civil Rights Attorney's Fees Awards Act of 1976 provided a clear indication of Congressional intent. To this end, the appellate panel reviewed the trial court's 1977 and 1978 fee awards, deciding that as long as there was an active controversy at the time the act became effective, it applied to authorize fees for the entire case unless special circumstances existed that would have made an award manifestly unjust. Insofar as the Sixth Circuit, unlike the trial court, could not uncover any substantial differences between the purposes of that Civil Rights Attorney's Fees Awards Act and the Emergency School Aid Act, it reasoned that the former was clearly applicable to both fee awards, because *Northcross* was pending when the statutes became law.

The Sixth Circuit next discussed "special circumstances" that would have been necessary to defeat a statutory fee award and did not find the awards unjust. The court noted that the plaintiffs in school desegregation cases were "private attorneys general" operating at a tremendous disadvantage to the defendants in terms of finances and resources. The court added that desegregation cases were a matter of "great national concern" as opposed to mere differences between individuals. Moreover, in an attorney fee issue, the court was of the opinion that a change in the law has no effect on any party's right that has matured or become unconditional. The court thus pointed out that no additional obligation was being imposed on the defendants, because they may ultimately have been required to pay fees anyway, and the new statute simply created an additional source.

Hence, the panel indicated that it had been improper for the trial court to have reduced the compensation because the plaintiffs did not prevail on "parts of issues." In concluding, the court observed that the plaintiffs' attorneys were also entitled to be compensated for time spent litigating the issue of whether they could recover their fees.

Mark A. Gooden

See also Attorney Fees; Dual and Unitary Systems

Legal Citations

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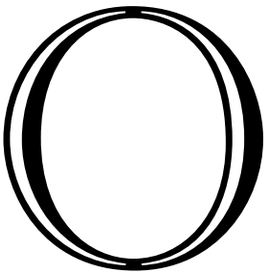

O'Connor, Sandra Day (1930–)

Sandra Day O'Connor was sworn in as a member of the U.S. Supreme Court on September 25, 1981. She was the first female associate justice of the Supreme Court, and she served from 1981 to 2006. Justice O'Connor distinguished herself on the Supreme Court as an articulate voice. As part of the federalism movement, she approached each dispute on a case-by-case basis. O'Connor's opinions were conservative during the years of the Burger Court. However, she was later regarded as occupying the ideological center, often serving as the Court's swing vote.

Early Years

O'Connor was born on March 26, 1930, in El Paso, Texas, the daughter of Harry A. Day and Ad Mae Wilkey Day. In 1952, she married John Jay O'Connor III; they have three sons, Scott, Brian, and Jay. She graduated from high school at 16 and received her BA in Economics at Stanford University in 1950, graduating magna cum laude.

O'Connor continued at Stanford Law School, serving as the editor of the *Stanford Law Review* and a member of Order of the Coif, a legal honorary society. She received her LLB in 1952, graduating third in her class, which also included William Rehnquist, future chief justice of the Supreme Court, as valedictorian.

The road for a woman in the judiciary or in politics was not easy at this time in the history of the United States. Despite her accomplishments, O'Connor was unable to gain employment as a lawyer; one firm offered her a position as a legal secretary. She therefore turned to public service, taking a position as deputy county attorney of San Mateo County, California (1952–1953), and working as an attorney for the Quartermaster Market Center in Frankfurt, Germany, from 1954 to 1957. O'Connor was able to practice law from 1958 to 1960 in Phoenix, Arizona, and served as the assistant attorney general of Arizona from 1965 to 1969.

In 1969, O'Connor's path moved to politics when she was appointed to the Arizona State Senate and reelected to two additional terms. In 1973, she became the first woman to serve as a state senate majority leader in any state. Prior to her appointment to the Supreme Court, O'Connor was elected judge of the Maricopa County Superior Court in Phoenix, Arizona, serving from 1975 to 1979. She was then appointed to the Arizona Court of Appeals and served from 1979 to 1981.

Court Record

O'Connor was nominated to the Supreme Court by President Ronald Reagan on July 7, 1981, and was confirmed by the U.S. Senate (99–0) on September 22 of that year. She replaced Justice Potter Stewart, who retired after 23 years on the Court.

In education, Justice O'Connor wrote for a 5-to-4 majority in *Agostini v. Felton* (1997), an important case in Establishment Clause law upholding the provision of publicly funded educational programs designed to benefit students attending religion-affiliated schools. She advocated the adoption and application of the "endorsement test" in Establishment Clause cases, explaining that public school decisions involving religion should be judged on their intent to endorse and whether they conveyed a message of endorsement or whether school officials sent "a message to nonadherents that they are outsiders, not full members of the political community" (*Lynch v. Donnelly,* 1984, p. 688). Justice O'Connor also advocated the application of the endorsement test in a concurring opinion in *Elk Grove Unified School District v. Newdow* (2004), wherein the Court rejected a claim to the inclusion of the words "under God" in the Pledge of Allegiance on the basis that the plaintiff lacked standing.

Perhaps the most noteworthy education law opinions late in Justice O'Connor's career were those in *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), the University of Michigan affirmative action cases. In *Grutter,* the Court upheld an admissions policy for the law school, but in *Gratz,* it struck down the admissions policy for the university's College of Literature, Science, and the Arts. Justice O'Connor was the only justice in the majority in both cases.

In 1988, Justice O'Connor was successfully treated for breast cancer. As a result, there was public speculation for the following 17 years that she might retire. On July 1, 2005, O'Connor announced her retirement. In her letter to President George W. Bush, she stated that her retirement would take effect on the confirmation of her successor.

O'Connor hoped that her replacement to the Court might be a woman. However, President Bush nominated D.C. Circuit Judge John G. Roberts, Jr. In an address to the Ninth Circuit conference, O'Connor criticized the media for sensationalizing the Senate Judiciary Committee hearings, while declaring that President Reagan had made historic strides in opening the doors for women.

On October 3, 2005, Chief Justice Rehnquist died. Two days later, President Bush withdrew his nomination of Roberts for O'Connor's seat and appointed him to fill the office of the chief justice of the Supreme Court. The president then nominated White House Counsel Harriet Miers to the seat, and on October 27, he accepted her request to withdraw her nomination. On October 31, 2005, Third Circuit Court Judge Samuel A. Alito, Jr., was nominated to replace O'Connor. Justice Alito was confirmed and sworn in on January 31, 2006.

Deborah E. Stine

See also Affirmative Action; *Agostini v. Felton;* Burger Court; *Gratz v. Bollinger; Grutter v. Bollinger;* Rehnquist Court; Roberts Court; U. S. Supreme Court Cases in Education

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O'Connor v. Ortega

The Fourth Amendment to the U.S. Constitution protects citizens against unreasonable searches and seizures of their persons, houses, papers, and effects. However, this protection limits governmental searches and seizures only—citizens are not guaranteed protection from unreasonable searches and seizures conducted by private citizens or organizations. The central issue in *O'Connor v. Ortega* (1987)

was whether officials at a public hospital violated a doctor's Fourth Amendment rights. The Supreme Court held that public employees have reasonable expectations of privacy in their offices and that their employers must meet strict criteria to conduct legal searches of these areas.

Facts of the Case

O'Connor involved a doctor employed at a state hospital who trained physicians in its psychiatric residency program. After being accused of misconduct, including acquiring a computer by coercing residents to contribute funds, sexually harassing female employees, and taking inappropriate disciplinary action against a resident, the doctor was placed on administrative leave while hospital officials investigated the allegations. As part of the hospital's investigation, officials searched the doctor's office, seizing items belonging to the hospital, which was an arm of the state as a public institution, as well as personal items belonging to the doctor. As a result of the investigation, hospital officials terminated the doctor's employment.

The doctor alleged that the search of his office was unreasonable in that the search violated the protections afforded him under the Fourth Amendment. The doctor thus brought suit against his former employer, the hospital, and various officials. A federal trial court in California, in granting the hospital's motion for summary judgment, found that the search was proper because officials there needed to secure the state's property contained within the doctor's office. However, the Ninth Circuit reversed in favor of the doctor, ruling that since he had a reasonable expectation of privacy in his office, the search by hospital officials violated his Fourth Amendment rights.

The Court's Ruling

On further appeal by the hospital, the U.S. Supreme Court, in turn, reversed and remanded the dispute. The Court agreed with the Ninth Circuit to the extent that public employees have, and are entitled to, reasonable expectations of privacy in their individual offices, desks, and files; the Court also concurred that public employees are covered by the Fourth Amendment's protection against unreasonable searches and seizures.

However, the Court disagreed insofar as it was of the opinion that since the record did not reveal the extent to which hospital officials may have had work-related reasons to enter the doctor's office, the Ninth Circuit should have remanded the matter to the trial court for further consideration. Even so, a majority of the Court agreed with the Ninth Circuit that the doctor had a reasonable expectation of privacy in his office. Further, regardless of any expectation of privacy in the office itself, the Court pointed out that the undisputed evidence supported the finding that the doctor had a reasonable expectation of privacy at least in his desk and file cabinets.

While recognizing the protection from unreasonable searches and seizures afforded for public employees, the Court noted that public employers may conduct reasonable searches if officials satisfy two conditions. First, the Court explained that there must be reasonable grounds to believe that a search will reveal evidence that a public employee has engaged in work-related misconduct. Second, the Court maintained that the search methods adopted must be reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the alleged misconduct of the employee. The Court concluded that public employers must also produce evidence to demonstrate compliance with this two-prong test.

Although *O'Connor* arose in a hospital rather than a school setting, the Supreme Court's holding could arguably support the notion that school staff, by virtue of being public employees, have the protections against unreasonable searches and seizures afforded by the Fourth Amendment. Specifically, school employees are protected by the Fourth Amendment if they can demonstrate that they have reasonable expectations of privacy in their individual office, desk, handbag, purse, briefcase, and other personal items brought onto school grounds and are not accused of having engaged in work-related misconduct. The specific facts of how the work areas of school employees are regulated would be determinative as to whether they could be said to have had a reasonable expectation of privacy. At the same time, school employees

would likely have no reasonable expectation of privacy in desks, filing cabinets, storage areas, or lockers that are shared with other employees.

Carolyn L. Carlson

See also *National Treasury Employees Union v. Von Raab; New Jersey v. T. L. O.; Skinner v. Railway Labor Executives' Association*

Further Readings

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Ohio Civil Rights Commission v. Dayton Christian Schools

Ohio Civil Rights Commission v. Dayton Christian Schools (1986) raised important questions about the issue of sexual discrimination by a religiously affiliated nonpublic school against one of its female teachers. The school board required its employees to subscribe to a specified set of religious beliefs. In addition to these beliefs, the board expected all employees to acknowledge, as a contractual requirement, that they would present any grievances to their immediate supervisors and agree to abide by its final decision, rather than pursue a judicial remedy.

Facts of the Case

The dispute in *Dayton Christian* arose after a teacher at the school notified her supervisor that she was pregnant and she was informed that her contract would not be renewed due to the board's religious belief that mothers should stay home with their preschool-aged children. The teacher then contacted an attorney, who threatened the school with litigation under state and federal sex discrimination laws. In response, school officials rescinded the original decision not to renew the teacher's contract on the grounds that she did not receive adequate notice of their position concerning a mother's duty to stay home with her young children. Even so, officials terminated the teacher's employment for violating the school's dispute resolution procedures.

On being dismissed, the teacher filed a complaint with the Ohio Civil Rights Commission alleging that the original nonrenewal of her contract violated state statutes regarding unlawful sex discrimination. While the commission was conducting administrative procedures involving the sex discrimination complaint against the school, officials went to federal court seeking an injunction against the state investigation, arguing that it infringed on their freedom of religion under the First Amendment to the U.S. Constitution since they were acting pursuant to deeply held religious beliefs. The commission, on the other hand, responded that the court should abstain from exercising its jurisdiction under the federal abstention doctrine and simply permit it to do its job. The trial court refused the request to grant an injunction and, finding that the commission's proposed action would not have violated the First Amendment, dismissed the case. On appeal, the Sixth Circuit reversed in favor of the school. The court explained that such an exercise of jurisdiction would have violated both the Free Exercise Clause and the Establishment Clause of the First Amendment.

The Court's Ruling

On further review, the U.S. Supreme Court reversed and remanded based on *Younger v. Harris* (1971) and its progeny. More specifically, the Court decided that the trial court should have abstained from asserting any jurisdiction in the dispute. In *Younger,* the Court identified "comity" for its action, meaning that one court should defer jurisdiction to another, such as a federal court deferring to state courts. In cases where multiple jurisdictions may be represented, the justices pointed out that courts are advised to use comity except in very unusual situations, such as when an injunction is necessary to prevent great and immediate irreparable injury. In *Younger,* the trial court did, in fact, issue an injunction barring a criminal prosecution in the state court. As such, in *Dayton Christian,* the Court was of the opinion that since the school's constitutional claim should have been resolved on its

merits, the Ohio Civil Rights Commission did not violate the First Amendment by merely investigating the circumstances of the nonrenewal of the teacher's contract to determine whether the reason school officials acted was solely religion based.

On remand, the Sixth Circuit vacated its earlier judgment as directed by the Supreme Court and remanded the dispute to the trial court, with instructions to dismiss the action based on abstention.

Dayton Christian is noteworthy in light of its implications with regard to judicial remedies when religious entities are involved, especially in jurisdictions such as Ohio, where state law authorized the Ohio Civil Rights Commission to investigate complaints of the type filed by the teacher and does not contain exemptions for religion-based entities. In rendering its judgment, the Supreme Court weighed the need for the states to achieve their goal of ending discrimination against the rights of schools to maintain religion-based policies. The justices thus concluded that insofar as prohibiting sexual discrimination is an important state interest, school officials in *Dayton Christian* should have had their day in court to raise the appropriate constitutional issues as to whether their actions were permissible.

Michael J. Jernigan

See also First Amendment; Due Process Rights: Teacher Dismissal; Teacher Rights

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Oncale v. Sundowner Offshore Services

At issue in *Oncale v. Sundowner Offshore Services* (1998) was whether an employer could be liable for same-sex sexual harassment. Even though *Oncale* was not set in a school context, the U.S. Supreme Court's holding that such a claim is actionable should be instructive for all educators.

Facts of the Case

Joseph Oncale worked for Sundowner Offshore Services as a roustabout on a Chevron Oil Company oil platform in the Gulf of Mexico, as one member of an eight-man crew. Two other members of the crew were supervisors. During the time Oncale worked on the platform, the two supervisors and another employee repeatedly subjected him to sex-related, humiliating actions in front of the rest of the crew. The supervisors also physically assaulted him in a sexual way, and one of the supervisors threatened to rape Oncale, who then complained to higher supervisors. Even so, the second-level supervisors did nothing to change the situation.

Oncale complained to a safety compliance clerk that the two supervisors picked on him, too; the clerk then called Oncale a name connected with homosexuality. Oncale eventually quit his job but asked that his employment record show that he left due to verbal abuse and sexual harassment. In his deposition, Oncale said that he feared that if he did not leave his job, he would have been raped or forced to engage in sexual relations.

Oncale subsequently unsuccessfully sued his employer, alleging that he was subjected to employment discrimination because of his sex. A federal trial court in Louisiana, in granting the employer's motion for summary judgment, maintained that a male employee cannot sustain a cause of action under Title VII for sexual harassment by male coworkers. On appeal, the Fifth Circuit affirmed in favor of the employer.

The Court's Ruling

On further review, at issue before the Supreme Court was whether workplace sexual harassment can violate Title VII of the Civil Rights Act when the harasser and the harassed are of the same sex. In a unanimous decision penned by Justice Scalia, the Court reversed in favor of the plaintiff, ruling that sex discrimination

consisting of same-sex sexual harassment is actionable under Title VII. Justice Thomas filed a one-sentence concurrence, in which he specified that a "plaintiff must plead and ultimately prove Title VII's statutory requirement that there be discrimination because of . . . sex" (*Oncale,* p. 83).

In its analysis, the Supreme Court observed that Title VII protects both men and women. To this end, the Court pointed out that in a previous case, *Castaneda v. Partida* (1977), set in the context of racial discrimination, it never accepted the view that a member of one definable group would not discriminate against other members of the same group. The Court noted that the judiciary has generally had little trouble in recognizing the application of Title VII to same-sex harassment involving a tangible work benefit such as quid pro quo sex harassment. At the same time, the Court acknowledged a perplexing array of legal standards in the lower courts when it came to hostile work environment sexual harassment. The Court explained that some lower courts viewed sexual harassment in the workplace as always actionable, regardless of the characteristics of the harasser and the harassed, while others believed that same-sex claims were never possible under Title VII. The Court indicated that a third group of courts took the position that a same-sex Title VII claim is actionable if the harasser is homosexual and motivated by sexual desire. In *Oncale,* the Court settled the issue that Title VII protects individuals from same-sex discrimination on the basis of sex and that it makes no difference as to a harasser's sex, sexual orientation, or motivation.

As part of its rationale, the Supreme Court denied that Title VII creates a general civility code for the workplace. Rather, the Court was of the opinion that Title VII does not address the different ways that men and women customarily interact with each other and with members of their own sex. Instead, the Court pointed out that the proscription against sexual harassment prohibits behavior that is objectively severe or pervasive enough to change an employee's conditions of employment; it does not reach to what the Court called "ordinary socializing in the workplace—such as male-on-male horseplay or inter-sexual flirtation" (*Oncale,* p. 81). The Court stressed that the objective severity of harassment should take into account the perspective of a reasonable person in the victim's position, considering all the circumstances. Consequently, the Court reasoned that the context of the behavior should help courts and juries resolve whether they are looking at teasing and horseplay, as opposed to conduct a reasonable person would find severely hostile or abusive wherever in the workplace individuals find themselves, including educational institutions.

David L. Dagley

See also *Burlington Industries v. Ellerth; Faragher v. City of Boca Raton;* Hostile Work Environment; *Meritor Savings Bank v. Vinson;* Sexual Harassment, Quid Pro Quo; Sexual Harassment, Same-Sex; Sexual Orientation; Teacher Rights; Title VII

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Open Meetings Laws

Throughout the United States, a variety of state statutes mandate that meetings of the governing bodies of public entities be open to the public. In some states, such as Vermont, the legal basis for open meetings of public entities derives from the state constitution. Being public entities, the governing bodies of public schools, public colleges, and public universities generally must comply with states' open meetings laws. For example, meetings of the board of education of a local

school district and meetings of the governing board of a public community college district must be open to the public, and, in addition, the public school or college district must comply with a variety of rules that are applicable to board meetings. This entry discusses what such laws require.

The primary underlying public policy of open meetings laws is to require governmental entities, including public educational institutions, to conduct their business in a transparent manner, exposed to public scrutiny and open to public participation, particularly because the expenditure of public funds is involved.

Many of the open meetings statutes set forth an express statement of public policy. For example, in enacting New York's Open Meetings Law, the legislature declared,

> It is essential to the maintenance of a democratic society that the public business be performed in an open and public manner and that the citizens of this state be fully aware of and able to observe the performance of public officials and attend and listen to the deliberations and decisions that go into making of public policy.

In light of these strong public policies, many states also have express statutory provisions declaring that the open meetings laws are to be strictly interpreted in favor of openness.

What Is Required

Under open meetings laws, it generally is unlawful to have private or "secret" meetings; for school boards, it is also unlawful to have public meetings without providing proper notice to the public. Distinctions are often made as to what constitutes a "meeting" for purposes of being encompassed within the open meetings laws. Under California's Ralph M. Brown Act, for example, a "meeting" means "any congregation of a majority of the members of a [board] at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the [institution]." Statutes often carve out exceptions to allow a majority of board members to attend conferences, meetings of other public entities, community meetings, or ceremonies without complying with the open meetings laws.

Circumventing open meetings laws by convening "serial meetings" or by developing what is known as a "collective concurrence" by having an intermediary essentially poll the majority of board members on a particular issue would constitute a violation of open meetings laws. In other words, violations occur if board votes are somehow achieved outside the context of public meetings, even if a majority of a board is not actually meeting together in a secret fashion.

There are exceptions, however, when boards are permitted to meet privately, not in view of the public, in certain situations where they may convene in "closed" or "executive" session. These topics typically include the following: The board meets with its legal counsel to discuss, for example, pending or threatened litigation; the board meets with its labor negotiators to discuss strategies for dealing with an employee union; the board meets with its real property negotiators to discuss how much money the board might offer for a parcel of realty; meetings to discuss a security threat or to deal with employee appointment, discipline, or performance evaluation may also be closed. In these situations, a balance has been reached between the public's right to know about the business of the public entity, on one hand, and the privacy rights of public employees, the attorney-client privilege, the bargaining power of the public entity, or public safety, on the other.

Open meetings laws usually apply not only to boards themselves but also to many of their committees. In addition, within the context of higher education, certain constituent groups, such as student government and faculty senates, may also be required to comply with open meetings laws. Moreover, those newly elected to boards who have not yet taken office are generally covered by open meetings laws.

In addition to the right to attend board meetings, states' open meetings laws usually permit members of the public to make an audiotape or videotape of board meetings, to have items placed on the agenda, and to comment at meetings. It is allowable and customary for a board to place time restrictions (e.g., 3 minutes per person) on public comment at a board meeting.

Agenda Issues

The agenda for board meetings typically must be publicly posted during a specified period of time, such as 72 hours in advance of the meeting. If there is an urgent situation or emergency, the agenda can be amended after the posting deadline. There may be different requirements for special meetings, as opposed to regular meetings.

There often are specific guidelines as to the language of the agendas of board meetings, both in terms of content and in terms of amount of detail required. There may be even-more-specific agenda requirements for items to be considered in closed sessions. The wording of agendas is important because it frames the issues for meetings and it generally is unlawful for boards to consider or take actions on any matters not appearing on their agendas.

Violations of open meetings laws can be associated with criminal penalties in addition to various civil remedies. In this regard, a violation of open meetings laws could result in action taken by the board to be invalidated, and if the requisite criminal intent is involved, there could be a criminal prosecution against the offending board members.

Jack P. Lipton

See also Open Records Laws; School Board Policy; School Boards

Further Readings

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Legal Citations

Open Meetings Law, N.Y. Pub. Off., Article 7, §§ 100 *et seq.*
Ralph M. Brown Act, Cal. Gov't Code §§ 54950 *et seq.*
Vermont Constitution, Chapter 1, Article 6.

Open Records Laws

Everywhere in the United States, there are statutory schemes mandating that the records and documents generated by public entities be made available to the public. In some states, like California, the legal basis for open public records derives from the state constitution. Accordingly, the governing bodies of public schools, public colleges, and public universities typically must comply with states' open records laws. Indeed, generally speaking, records of public schools and public colleges must be made available for public inspection upon request. States' open records laws are analogous to the federal Freedom of Information Act.

The primary underlying public policy of the open records laws is to encourage open government and to discourage governmental secrecy. Many of the states' open records statutes set forth express statements of public policy. For example, New York, in enacting that state's Freedom of Information Law, declared "that government is the public's business and that the public, individually and collectively and represented by a free press, should have access to the records of government." In light of these strong public policies, many states have express statutory provisions declaring that the open records laws are to be strictly interpreted in favor of public disclosure.

Tricky questions often arise as to whether a particular document must be made available to the public upon request. Under Montana law, for instance, a clear dichotomy is expressly established between "public" documents and "private" documents, but the more difficult questions typically concern not whether a particular document is "public," but rather, presuming that it is a public document, whether the document is somehow exempt from public disclosure.

In this regard, public documents that typically are exempt from disclosure include employee personnel files, such as the personnel files of public school teachers or public university professors; public school employees' medical records; certain documents pertaining to pending claims or litigation; documents that are privileged, such as under the attorney-client privilege; test questions and scoring keys; library circulation records; and student records. Litigation sometimes arises when there are disputes as to whether particular documents were properly withheld by a public school or public university.

Open records laws often set forth procedures regarding how public records are to be requested by the public and how and when a public entity must respond to

the requests. Also, there often are provisions not only for inspection of public records but also for obtaining photocopies of the records upon payment of fees. Schools or institutions of higher learning usually have a certain time frame in which officials must respond to requests by indicating their willingness to comply or by asserting one or more applicable exemptions.

Requests for public records generally must be reasonably clear and specific. Even so, underscoring the legal emphasis on public disclosure in some states, such as California, school or institutions of higher learning are legally required to assist members of the public in formulating their requests if they are having difficulty in doing so.

Considering that public documents are now often stored in electronic formats, open records laws now typically specify that electronically stored data are considered public documents that must be made available to the public unless otherwise exempt. Sometimes the school or college may produce the documents to the public in electronic format, rather than in paper format.

When schools or institutions of higher learning make documents available to the public that may be exempt from disclosure, the disclosure could constitute a waiver of the applicable exemption.

Jack P. Lipton

See also Open Meetings Laws; School Board Policy; School Boards

Legal Citations

California Constitution, Article 1, § 3.
California Public Records Act, Cal. Gov't Code §§ 6250 *et seq.*
Freedom of Information Act, 5 U.S.C. § 552.
New York Freedom of Information Law, N.Y. Pub. Off., Article 76 §§ 84 *et seq*.

Open Shop

The term *open shop* refers to a business or organization wherein employees are not required to become union members as a precondition of employment. An open shop can be distinguished from a *closed shop,* which refers to a business or organization wherein union membership is a precondition of employment. Historically, an open shop was a slogan adopted by American employees during the early 20th century as a means of attempting to drive unions out of the construction industry. Under the National Labor Relations Act (NLRA), open shops are deemed legal labor practices in the United States.

The passage of the Taft-Hartley Labor Act in 1947 officially declared closed shops illegal throughout the United States. The Taft-Hartley Labor Act specifically gave states the legal authority to create "right-to-work" laws while granting federal courts jurisdiction over the enforcement of collective bargaining agreements between employers and employees. In 1959, Wisconsin became the first state to legislate collective bargaining by public sector employees, including public school teachers. More than 30 states presently have legislation allowing public school teachers the right to unionize or collectively negotiate with school board authorities. At present, only a few states, most notably North Carolina, Texas, Utah, and Virginia, expressly prohibit teachers from collective bargaining with school district authorities.

In states with "right-to-work" laws, open shops are primarily viewed as the legal norm. Employers may not legally fire employees who fail or refuse to pay union dues. In states with open shops or right-to-work laws, since union membership is not required for jobs, employees can choose whether they want to be union members even if their employers are unionized. Currently, 22 states, mostly in the South (Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming), are deemed right-to-work states.

Proponents of open-shop or right-to-work laws argue that employees should be given the right to choose whether they wish to join unions. Moreover, open-shop advocates contend that it is wrong for unions to be legally able to force employees to either join unions or pay union dues or fair-share/agency fees as a condition of employment. Nationwide, 28 states permit unions to collect mandatory agency fees from their public employees, and 22 states disallow this practice.

In 1977, the U.S. Supreme Court dealt with the first of four cases involving the legal issue of agency shop fees as it applies to public sector unions' use of nonunion member fees for political purposes. In *Abood v. Detroit Board of Education* (1977), the Court held that the First Amendment explicitly prohibits public sector unions from using nonmembers' agency fees for ideological purposes not related to the union's collective bargaining duties and responsibilities.

The Court, in *Chicago Teachers Union, Local No. 1 v. Hudson* (1986), subsequently imposed the procedural requirement that public sector unions must inform nonmembers in open shops how much of their agency fees go to noncollective bargaining purposes and offer these nonmembers a refund in that amount. To be in compliance with the law, many public sector unions send what is commonly referred to as "Hudson" packets to all their nonmembers, informing them of their legal right to refuse the use of agency fees for noncollective-bargaining-related expenditures.

In the third case, *Lehnert v. Ferris Faculty Association* (1991), which was set in higher education, the Supreme Court clarified what union expenses are chargeable to dissenting nonmembers in open shops. The Court explained that nonunion members could be charged a pro rata share of costs associated with activities of state and national union affiliates even if they did not directly benefit their bargaining units.

Most recently, in *Davenport v. Washington Education Association* (2007), a unanimous Supreme Court placed further restrictions on the ability of unions to spend the fair-share fees of nonmembers in open shops. The Court held that "it does not violate the First Amendment for a State to require that its public-sector [teacher] unions receive affirmative authorization from a nonmember before spending that nonmember's agency fees for election-related purposes" (p. 2383). In sum, then, while unions can charge some fees in open shops, the Court has continued to narrow the purposes for which labor organizations can use these funds.

Kevin P. Brady

See also *Abood v. Detroit Board of Education;* Agency Shop; Closed Shop; Collective Bargaining; Contracts; *Davenport v. Washington Education Association;* Unions

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Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

National Labor Relations Act, 29 U.S.C. § 157.

Owasso Independent School District No. 1011 v. Falvo

In *Owasso Independent School District No. 1011 v. Falvo* (2002), the Supreme Court considered whether peer-graded materials are education records under the Family Educational Rights and Privacy Act (FERPA). The Supreme Court held that peer-graded materials are not considered education records under FERPA and thus peer grading does not violate the act.

It is unusual for the Supreme Court to accept a case such as *Owasso,* which questioned the legality of a teaching strategy, especially a commonplace practice such as peer grading, which has been prevalent in schools for years. However, *Owasso* is known today as one of the few Supreme Court cases providing schools with practical guidance about how the language of FERPA should be interpreted.

Facts of the Case

Under FERPA, federally funded schools must protect students' privacy. Specifically, FERPA mandates that

schools cannot release students' education records without parental consent. Kristja Falvo, a parent of three children, alleged that the Owasso Independent School District was in violation of FERPA by allowing the practice of peer grading to occur in her children's classrooms. Ms. Falvo claimed that her children were embarrassed when their classmates scored their papers, tests, or assignments and when the teacher asked the children to call out the grades for the teacher to record.

Prior to the Supreme Court's decision, the federal trial court in Oklahoma decided that peer-graded assignments are not education records; however, the Tenth Circuit reversed. The Tenth Circuit found that Ms. Falvo could sue for damages under Title 42 of the U.S. Code § 1983, in order to enforce FERPA, and that peer grading violated FERPA because the peer-graded assignments were educational records that should not have been released without parental permission.

The Court's Ruling

The Supreme Court unanimously reversed the Tenth Circuit's holding. The Court analyzed the language of FERPA, which defines "education records" as "records, files, documents, and other materials" that contain student information and "are maintained by an educational agency or institution or by a person acting for such agency or institution" (20 U.S.C. § 1232g(a)(4)(A)). The Court reasoned that the term *maintain* implies that the student work is kept over a period of time and is stored in a filing cabinet or some type of permanent database. Yet during peer grading, neither the student grading the assignment nor the teacher receiving the score maintains the peer-graded work within this meaning of the act. In addition, the phrase "a person acting for" was interpreted to mean employees of the school, such as teachers and administrators, not students.

The Court also maintained that it would not have been good policy to define peer-graded papers as education records. If peer grading were found to be in violation of FERPA, teachers across the country would be burdened with extra work. For instance, requiring teachers to grade every homework paper or classroom assignment would mean that teachers would be left with less time to teach new material. It is doubtful that Congress intended FERPA to change the customary practices of schools or desired that the federal government intervene in traditional state functions, the Court said.

Justice Scalia offered a concurring opinion, in which he agreed with the Court's judgment that student-graded papers are not education records; however, he disagreed that education records are limited only to those that are maintained in some type of main storage area.

The Supreme Court left two questions unanswered in *Owasso:* whether the peer-graded scores, once turned in to the teacher and placed in his or her grade book (electronic or hard copy), would be considered an education record and whether a private party such as Ms. Falvo could bring a case under § 1983 to enforce FERPA. The question of whether a teacher's grade book is considered an education record remains unanswered; however, soon after *Owasso* was decided, the Supreme Court held in *Gonzaga University v. Doe* (2002) that a private party cannot bring an individual cause of action under § 1983 to enforce FERPA. Therefore, Ms. Falvo could not have brought her case before the court using the same grounds today. Nevertheless, *Owasso* continues to be an important education law decision because of its clarification of some of the ambiguous language of FERPA and its ultimate deference to the time-honored educational practice of peer grading.

Janet R. Rumple

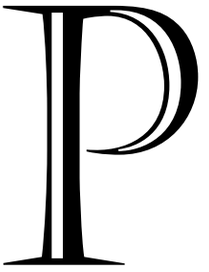
See also Family Educational Rights and Privacy Act; Privacy Rights of Students

Legal Citations

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (2002).

Gonzaga University v. Doe, 536 U.S. 273 (2002).

Owasso Independent School District No. 1011 v. Falvo, 534 U.S. 426 (2002).



Parens Patriae

Parens patriae can be translated as "the father of the country." This concept generally means that a government has the authority, as a sovereign over its citizens, to act in a protective manner. The term is often applied in disputes over the well-being of children and people with disabilities. The doctrine of parens patriae consists of a set of interests that the government, such as the state, has in the well-being of its populace.

The State's Interest

The concept of parens patriae was adopted from English precedent and is the origin of the state's power to preserve and protect the health, patriotism, morality, efficiency, industry, and integrity of its citizens. As a result, the state, as parent to all its citizens, has the inherent prerogative to provide for the welfare of both the commonwealth and individuals and to protect those individuals who are not legally competent to act on their own behalf.

In relationship to education, the state, in its role of parens patriae, can act to serve and protect the well-being of children and the parental interests in having children educated. The parens patriae concept gives states standing to sue on behalf of these citizens to protect what courts deem a quasi-sovereign interest, defined by the U.S. Supreme Court as those interests that the state has in the well-being of its populace. In order to act in its capacity as parens patriae, state officials must articulate an interest apart from those of private parties, usually one that the state could address through its sovereign law-making powers. The state has a quasi-sovereign interest in the health and well-being, both physical and economic, of its residents in general, and thus can act to protect children and people who are incompetent, helpless, or infirm and require protection.

In applying the concept of parens patriae to schools, states often assert their authority to enforce minimum educational and welfare requirements for the benefit of their citizenry. It is well accepted that education is a benefit to the society; education supports state goals, such as the continuity of having an enlightened electorate, an educated populace, and an educated workforce.

Legally, because education is viewed as a benefit to the entire society, state legislatures have the power to tax citizens for support of public schools. The early theorists examined this notion and asserted that education was a public obligation that must be nurtured to develop the entire civic intelligence and to better govern through an enlightened republic. In other words, because the state, as parens patriae, has an interest in enforcing minimum education and welfare requirements, it also has the force and power to use taxation to fund schooling.

A final tenet of the parens patriae authority of the state within the context of schooling is its right to compel all parents to provide their children with a

minimum secular education. This includes compulsory education as a basis for fostering basic educational requirements. State legal authority to require school attendance is found in the common-law doctrine of parens patriae. The authority for requiring compulsory attendance is the state's ability, through the exercise of the police power of the legislature, to establish reasonable laws as it may judge are necessary for the good of the state and its inhabitants.

State Versus Parents

Under some circumstances, the state's parens patriae authority collides with parental rights. In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), the Supreme Court ruled that parents have a liberty interest under the Fourteenth Amendment to control the upbringing of their children, including the right to direct the content of their education. In *Pierce,* the issue was whether a state's compulsory education law requiring all children to attend only public schools violated the Fourteenth Amendment rights of parents to determine the upbringing of their children.

The Court reasoned that states have the power to regulate reasonably all schools and to inspect, supervise, and examine them, their teachers, and pupils. States may require that all children of proper age attend some school, that teachers be of good moral character and patriotic disposition, that students be taught subjects essential to good citizenship, and that nothing be taught that is manifestly inimical to the public welfare. However, in *Pierce,* the Court found that the State of Oregon violated the parents' constitutional liberty interests when it unreasonably interfered with their liberty to direct the upbringing and education of children under their control by prohibiting parents from meeting state compulsory attendance requirements by sending their offspring to nonpublic schools as an alternative to public schools.

The power of parents may also be limited by states' parens patriae authority when it appears that parental decisions will jeopardize the health or safety of children. Historically, courts have held that the family itself is not beyond regulation on behalf of the public interest. Acting to guard the general interest in a child's well-being, the state, as parens patriae, may restrict a parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways.

In *Wisconsin v. Yoder* (1972), the Supreme Court rejected the applicability of parens patriae to compulsory attendance but upheld the general principle that the state has the authority to regulate education. The Court decided that when the state's compulsory school attendance law, under its power to extend the benefit of secondary education to children, conflicts with parents' religious beliefs protected under the First Amendment of the Constitution, the parents' rights prevail. Yet, in other cases, the general welfare is always the concern of the state and gives the state authority to exercise the parens patriae doctrine.

The state's invocation of the doctrine of parens patriae in matters of education has arisen when parents did not assist or support children in obtaining an education or where children sought financial assistance from parents for education as a necessity, along with food, lodging, clothing, and medical care. There have also been cases where the state's parens patriae authority has been invoked to support parents who were unable to control their own children or where children became a nuisance to the public.

Protecting Children

The parens patriae authority of the state extends to protecting children from parental abuse or neglect. Courts have stated that it is the unquestioned right and imperative duty of government, in its character of parens patriae, to protect and provide for the comfort and well-being of its citizens who by reason of infancy are unable to take care of themselves. Thus, under this doctrine, a child has a right to be protected from abuse of his or her parents. Under the umbrella of their authority as parens patriae, states have traditionally intervened between parents and children when the parents have been found to be legally unfit. In each case, the state's action must be supported by a compelling or a rational state interest where the rights of either the child or parent are restricted.

The state's authority as parens patriae has been exercised in other areas related to children. In some circumstances, acting as parens patriae, the state has regulated and sometimes severed the parent-child

relationship through divorce, neglect, or child abuse statutes. States have used the doctrine of parens patriae to regulate compulsory medical care over the objection of parents, if they are found legally neglectful by not providing medical care for their children.

More recently, states have exercised their parens patriae authority in regulating both public and nonpublic schools. Today, many states have legislated minimum state requirements for private schools under the parens patriae doctrine. These requirements often include prescribed courses, personnel requirements, and specific curricula as well as outcome measures such as requiring students in nonpublic schools to participate in statewide testing programs.

Vivian Hopp Gordon

See also Fourteenth Amendment; Parental Rights; *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary;* Statute; *Wisconsin v. Yoder*

Legal Citations

Alfred L. Snapp and Sons, Inc., et al. v. Puerto Rico ex rel. Barez, Secretary of Labor and Human Resources, 458 U.S. 592 (1982).
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Prince v. Massachusetts, 321 U.S. 158 (1944).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

Parental Rights

The right of parents to make educational decisions for their children has evolved since the earliest reported state law cases in the last quarter of the 19th century. As state governments became more involved in regulating education, conflicts between parents and public officials led to litigation. Most recently, the rights of students themselves are being recognized. This entry summarizes the development of parental rights as evidenced in judicial decisions.

Natural Law

The earliest cases involved the application of state common law to requests by parents to make educational decisions on behalf of their children. The origin of this common law is not clear, but presumably it devolved from the notion that the responsibilities of parents to maintain, protect, and educate their children were undergirded by "principles of natural law and affection laid on [parents] by Nature itself, [and] by [the parents'] own proper act of bringing [children] into the world" (*School Board District No. 18, Garvin County v. Thompson*, 1909, p. 579).

State courts eventually applied this natural law to parental requests regarding the education of their children pursuant to states' implied authority under the Tenth Amendment to control education. The result in many state cases was a broad protection of parent educational choices for their children, either because the parental choices were assumed to be in the children's best interests or because the choices were not considered to be disruptive to the school setting (*State of Nebraska ex rel. Kelly v. Ferguson,* 1914; *Trustees of School v. People ex rel. Van Allen,* 1877; *State ex rel. Sheibley v. School District No. 1 of Dixon County,* 1891).

However, parents were not always successful in imposing their choices upon schools. In some cases, courts, in rejecting parental choices, relied on the authority of both state legislatures and school boards to set course requirements and on a fear that citizens should not be able to nullify reasonable school board requirements or state legislation (*Sewell v. Board of Education of Defiance Union School, Ohio,* 1876).

The success of parents in advancing the common-law claims to control the education of their children not only varied among the states but represented an agrarian society, where both the authority of local school boards and parents were significant forces. With the end of World War I, state legislatures became more active in education by enacting compulsory attendance laws. The shift to statewide legislation had a diluting effect on the common-law authority of parents. While parental authority was a prominent force when balanced against the authority of local school boards, it was not as significant when balanced against state-legislated rules.

State Regulation

At the end of World War I, the state legislatures of Nebraska and Oregon enacted statutes that required

the teaching of all courses in English (Nebraska) and attendance by all students at public schools (Oregon). The challenge to these two statutes resulted in two important U.S. Supreme Court decisions, *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), which created a constitutional right of parents pursuant to the Liberty Clause of the Fourteenth Amendment to make educational decisions for their children.

In both *Meyer* and *Pierce,* the Supreme Court considered that prohibiting the teaching of a subject in German in a religious school (*Meyer*) and prohibiting students from attending nonpublic schools (*Pierce*) "unreasonably interfere[d] with the liberty or parents and guardians to direct the upbringing and education of their children" (*Pierce,* p. 534). Even though the Supreme Court invalidated the state statutes in *Meyer* and *Pierce,* the Court was careful to note that "the power of the state to compel attendance at some school and to make reasonable regulations for all schools . . . is not questioned" (*Meyer,* p. 402).

Forty-seven years later, the Supreme Court, in *Wisconsin v. Yoder* (1972), addressed a challenge to the state of Wisconsin's charge of truancy against two Amish fathers who refused to keep their children enrolled in a school until the children reached the age of 16. At stake was the authority of the state to enforce its compulsory attendance statute requiring attendance at school until age 16 versus Amish religious beliefs that opposed the enrollment of their children in a public school past the completion of eighth grade, where such attendance could cause a significant number of children to leave the Amish community.

In supporting the Amish parents' claim that they were exempt from the compulsory attendance requirement because of their religious beliefs, which were grounded in a 300-year-old, cohesive, religious-based, Amish community, the Court relied on the Liberty Clause used in *Meyer* and *Pierce,* as well as the Free Exercise of Religion Clause of the First Amendment. The Court reasoned that, when a free exercise claim was raised, government was required to demonstrate a compelling interest before if could overcome parents' religious beliefs, something the state of Wisconsin was unable to do in this case, because the children's eighth- grade education satisfied the state's interests in a literate and productive citizenry.

Unlike *Meyer* and *Pierce,* though, *Yode*r did not invalidate the state's compulsory attendance statute. Rather, because it struck down only the statute's application to the Amish, the question for post-*Yoder* courts was the extent to which state compulsory attendance laws would not apply to parents whose religious beliefs did not share the community values of the Amish. Generally, the success of these other religious challenges varied among the states and devolved into the reasonableness of the state regulations (see *State of Nebraska v. Faith Baptist Church of Louisville*, 1981) or into whether the *Yoder* exemption should apply to other religious belief systems (see *Fellowship Baptist Church v. Benton,* 1987).

Recent Developments

In 1990, the Supreme Court, in *Employment Division, Department of Human Resources of Oregon v. Smith,* eliminated the Free Exercise Clause as a defense against state action that was neutral and generally applicable. *Smith* has gone a long way toward reducing the effectiveness of parental invocation of religious-based claims pursuant to *Yoder* for purposes of exemption from state regulation.

A more substantial challenge to parental rights is embedded in the emergence of student rights in the aftermath of *Tinker v. Des Moines Independent Community School District* (1969), where the ongoing question has been the extent to which the rights of parents to make decisions for their children can be undercut by the rights of students themselves. Justice Douglas, in his dissenting opinion in *Yoder,* had observed that, while parents

> normally speak for the entire family . . . , it is the student's judgment, not the parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be the masters of their own destiny. (pp. 244–245)

Congress has continued to accord rights to parents, such as access to student records in the Family

Educational Rights and Privacy Act (FERPA, 1974) and the right to negotiate an individualized education plan (IEP) for their children under the Individuals with Disabilities Education Act (IDEA, 1975). Nonetheless, courts have taken a small step toward separating student and parent rights by acknowledging that students may have legal claims against schools separate from their parents (see *Circle Schools v. Pappert,* 2004). To date, though, no court has discounted all parent interests in the education of their children.

Ralph D. Mawdsley

See also *Employment Division, Department of Human Resources of Oregon v. Smith;* Family Educational Rights and Privacy Act; *Meyer v. Nebraska; Pierce v. Society of Sisters of the Holy Names of Jesus and Mary; Tinker v. Des Moines Independent Community School District; Wisconsin v. Yoder*

Further Reading

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Parents Involved in Community Schools v. Seattle School District No. 1

Parents Involved in Community Schools v. Seattle School District No. 1 (*PICS,* 2005, 2007), which was combined with *Meredith v. Jefferson County Public Schools* (2007), stands out as the U.S. Supreme Court's most recent case addressing the constitutionality of race-conscious admissions plans. The Court struck down both plans in *PICS* in a plurality opinion in a consolidated appeal.

Facts of the Case

The disputes arose when two school systems, one in Seattle, Washington, the other in Louisville, Kentucky, voluntarily adopted race-conscious student assignment plans as both a remedial measure to address de facto segregation and, concomitantly, to achieve the educational goal of a diverse student body that would be reflective of the racial make-up of the entire school district community. Both plans evolved from many years of prior attempts to desegregate and also to address the issue of "White flight." Yet, Seattle never operated under a desegregation order, and Louisville had been released from judicial oversight. The objective of the plans was to promote the pedagogical and social benefits flowing from diversity in an increasingly pluralistic society and global marketplace.

At the completion of an en banc rehearing, the Ninth Circuit upheld the constitutionality of the Seattle plan (*PICS,* 2005). During the same year, the Sixth Circuit upheld the constitutionality of the plan from Louisville (*McFarland*).

On further review, the Supreme Court, in a plurality judgment, invalidated both plans. Writing for a Court

plurality, Chief Justice John Roberts explained the consolidated plans were unconstitutional insofar as neither was implemented to address the ongoing vestiges of intentional discrimination and that both plans were based on what the Court considered the inappropriate consideration of race. Chief Justice Roberts further indicated that diversity was not a compelling governmental interest in K–12 education, a position that the majority of the Court rejected and with which Justice Kennedy disagreed in a concurring opinion.

The Court's Ruling

In his analysis, the chief justice observed that the school boards did not meet their heavy burden of demonstrating that the interest they sought to achieve justified the highly suspect means of discriminating among individual students based on race by relying on racial classifications in making school assignments, because "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification" (*PICS,* p. 2752, citing *Johnson v. California,* 2005, pp. 505–506). Accordingly, Roberts determined that school boards need to demonstrate that their use of such classifications was sufficiently narrowly tailored to achieve a compelling governmental interest. He conceded that remedying the effects of past intentional discrimination is a compelling interest under the strict scrutiny test. Even so, Roberts pointed out that such an interest was not involved in *PICS,* because the Seattle schools were never segregated by law nor subject to court-ordered desegregation, and the desegregation decree that covered *Louisville* had been dissolved.

At the same time, Chief Justice Roberts remarked that the *PICS* cases were not governed by the rule in *Grutter v. Bollinger* (2003) in which the Court ruled that, for the purposes of strict scrutiny, the government had a compelling interest in ensuring the diversity of student bodies in the context of higher education. Roberts added that the classification was appropriate in *Grutter,* because it was not focused on race alone but encompassed all factors that might have contributed to student body diversity. To this end, he posited that in the two cases that were consolidated in *PICS,* race-conscious admissions plans were unacceptable, because race was not considered as part of a broader effort to achieve diversity, and its use was utterly determinative of where particular students were assigned.

In sum, *PICS* can be read as standing for four points. First, the use of racial classification is injurious and detrimental, not just when it is used to subordinate or stigmatize groups. Second, with very rare exceptions, racial classifications may be used only to reverse institutions' prior, state-sanctioned segregation; voluntary improvements are inapposite. Third, governmental interest in diversity with respect to education encompasses a broad array of interests and, as of *PICS,* is limited to higher education. Fourth, the judicial doctrine of strict scrutiny is to be used to address all uses of race, and there is no invidious/benign continuum on this issue.

In his concurrence, Justice Kennedy agreed that because the *PICS* plans were not narrowly tailored to advance a compelling governmental interest, the plans did not survive strict scrutiny. However, he wrote separately in light of his belief that the chief justice went too far in proscribing the use of race in instances where it might be appropriate. He was of the opinion that "diversity . . . is a compelling educational goal a school district may pursue . . . without treating each student in a different fashion solely on the basis of a systematic, individual typing by race" (*PICS,* 2007, p. 2792). Kennedy further proposed that diversity may be infused in student assignment plans based on the following:

> School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of the demographics of neighborhoods; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race. (p. 2792)

Justice Kennedy's concurrence can be understood as representing four propositions. First, school boards do have a compelling interest in diversity. Second, school officials may construct assignment plans where students are "considered for a whole range of talents with race as a . . . consideration" (p. 2794). Third, the classifications used in *PICS* are subject to strict scrutiny and may be used only after more narrow approaches have been tried and have not

succeeded. Fourth, he suggested that the uses of race that have no adverse affect do not require strict scrutiny.

Justice Thomas also filed a concurrence in which he expressed his full agreement with the plurality. He penned a separate opinion to detail his disagreements with Justice Breyer's dissent.

Justice Breyer's dissenting opinion, which was joined by Justices Stevens, Souter, and Ginsburg, lamented the Supreme Court's breaking with its own well-established precedent in ensuring equal educational opportunities for students.

Justice Stevens's dissent essentially chided the plurality for ignoring history and misunderstanding the use of race in making school assignments.

PICS has generated intense interest among educators and legal scholars alike. While it is currently too early to evaluate what the overall reaction to *PICS* will be, the alternatives before school officials are to reduce race-conscious efforts substantially in student assignment plans based on Justice Roberts's plurality analysis or to develop more all-inclusive and expansive policies under the criteria established under Justice Kennedy's concurrence.

Philip T. K. Daniel

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Equal Protection Analysis; *Grutter v. Bollinger;* White Flight

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Parents Involved in Community Schools v. Seattle School District No. 1 (Excerpts)

In a plurality in Parents Involved in Community Schools v. Seattle School District No. 1, *the Supreme Court struck down a race-conscious admissions plan. The Court ruled that school officials failed not only to demonstrate that the use of racial classifications in their student assignment plans was necessary to achieve their stated goal of racial diversity but also that they failed to consider alternative approaches adequately.*

Supreme Court of the United States

PARENTS INVOLVED IN COMMUNITY SCHOOLS, Petitioner,

v.

SEATTLE SCHOOL DISTRICT NO. 1 et al.

127 S. Ct. 2738

Argued Dec. 4, 2006.

Decided June 28, 2007.

Chief Justice ROBERTS announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II, III-A, and III-C, and an opinion with respect to Parts III-B and IV, in which Justices SCALIA, THOMAS, and ALITO join.

The school districts in these cases voluntarily adopted student assignment plans that rely upon race to determine which public schools certain children may attend. The Seattle school district classifies children as white or nonwhite; the Jefferson County school district as black or "other." In Seattle, this racial classification is used to allocate slots in oversubscribed high schools. In Jefferson County, it is used to make certain elementary school assignments and to rule on transfer requests. In each case, the school district relies upon an individual student's race in assigning that student to a particular school, so that the racial balance at the school falls within a predetermined range based on the racial composition of the school district as a whole. Parents of students denied assignment to particular schools under these plans solely because of their race brought suit, contending that allocating children to different public schools on the basis of race violated the Fourteenth Amendment guarantee of equal protection. The Courts of Appeals below upheld the plans. We granted certiorari, and now reverse.

I

Both cases present the same underlying legal question—whether a public school that had not operated

legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments. Although we examine the plans under the same legal framework, the specifics of the two plans, and the circumstances surrounding their adoption, are in some respects quite different.

A

Seattle School District No. I operates 10 regular public high schools. In 1998, it adopted the plan at issue in this case for assigning students to these schools. The plan allows incoming ninth graders to choose from among any of the district's high schools, ranking however many schools they wish in order of preference.

Some schools are more popular than others. If too many students list the same school as their first choice, the district employs a series of "tiebreakers" to determine who will fill the open slots at the oversubscribed school. The first tiebreaker selects for admission students who have a sibling currently enrolled in the chosen school. The next tiebreaker depends upon the racial composition of the particular school and the race of the individual student. In the district's public schools approximately 41 percent of enrolled students are white; the remaining 59 percent, comprising all other racial groups, are classified by Seattle for assignment purposes as nonwhite. If an oversubscribed school is not within 10 percentage points of the district's overall white/nonwhite racial balance, it is what the district calls "integration positive," and the district employs a tiebreaker that selects for assignment students whose race "will serve to bring the school into balance." If it is still necessary to select students for the school after using the racial tiebreaker, the next tiebreaker is the geographic proximity of the school to the student's residence.

Seattle has never operated segregated schools—legally separate schools for students of different races—nor has it ever been subject to court-ordered desegregation. It nonetheless employs the racial tiebreaker in an attempt to address the effects of racially identifiable housing patterns on school assignments. Most white students live in the northern part of Seattle, most students of other racial backgrounds in the southern part. Four of Seattle's high schools are located in the north—Ballard, Nathan Hale, Ingraham, and Roosevelt—and five in the south—Rainier Beach, Cleveland, West Seattle, Chief Sealth, and Franklin. One school—Garfield—is more or less in the center of Seattle. . . .

For the 2000–2001 school year, five of these schools were oversubscribed—Ballard, Nathan Hale, Roosevelt, Garfield, and Franklin—so much so that 82 percent of incoming ninth graders ranked one of these schools as their first choice. Three of the oversubscribed schools were "integration positive" because the school's white enrollment the previous school year was greater than 51 percent—Ballard, Nathan Hale, and Roosevelt. Thus, more nonwhite students (107, 27, and 82, respectively) who selected one of these three schools as a top choice received placement at the school than would have been the case had race not been considered, and proximity been the next tiebreaker. Franklin was "integration positive" because its nonwhite enrollment the previous school year was greater than 69 percent; 89 more white students were assigned to Franklin by operation of the racial tiebreaker in the 2000–2001 school year than otherwise would have been. Garfield was the only oversubscribed school whose composition during the 1999–2000 school year was within the racial guidelines, although in previous years Garfield's enrollment had been predominantly nonwhite, and the racial tiebreaker had been used to give preference to white students.

Petitioner Parents Involved in Community Schools (Parents Involved) is a nonprofit corporation comprising the parents of children who have been or may be denied assignment to their chosen high school in the district because of their race. The concerns of Parents Involved are illustrated by Jill Kurfirst, who sought to enroll her ninth-grade son, Andy Meeks, in Ballard High School's special Biotechnology Career Academy. Andy suffered from attention deficit hyperactivity disorder and dyslexia, but had made good progress with hands-on instruction, and his mother and middle school teachers thought that the smaller biotechnology program held the most promise for his continued success. Andy was accepted into this selective program but, because of the racial tiebreaker, was denied assignment to Ballard High School. Parents Involved commenced this suit in the Western District of Washington. . . .

The District Court granted summary judgment to the school district, finding that state law did not bar the district's use of the racial tiebreaker and that the plan survived strict scrutiny on the federal constitutional claim because it was narrowly tailored to serve a compelling government interest. The Ninth Circuit initially reversed based on its interpretation of the Washington Civil Rights Act (*Parents Involved II*) and enjoined the district's use of the integration tiebreaker, *id.,* at 1257. Upon realizing that the litigation would not be resolved

in time for assignment decisions for the 2002–2003 school year, the Ninth Circuit withdrew its opinion (*Parents Involved III*), vacated the injunction, and . . . certified the state-law question to the Washington Supreme Court (*Parents Involved IV*).

The Washington Supreme Court determined that the State Civil Rights Act bars only preferential treatment programs "where race or gender is used by government to select a less qualified applicant over a more qualified applicant," and not "[p]rograms which are racially neutral, such as the [district's] open choice plan." *Parents Involved in Community Schools v. Seattle School Dist., No. 1* (*Parents Involved V*). The state court returned the case to the Ninth Circuit for further proceedings.

A panel of the Ninth Circuit then again reversed the District Court, this time ruling on the federal constitutional question, *Parents Involved VI* . The panel determined that while achieving racial diversity and avoiding racial isolation are compelling government interests Seattle's use of the racial tiebreaker was not narrowly tailored to achieve these interests. The Ninth Circuit granted rehearing en banc and overruled the panel decision, affirming the District Court's determination that Seattle's plan was narrowly tailored to serve a compelling government interest, *Parents Involved VII.* We granted certiorari.

B

Jefferson County Public Schools operates the public school system in metropolitan Louisville, Kentucky. In 1973 a federal court found that Jefferson County had maintained a segregated school system, [the Supreme Court] vacated and remanded, reinstated with modifications, and in 1975 the District Court entered a desegregation decree. Jefferson County operated under this decree until 2000, when the District Court dissolved the decree after finding that the district had achieved unitary status by eliminating "[t]o the greatest extent practicable" the vestiges of its prior policy of segregation.

In 2001, after the decree had been dissolved, Jefferson County adopted the voluntary student assignment plan at issue in this case. Approximately 34 percent of the district's 97,000 students are black; most of the remaining 66 percent are white. The plan requires all nonmagnet schools to maintain a minimum black enrollment of 15 percent, and a maximum black enrollment of 50 percent.

At the elementary school level, based on his or her address, each student is designated a "resides" school to which students within a specific geographic area are assigned; elementary resides schools are "grouped into clusters in order to facilitate integration." The district assigns students to nonmagnet schools in one of two ways: Parents of kindergartners, first-graders, and students new to the district may submit an application indicating a first and second choice among the schools within their cluster; students who do not submit such an application are assigned within the cluster by the district. "Decisions to assign students to schools within each cluster are based on available space within the schools and the racial guidelines in the District's current student assignment plan." If a school has reached the "extremes of the racial guidelines," a student whose race would contribute to the school's racial imbalance will not be assigned there. After assignment, students at all grade levels are permitted to apply to transfer between nonmagnet schools in the district. Transfers may be requested for any number of reasons, and may be denied because of lack of available space or on the basis of the racial guidelines.

When petitioner Crystal Meredith moved into the school district in August 2002, she sought to enroll her son, Joshua McDonald, in kindergarten for the 2002–2003 school year. His resides school was only a mile from his new home, but it had no available space—assignments had been made in May, and the class was full. Jefferson County assigned Joshua to another elementary school in his cluster, Young Elementary. This school was 10 miles from home, and Meredith sought to transfer Joshua to a school in a different cluster, Bloom Elementary, which—like his resides school—was only a mile from home. Space was available at Bloom, and intercluster transfers are allowed, but Joshua's transfer was nonetheless denied because, in the words of Jefferson County, "[t]he transfer would have an adverse effect on desegregation compliance" of Young.

Meredith brought suit in the Western District of Kentucky, alleging violations of the Equal Protection Clause of the Fourteenth Amendment. The District Court found that Jefferson County had asserted a compelling interest in maintaining racially diverse schools, and that the assignment plan was (in all relevant respects) narrowly tailored to serve that compelling interest. The Sixth Circuit affirmed in a *per curiam* opinion relying upon the reasoning of the District Court, concluding that a written opinion "would serve no useful purpose." We granted certiorari.

II

As a threshold matter, we must assure ourselves of our jurisdiction. . . .

III

A

It is well established that when the government distributes burdens or benefits on the basis of individual racial classifications, that action is reviewed under strict scrutiny. As the Court recently reaffirmed, "racial classifications are simply too pernicious to permit any but the most exact connection between justification and classification." In order to satisfy this searching standard of review, the school districts must demonstrate that the use of individual racial classifications in the assignment plans here under review is "narrowly tailored" to achieve a "compelling" government interest.

Without attempting in these cases to set forth all the interests a school district might assert, it suffices to note that our prior cases, in evaluating the use of racial classifications in the school context, have recognized two interests that qualify as compelling. The first is the compelling interest of remedying the effects of past intentional discrimination. Yet the Seattle public schools have not shown that they were ever segregated by law, and were not subject to court-ordered desegregation decrees. The Jefferson County public schools were previously segregated by law and were subject to a desegregation decree entered in 1975. In 2000, the District Court that entered that decree dissolved it. . . .

. . . .

The second government interest we have recognized as compelling for purposes of strict scrutiny is the interest in diversity in higher education upheld in *Grutter*. The specific interest found compelling in *Grutter* was student body diversity "in the context of higher education." The diversity interest was not focused on race alone but encompassed "all factors that may contribute to student body diversity." . . .

. . . .

The entire gist of the analysis in *Grutter* was that the admissions program at issue there focused on each applicant as an individual, and not simply as a member of a particular racial group. The classification of applicants by race upheld in *Grutter* was only as part of a "highly individualized, holistic review." As the Court explained, "[t]he importance of this individualized consideration in the context of a race-conscious admissions program is paramount." The point of the narrow tailoring analysis in which the *Grutter* Court engaged was to ensure that the use of racial classifications was indeed part of a broader assessment of diversity, and not simply an effort to achieve racial balance, which the Court explained would be "patently unconstitutional."

In the present cases, by contrast, race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints"; race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in *Grutter*; it is *the* factor. Like the University of Michigan undergraduate plan struck down in *Gratz,* the plans here "do not provide for a meaningful individualized review of applicants" but instead rely on racial classifications in a "nonindividualized, mechanical" way.

Even when it comes to race, the plans here employ only a limited notion of diversity, viewing race exclusively in white/nonwhite terms in Seattle and black/"other" terms in Jefferson County. The Seattle "Board Statement Reaffirming Diversity Rationale" speaks of the "inherent educational value" in "[p]roviding students the opportunity to attend schools with diverse student enrollment." But under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not. It is hard to understand how a plan that could allow these results can be viewed as being concerned with achieving enrollment that is "broadly diverse."

Prior to *Grutter,* the courts of appeals rejected as unconstitutional attempts to implement race-based assignment plans—such as the plans at issue here—in primary and secondary schools. After *Grutter,* however, the two Courts of Appeals in these cases, and one other, found that race-based assignments were permissible at the elementary and secondary level, largely in reliance on that case.

In upholding the admissions plan in *Grutter,* though, this Court relied upon considerations unique to institutions of higher education, noting that in light of "the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." The Court explained that "[c]ontext matters" in applying strict scrutiny, and repeatedly noted that it was addressing the use of race "in the context of higher education." The

Court in *Grutter* expressly articulated key limitations on its holding—defining a specific type of broad-based diversity and noting the unique context of higher education—but these limitations were largely disregarded by the lower courts in extending *Grutter* to uphold race-based assignments in elementary and secondary schools. The present cases are not governed by *Grutter*.

B

Perhaps recognizing that reliance on *Grutter* cannot sustain their plans, both school districts assert additional interests, distinct from the interest upheld in *Grutter,* to justify their race-based assignments. In briefing and argument before this Court, Seattle contends that its use of race helps to reduce racial concentration in schools and to ensure that racially concentrated housing patterns do not prevent nonwhite students from having access to the most desirable schools. Jefferson County has articulated a similar goal, phrasing its interest in terms of educating its students "in a racially integrated environment." Each school district argues that educational and broader socialization benefits flow from a racially diverse learning environment, and each contends that because the diversity they seek is racial diversity—not the broader diversity at issue in *Grutter*—it makes sense to promote that interest directly by relying on race alone.

The parties and their *amici* dispute whether racial diversity in schools in fact has a marked impact on test scores and other objective yardsticks or achieves intangible socialization benefits. The debate is not one we need to resolve, however, because it is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, pure and simple, an objective this Court has repeatedly condemned as illegitimate.

The plans are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain the asserted educational benefits. In Seattle, the district seeks white enrollment of between 31 and 51 percent (within 10 percent of "the district white average" of 41 percent), and nonwhite enrollment of between 49 and 69 percent (within 10 percent of "the district minority average" of 59 percent). In Jefferson County, by contrast, the district seeks black enrollment of no less than 15 or more than 50 percent, a range designed to be "equally above and below Black student enrollment systemwide," based on the objective of achieving at "all schools . . . an African-American enrollment equivalent to the average district-wide African-American enrollment" of 34 percent. In Seattle, then, the benefits of racial diversity require enrollment of at least 31 percent white students; in Jefferson County, at least 50 percent. There must be at least 15 percent nonwhite students under Jefferson County's plan; in Seattle, more than three times that figure. This comparison makes clear that the racial demographics in each district-whatever they happen to be—drive the required "diversity" numbers. The plans here are not tailored to achieving a degree of diversity necessary to realize the asserted educational benefits; instead the plans are tailored, in the words of Seattle's Manager of Enrollment Planning, Technical Support, and Demographics, to "the goal established by the school board of attaining a level of diversity within the schools that approximates the district's overall demographics."

The districts offer no evidence that the level of racial diversity necessary to achieve the asserted educational benefits happens to coincide with the racial demographics of the respective school districts—or rather the white/nonwhite or black/"other" balance of the districts, since that is the only diversity addressed by the plans. . . .

In fact, in each case the extreme measure of relying on race in assignments is unnecessary to achieve the stated goals, even as defined by the districts. . . .

In *Grutter,* the number of minority students the school sought to admit was an undefined "meaningful number" necessary to achieve a genuinely diverse student body. Although the matter was the subject of disagreement on the Court, the majority concluded that the law school did not count back from its applicant pool to arrive at the "meaningful number" it regarded as necessary to diversify its student body. Here the racial balance the districts seek is a defined range set solely by reference to the demographics of the respective school districts.

This working backward to achieve a particular type of racial balance, rather than working forward from some demonstration of the level of diversity that provides the purported benefits, is a fatal flaw under our existing precedent. We have many times over reaffirmed that "[r]acial balance is not to be achieved for its own sake." *Grutter* itself reiterated that "outright racial balancing" is "patently unconstitutional."

Accepting racial balancing as a compelling state interest would justify the imposition of racial proportionality

throughout American society, contrary to our repeated recognition that "[a]t the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat citizens as individuals, not as simply components of a racial, religious, sexual or national class." Allowing racial balancing as a compelling end in itself would "effectively assur[e] that race will always be relevant in American life, and that the 'ultimate goal' of 'eliminating entirely from governmental decisionmaking such irrelevant factors as a human being's race' will never be achieved." An interest "linked to nothing other than proportional representation of various races . . . would support indefinite use of racial classifications, employed first to obtain the appropriate mixture of racial views and then to ensure that the [program] continues to reflect that mixture."

The validity of our concern that racial balancing has "no logical stopping point" is demonstrated here by the degree to which the districts tie their racial guidelines to their demographics. As the districts' demographics shift, so too will their definition of racial diversity.

. . . .

The principle that racial balancing is not permitted is one of substance, not semantics. Racial balancing is not transformed from "patently unconstitutional" to a compelling state interest simply by relabeling it "racial diversity." While the school districts use various verbal formulations to describe the interest they seek to promote—racial diversity, avoidance of racial isolation, racial integration—they offer no definition of the interest that suggests it differs from racial balance.

. . . .

C

The districts assert, as they must, that the way in which they have employed individual racial classifications is necessary to achieve their stated ends. The minimal effect these classifications have on student assignments, however, suggests that other means would be effective.

. . . .

While we do not suggest that *greater* use of race would be preferable, the minimal impact of the districts' racial classifications on school enrollment casts doubt on the necessity of using racial classifications. In *Grutter,* the consideration of race was viewed as indispensable in more than tripling minority representation at the law school—from 4 to 14.5 percent. Here the most Jefferson County itself claims is that "because the guidelines provide a firm definition of the Board's goal of racially integrated schools, they 'provide administrators with the authority to facilitate, negotiate and collaborate with principals and staff to maintain schools within the 15–50% range.' " Classifying and assigning schoolchildren according to a binary conception of race is an extreme approach in light of our precedents and our Nation's history of using race in public schools, and requires more than such an amorphous end to justify it.

The districts have also failed to show that they considered methods other than explicit racial classifications to achieve their stated goals. Narrow tailoring requires "serious, good faith consideration of workable race-neutral alternatives," and yet in Seattle several alternative assignment plans—many of which would not have used express racial classifications—were rejected with little or no consideration. Jefferson County has failed to present any evidence that it considered alternatives, even though the district already claims that its goals are achieved primarily through means other than the racial classifications.

IV

Justice BREYER's dissent takes a different approach to these cases, one that fails to ground the result it would reach in law. Instead, it selectively relies on inapplicable precedent and even dicta while dismissing contrary holdings, alters and misapplies our well-established legal framework for assessing equal protection challenges to express racial classifications, and greatly exaggerates the consequences of today's decision.

To begin with, Justice BREYER seeks to justify the plans at issue under our precedents recognizing the compelling interest in remedying past intentional discrimination. Not even the school districts go this far, and for good reason. The distinction between segregation by state action and racial imbalance caused by other factors has been central to our jurisprudence in this area for generations. The dissent elides this distinction between *de jure* and *de facto* segregation, casually intimates that Seattle's school attendance patterns reflect illegal segregation and fails to credit the judicial determination—under the most rigorous standard—that Jefferson County had eliminated the vestiges of prior segregation. The dissent thus alters in fundamental ways not only the facts presented here but the established law.

Justice BREYER's reliance on *McDaniel v. Barresi,* highlights how far removed the discussion in the dissent is from the question actually presented in these cases. *McDaniel* concerned a Georgia school system that had been segregated by law. There was no doubt that the

county had operated a "dual school system," and no one questions that the obligation to disestablish a school system segregated by law can include race-conscious remedies—whether or not a court had issued an order to that effect. The present cases are before us, however, because the Seattle school district was never segregated by law, and the Jefferson County district has been found to be unitary, having eliminated the vestiges of its prior dual status. The justification for race-conscious remedies in *McDaniel* is therefore not applicable here. . . .

Justice BREYER's dissent next relies heavily on dicta from *Swann v. Charlotte-Mecklenburg Bd. of Ed.*—far more heavily than the school districts themselves. The dissent acknowledges that the two-sentence discussion in *Swann* was pure dicta, *post,* at 2811–2812, but nonetheless asserts that it demonstrates a "basic principle of constitutional law" that provides "authoritative legal guidance." Initially, as the Court explained just last Term, "we are not bound to follow our dicta in a prior case in which the point now at issue was not fully debated." That is particularly true given that, when *Swann* was decided, this Court had not yet confirmed that strict scrutiny applies to racial classifications like those before us. There is nothing "technical" or "theoretical," *post,* at 2816, about our approach to such dicta.

Justice BREYER would not only put such extraordinary weight on admitted dicta, but relies on the statement for something it does not remotely say. *Swann* addresses only a possible state objective; it says nothing of the permissible *means*—race conscious or otherwise—that a school district might employ to achieve that objective. The reason for this omission is clear enough, since the case did not involve any voluntary means adopted by a school district. The dissent's characterization of *Swann* as recognizing that "the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals" is—at best—a dubious inference. Even if the dicta from *Swann* were entitled to the weight the dissent would give it, and no dicta is, it not only did not address the question presented in *Swann,* it also does not address the question presented in these cases—whether the school districts' use of racial classifications to achieve their stated goals is permissible.

. . . .

Justice BREYER's dissent also asserts that these cases are controlled by *Grutter,* claiming that the existence of a compelling interest in these cases "follows *a fortiori*" from *Grutter* and accusing us of tacitly overruling that case. The dissent overreads *Grutter,* however, in suggesting that it renders pure racial balancing a constitutionally compelling interest; *Grutter* itself recognized that using race simply to achieve racial balance would be "patently unconstitutional." The Court was exceedingly careful in describing the interest furthered in *Grutter* as "not an interest in simple ethnic diversity" but rather a "far broader array of qualifications and characteristics" in which race was but a single element. We take the *Grutter* Court at its word. We simply do not understand how Justice BREYER can maintain that classifying every schoolchild as black or white, and using that classification as a determinative factor in assigning children to achieve pure racial balance, can be regarded as "less burdensome, and hence more narrowly tailored" than the consideration of race in *Grutter* when the Court in *Grutter* stated that "[t]he importance of . . . individualized consideration" in the program was "paramount," and consideration of race was one factor in a "highly individualized, holistic review." Certainly if the constitutionality of the stark use of race in these cases were as established as the dissent would have it, there would have been no need for the extensive analysis undertaken in *Grutter*. In light of the foregoing, Justice BREYER's appeal to *stare decisis* rings particularly hollow.

At the same time it relies on inapplicable desegregation cases, misstatements of admitted dicta, and other noncontrolling pronouncements, Justice BREYER's dissent candidly dismisses the significance of this Court's repeated *holdings* that all racial classifications must be reviewed under strict scrutiny, arguing that a different standard of review should be applied because the districts use race for beneficent rather than malicious purposes.

This Court has recently reiterated, however, that "all racial classifications [imposed by government] . . . must be analyzed by a reviewing court under strict scrutiny." Justice BREYER nonetheless relies on the good intentions and motives of the school districts, stating that he has found "no case that . . . repudiated this constitutional asymmetry between that which seeks to exclude and that which seeks to include members of minority races." We have found many. Our cases clearly reject the argument that motives affect the strict scrutiny analysis.

This argument that different rules should govern racial classifications designed to include rather than exclude is not new; it has been repeatedly pressed in the past and has been repeatedly rejected.

The reasons for rejecting a motives test for racial classifications are clear enough. "The Court's emphasis on 'benign racial classifications' suggests confidence in its ability to distinguish good from harmful governmental uses of racial criteria. History should teach greater

humility. . . . '[B]enign' carries with it no independent meaning, but reflects only acceptance of the current generation's conclusion that a politically acceptable burden, imposed on particular citizens on the basis of race, is reasonable." . . .

Justice BREYER speaks of bringing "the races" together (putting aside the purely black-and-white nature of the plans), as the justification for excluding individuals on the basis of their race). Again, this approach to racial classifications is fundamentally at odds with our precedent, which makes clear that the Equal Protection Clause "protect[s] *persons,* not *groups*." This fundamental principle goes back, in this context, to *Brown* itself. For the dissent, in contrast, " 'individualized scrutiny' is simply beside the point."

Justice BREYER's position comes down to a familiar claim: The end justifies the means. He admits that "there is a cost in applying 'a state-mandated racial label,'" but he is confident that the cost is worth paying. Our established strict scrutiny test for racial classifications, however, insists on "detailed examination, both as to ends and as to means." Simply because the school districts may seek a worthy goal does not mean they are free to discriminate on the basis of race to achieve it, or that their racial classifications should be subject to less exacting scrutiny.

Despite his argument that these cases should be evaluated under a "standard of review that is not 'strict' in the traditional sense of that word," Justice BREYER still purports to apply strict scrutiny to these cases. It is evident, however, that Justice BREYER's brand of narrow tailoring is quite unlike anything found in our precedents. Without any detailed discussion of the operation of the plans, the students who are affected, or the districts' failure to consider race-neutral alternatives, the dissent concludes that the districts have shown that these racial classifications are necessary to achieve the districts' stated goals. This conclusion is divorced from any evaluation of the actual impact of the plans at issue in these cases—other than to note that the plans "often have no effect." Instead, the dissent suggests that some combination of the development of these plans over time, the difficulty of the endeavor, and the good faith of the districts suffices to demonstrate that these stark and controlling racial classifications are constitutional. The Constitution and our precedents require more.

In keeping with his view that strict scrutiny should not apply, Justice BREYER repeatedly urges deference to local school boards on these issues. Such deference "is fundamentally at odds with our equal protection jurisprudence. We put the burden on state actors to demonstrate that their race-based policies are justified."

Justice BREYER's dissent ends on an unjustified note of alarm. It predicts that today's decision "threaten[s]" the validity of "[h]undreds of state and federal statutes and regulations." But the examples the dissent mentions-for example, a provision of the No Child Left Behind Act that requires States to set measurable objectives to track the achievement of students from major racial and ethnic groups—have nothing to do with the pertinent issues in these cases.

Justice BREYER also suggests that other means for achieving greater racial diversity in schools are necessarily unconstitutional if the racial classifications at issue in these cases cannot survive strict scrutiny. These other means—*e.g.,* where to construct new schools, how to allocate resources among schools, and which academic offerings to provide to attract students to certain schools—implicate different considerations than the explicit racial classifications at issue in these cases, and we express no opinion on their validity—not even in dicta. Rather, we employ the familiar and well-established analytic approach of strict scrutiny to evaluate the plans at issue today, an approach that in no way warrants the dissent's cataclysmic concerns. Under that approach, the school districts have not carried their burden of showing that the ends they seek justify the particular extreme means they have chosen—classifying individual students on the basis of their race and discriminating among them on that basis.

. . . .

If the need for the racial classifications embraced by the school districts is unclear, even on the districts' own terms, the costs are undeniable. "[D]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." Government action dividing us by race is inherently suspect because such classifications promote "notions of racial inferiority and lead to a politics of racial hostility," "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin" and "endorse race-based reasoning and the conception of a Nation divided into racial blocs, thus contributing to an escalation of racial hostility and conflict." As the Court explained in *Rice v. Cayetano,* "[o]ne of the principal reasons race is treated as a forbidden classification is that it demeans the dignity and worth of a person to be judged by ancestry instead of by his or her own merit and essential qualities."

All this is true enough in the contexts in which these statements were made—government contracting, voting districts, allocation of broadcast licenses, and electing state officers—but when it comes to using race to assign children to schools, history will be heard. In *Brown v. Board of Education* (*Brown I*), we held that segregation deprived black children of equal educational opportunities regardless of whether school facilities and other tangible factors were equal, because government classification and separation on grounds of race themselves denoted inferiority. It was not the inequality of the facilities but the fact of legally separating children on the basis of race on which the Court relied to find a constitutional violation in 1954. The next term, we accordingly stated that "full compliance" with *Brown I* required school districts "to achieve a system of determining admission to the public schools on a nonracial basis."

The parties and their *amici* debate which side is more faithful to the heritage of *Brown,* but the position of the plaintiffs in *Brown* was spelled out in their brief and could not have been clearer: "[T]he Fourteenth Amendment prevents states from according differential treatment to American children on the basis of their color or race." What do the racial classifications at issue here do, if not accord differential treatment on the basis of race? As counsel who appeared before this Court for the plaintiffs in *Brown* put it: "We have one fundamental contention which we will seek to develop in the course of this argument, and that contention is that no State has any authority under the equal-protection clause of the Fourteenth Amendment to use race as a factor in affording educational opportunities among its citizens." There is no ambiguity in that statement. And it was that position that prevailed in this Court, which emphasized in its remedial opinion that what was "[a]t stake is the personal interest of the plaintiffs in admission to public schools as soon as practicable on a nondiscriminatory basis," and what was required was "determining admission to the public schools on a nonracial basis." What do the racial classifications do in these cases, if not determine admission to a public school on a racial basis?

Before *Brown,* schoolchildren were told where they could and could not go to school based on the color of their skin. The school districts in these cases have not carried the heavy burden of demonstrating that we should allow this once again—even for very different reasons. For schools that never segregated on the basis of race, such as Seattle, or that have removed the vestiges of past segregation, such as Jefferson County, the way "to achieve a system of determining admission to the public schools on a nonracial basis" is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.

The judgments of the Courts of Appeals for the Sixth and Ninth Circuits are reversed, and the cases are remanded for further proceedings.

It is so ordered.

Citation: *Parents Involved in Community Schools v. Seattle School District No. 1*, 426 F.3d 1162 (9th Cir. 2005), 127 S. Ct. 2738 (2007).

Parent Teacher Associations/Organizations

Organizations that connect parents with the schools their children attend provide a vital link with teachers and other personnel who have a shared interest in their children. Through these groups, parents get a voice in the daily activities of schools and their administration. In turn, parents become valuable allies for teachers, educational leaders, and their schools, serving a variety of functions, among them classroom volunteers, community contacts, political allies, and fundraisers. Those groups that call themselves Parent Teacher Associations (PTAs) have a long shared history and a network of local, regional, and national organizations. Parent teacher organizations (PTOs) are more informal and localized groups, but they have the same composition and goals. This entry looks at both kinds of parent and teacher linkages.

PTAs and PTOs

In 1897, Alice McLellan Birney and Phoebe Apperson Hearst founded an organization whose challenge was to better the lives of children. Originally known as the National Congress of Mothers, it later became the National Parent Teacher Association (PTA). The creation of the organization occurred when social activism was unacceptable, and women did not possess the right to vote. The founders believed it was time for mothers across this country to help eliminate

the threats endangering children. The national PTA has a long history of support to students and their communities. The national PTA's history of hard work advocating for children includes the creation of kindergarten classes, child labor laws, a public health system, and mandatory immunizations.

Parent-teacher groups provide educators with participants from the surrounding community. Although membership is voluntary and typically requires a small monetary membership fee, the ability to generate support for school initiatives is invaluable to educators. Another area of importance is the ability of these groups to generate funds to support the school or district. These funds do not have the same legal implications that state, federal, or local monies provided to schools and districts have. Ethical considerations are the primary principles that drive the appropriate use of these funds by educators.

The PTA is an organization composed of parents, teachers, and administrators, and it may also include community representatives, working together to promote student achievement and success. The PTA has several levels of organization. The basic level begins at the local school or school district PTA, followed by the state PTA, and finally the national PTA. All organizations using the PTA acronym are affiliated with the state and national PTAs. Membership in the PTA is open to anyone. If individuals join local PTAs, they are also made members of the state and national PTAs. Individuals are free to join as many local or state PTAs as they desire.

Those parent teacher organizations not affiliated with the state or national PTAs are referred to generically as PTOs, which are individual organizations usually affiliated with only one school or school district.

Functions of PTAs and PTOs

The two different types (PTA and PTO) function on a daily basis in very similar ways. Both are advocates for children and pursue remedies that will enable all school-aged children the opportunity to learn in a safe environment. Both organizations operate under bylaws. The PTO usually is created and agrees to operate based on local requirements. The PTA also creates bylaws at the local level, but it must also comply with state and national bylaws.

PTAs and PTOs also serve as fundraising organizations to improve the school environment. PTA and PTO members are volunteers interested in supporting their school and helping to improve the school, which will help students. There is a multitude of areas in which members help the school on a daily basis. Members volunteer in classrooms, assist on playgrounds, help in libraries, and act as chaperones on field trips or at school functions such as dances. Members provide schools with support as adults supervising student activities when an inadequate number of teachers are available. This support is provided as volunteer work, which saves the school district money. These examples are just a few of the many ways PTAs and PTOs help the school or district to improve the learning environment.

PTAs and PTOs function as civic organizations whose goal is to improve local schools and districts. Parent and teacher involvement are key for community understanding of the vision and mission of the school and district. Open communication among administrators, the board of education, school/district staff, and parent-teacher groups adds immeasurably to the success of the school's and district's goals. An active parent-teacher group can become a powerful advocate for the school/district in the community.

Besides the civic aspects of these two types of organizations, there is another function that is political. PTOs influence local politics, because most members are eligible to vote in local elections. These include elections for school board members, city officials, county representatives, state representatives, and national representatives. Because a PTO has no national affiliation, and each is independent of all others, the ability to generate political pressure at the state and national levels is limited. PTAs, on the other hand, have state and national affiliations that provide a broad base of political influence. The national PTA can lobby for legislation that affects all states, while the state PTAs can lobby for state legislation affecting schools and school districts. Local PTAs can influence politics in a fashion similar to that of local PTOs, but they also have the advantage of state and national recognition and presence to advocate for changes at all levels.

PTAs and PTOs provide educators with an avenue for two-way communication with their surrounding communities. This can prove to be an essential element for schools and districts when changes are needed to improve student performance or in response to state or federal agency mandated legislation. The PTAs and PTOs can be used as sounding boards or resources for ideas to meet new legislative demands. Community support is essential to the success of a school or district. PTAs and PTOs provide a useful mechanism to garner that support from within communities.

Michael J. Jernigan

See also Kindergarten, Right to Attend; Parental Rights

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Pasadena City Board of Education v. Spangler

At issue in *Pasadena City Board of Education v. Spangler* (1976) was the validity of a court order that would have required a school board to engage in the annual rearrangement of school attendance zones in order to ensure a specified racial mix of students in schools. In *Spangler,* by finding that it was unnecessary for a board to make such an arrangement, the Court continued its retreat from support for efforts to desegregate schools.

Facts of the Case

Spangler began in 1968, when students and their parents sought to enjoin the alleged unconstitutional segregation of the high schools in Pasadena, California. A federal trial court held that the school board's educational policies violated the Fourteenth Amendment. In addition, the court ordered the board to adopt a plan for desegregating the schools by the 1970–1971 school year. The court indicated that the plan had to be designed to assure that there would be no school with a majority enrollment of minority students. Subsequently, the court approved the plan.

In 1974, the school board sought to modify the 1970 order by filing a motion to eliminate the "no majority of a minority" requirement insofar as it was ambiguous. In addition, the board wanted to dissolve the injunction and terminate the court's jurisdiction over the plan. However, the only year in which the board was in total compliance with the desegregation plan was in its first year of operation. The trial court denied the board's motion because of its failure to comply with the plan, because a number of schools did not meet the "no majority of a minority" requirement. The court explained that no majority of any minority requirement was a continual inflexible requirement that was to be applied each year even though subsequent changes in the racial mix of the schools may have been caused by other factors outside of the school's responsibility. When the board appealed, the Ninth Circuit upheld the desegregation plan.

The Court's Ruling

On further review, the Supreme Court vacated and remanded *Spangler* in favor of the board for further proceedings. The justices held that the plan established a racially neutral system of student assignment and that the trial court exceeded its authority in enforcing the order that required annual readjustment of attendance zones so that a majority of minority students would not be in any school. As part of its analysis, the justices were of the opinion that the trial court erred in interpreting *Swann v. Charlotte-Mecklenburg Board of Education* (1971) as seemingly creating a constitutional right to a specified degree of racial balance or mixing in schools. The Court thus

relied on *Swann* in maintaining that there are limits beyond which courts may not go in dismantling dual school systems. According to the Court, absent a constitutional violation, there was no basis for a court to order assignments on a racial basis.

At the same time, the Supreme Court ruled that the plan that the trial court approved did achieve the objective of creating a system of assignments to public schools on a nonracial basis. The Court also reviewed the trial court's record that rejected the school board's argument that the changes in the racial mix of schools were due to White flight. To this end, the Court found that shifts in racial demographics were due to people randomly moving in and out of the area, not to any actions of the school board. This led the Court to stress that once the board met its affirmative duty to desegregate and once racial discrimination was eliminated, there was no need to make year-to-year adjustments. Rounding out its analysis, the Court remanded for further proceedings to determine whether the school board had achieved a unitary system with respect to all aspects of the desegregation plan.

Spangler is notable because it was the first desegregation case to arise in California, which, unlike the South, did not have a history of dual systems of education. In pointing out that once a school system achieves unitary status it is no longer obligated to adjust boundaries, the Supreme Court signaled its continued retreat from strong enforcement of desegregation. The Court concluded that because officials must achieve a racial balance in the schools only once, the obligation to desegregate may be terminated when they have met this goal.

Deborah Curry

See also *Brown v. Board of Education of Topeka;* Fourteenth Amendment; Segregation, De Facto; *Swann v. Charlotte-Mecklenburg Board of Education*

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Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania

Two cases, *Mills v. Board of Education of District of Columbia* (1972) and *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania* (*PARC,* 1971, 1972), were major elements in helping to lay the foundation for the 1975 enactment of the Education for All Handicapped Children Act, now known as the Individuals with Disabilities Education Act (IDEA). Prior to that time, millions of students with disabilities were either excluded from public education totally or were admitted but did not receive appropriate services. While only heard at the federal trial court level, the decisions in *Mills* and *PARC* are truly landmark cases in the evolution of federal special education law.

Facts of the Case

PARC was a class action suit filed on behalf of 13 children with cognitive disabilities, each residing in a different Pennsylvania school system. At the time, Pennsylvania had a statute in effect that specifically allowed school boards to exclude any children that school psychologists deemed to be either "uneducable" or "untrainable" under the terminology used to identify children with disabilities. These exclusions could have occurred when the parents sought to enroll their children in schools or at some time after admittance, whenever school psychologists determined the students failed to meet acceptable educational criteria.

Any child so designated became the responsibility of the Department of Welfare, even though that agency did not provide any educational services. The plaintiffs filed suit, arguing that this practice violated the students' rights under both the Due Process and Equal Protection clauses of the Fourteenth Amendment.

The Court's Ruling

The federal trial court that heard the claim found merit in both of the plaintiffs' arguments. As to the Due Process claim, the court ruled that children could not be denied their right to an education without some sort of process. One aspect that the court pointed out as particularly troubling was the stigmatizing effect of the Pennsylvania statute. To this end, the court cited empirical studies that demonstrated the negative effects of the label and documented that 25% of the students were erroneously labeled, while another large group had questionable diagnoses.

Turning to the Equal Protection allegation, the court reasoned that there were "serious doubts" as to the rational basis to support the exclusion of this broad class of children from the educational benefits provided by the commonwealth. The court was of the opinion that the plaintiffs had presented a colorable claim under the Equal Protection Clause.

As a result of the court's analysis in *PARC,* it approved a detailed consent agreement between the parties. The consent agreement outlined remedies that, in essence, required Pennsylvania and its school systems to create means to identify children with disabilities in the commonwealth, a system of special education services to meet their educational needs, and a way for parents to participate in decision making and have any disputes with school districts settled by an impartial third party. *PARC* stands out as significant insofar as numerous provisions in today's IDEA can trace their origins to the settlement agreement that the parties reached in their consent decrees.

Julie F. Mead

See also Disabled Persons, Rights of; Equal Protection Analysis; Fourteenth Amendment; *Mills v. Board of Education of the District of Columbia*

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Perry Education Association v. Perry Local Educators' Association

After an election in which the Perry Education Association (PEA) was selected as the bargaining agent for public school teachers in Perry Township, Indiana, the school board denied the rival union and election loser, the Perry Local Educators' Association (PLEA), access to the district's mail system. PLEA argued that this action violated the organization's rights under the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. Ultimately, the U.S. Supreme Court held that the union did not have such a right.

Facts of the Case

In 1977, public school teachers in the Metropolitan School District of Perry Township, Indiana, elected the PEA as their exclusive representative for bargaining with their local school board. Prior to the election, the teachers were represented by PEA or by a rival union, PLEA, and both unions used the school mailboxes and interschool mail system to communicate with their respective members. However, after the election, the PLEA had no official status with the teachers or the school board. Consequently, the 1978 collective bargaining agreement with the board provided that the PEA, but no other union, would have access to the interschool mail system.

After its exclusion from school mail facilities, PLEA and two of its members filed suit in a federal

trial court, contending that the PEA's exclusive access violated their constitutional rights, because the mail facilities had been opened to the YMCA, Cub Scouts, other civic organizations, and parochial schools in the past. Therefore, the PLEA argued that because the mail facilities had become a limited public forum for expression, the school board could not arbitrarily exclude it from participation.

The trial court denied the PLEA's claim in granting motions for summary judgment on behalf of the PEA and board. According to the court, the mail system was not a public forum merely because it had accommodated outside groups periodically or because PLEA had equal access prior to PEA's certification as the sole bargaining agent for the teachers. PLEA appealed, and the Seventh Circuit reversed in its favor. The court held that once the board opened its mail system to PEA but denied access to PLEA, it violated both the First and Fourteenth Amendments.

The Court's Ruling

On further review, the U.S. Supreme Court ruled that the school board could deny PLEA access to its mail facilities. In the first place, the Court explained that the board had the authority to decide how its facilities would be used, and by whom, in accomplishing school objectives. The Court was of the opinion that because the mail facilities were not a limited public forum, the board could deny access to any and all outside groups if it chose to do so.

The Court pointed out that because the PLEA was no longer authorized to represent teachers in the district, it had no official relationship with teachers or the board. Therefore, the Court maintained that the PLEA could not claim that access to the mail system was necessary for it to carry out legal and contractual responsibilities to its membership or the school board. Insofar as the exclusive access policy applied only to use of the mail system, the Court reasoned, the PLEA was not prevented from using other school facilities to communicate with teachers. For example, the Court noted that the PLEA could post notices on bulletin boards, conduct meetings on school property after regular school hours, and with approval of the building principals, make announcements on the public address system. Moreover, the Court acknowledged that, of course, the PLEA could always communicate with teachers by telephone, U.S. mail, or word of mouth.

The Court also observed that the exclusive access extended to the PEA was consistent with the board's interest in reserving school property for its intended purpose. More specifically, the Court recognized that the use of the mail system enabled the PEA to carry out its legal obligations in representing classroom teachers. Under Indiana law, the Court reasoned that the PLEA was guaranteed equal access to all modes of communication when a union representation election was in progress. Therefore, the Court decided that it would have equal opportunity to inform potential members about its aims and services prior to elections. In the meantime, the Court interpreted the board's exclusion of the defeated PLEA was a reasonable means of ensuring labor peace within the district. To the Court, the board's excluding the PLEA significantly reduced the possibility that the Metropolitan School District would become "a battlefield for inter-union squabbles."

In sum, the Supreme Court ruled that PEA's exclusive access to school mail facilities was permissible and essential. Under law, the Court determined that the PEA was responsible for negotiating and administering a collective bargaining agreement and representing classroom teachers in settling disputes and processing grievances. To this end, the Court conceded that having access to the mail system made it easier for PEA officials to carry out those difficult tasks efficiently and effectively, thereby advancing an important state function. Consequently, the Court concluded that the preferential access granted to PEA did not violate the constitutional rights of PLEA.

Robert C. Cloud

See also *Abood v. Detroit Board of Education;* Collective Bargaining; Equal Protection Analysis; Fourteenth Amendment; School Boards; Unions

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Perry v. Sindermann

At issue in *Perry v. Sindermann* (1972) was whether a college faculty member's lack of a contractual or tenure right to re-employment, taken alone, defeats his claim that the nonrenewal of his contract violated the First and Fourteenth Amendments. The U.S Supreme Court held in *Perry* that it did not. Although a government employer may choose not to renew a contract for any number of reasons, it may not deny a contract extension to a faculty member on a basis that infringes on his constitutional rights, particularly the rights to freedom of speech and association, the court ruled.

Tenured faculty members in colleges and universities, in a manner similar to their colleagues in elementary and secondary schools, have property interests in continued employment, and they are entitled to due process prior to termination. Nontenured faculty members usually receive one-year contracts that, if renewable, must be renewed every year. Additionally, unless employer policy or state law hold otherwise, faculty members working under such contracts are not entitled to due process if their contracts are not extended, because they have no property interests in continued employment. However, due process may be required if nontenured faculty members can demonstrate that they had a liberty interest in employment and that the nonrenewal of their contracts was based on constitutionally impermissible reasons.

Facts of the Case

Robert Sindermann, a nontenured teacher at Odessa (Texas) Junior College (OJC) and the respondent in this case, served in four different public institutions in Texas over 10 years, the last 4 at OJC. During the 1968–1969 academic year, Sindermann served as president of the Texas Junior College Teachers Association (TJCTA) and was frequently in Austin, the state capital, representing the association before the Texas legislature. On more than one occasion, he disagreed publicly with policies of the OJC Board of Regents. At the time, OJC had no formal faculty tenure system. All faculty members, including Sindermann, received one-year contracts, even though the following statement had been in the faculty handbook for many years:

> Teacher Tenure: Odessa College has no tenure system. The Administration of the College wishes the faculty member to feel that he has *permanent tenure* as long as his teaching services are satisfactory and as long as he displays a cooperative attitude toward his coworkers and his superiors, and as long as he is happy in his work. (*emphasis added*)

In May 1969, the OJC Board of Regents voted not to renew Sindermann's contract for the 1969–1970 academic year. The board released a statement alleging insubordination by Sindermann, but he was not given a hearing to respond to the charge. Sindermann filed suit in a federal trial court in Texas, contending that his contract was not renewed because of his public criticism of the OJC board and that he was entitled to a hearing. Sindermann argued that the board's action violated his First and Fourteenth Amendment rights. The board countered that Sindermann was not entitled to a hearing, because his contract had expired, and he had no property interest in continued employment. Subsequently, the trial court granted the board's motion for summary judgment, concluding that Sindermann had no expectancy of continued employment, because his contract had, in fact, expired.

The Fifth Circuit reversed in favor of Sindermann, maintaining that he might have been able to show an expectancy of continued employment if he had received a hearing. Petitioners appealed, and the Supreme Court granted certiorari.

The Court's Ruling

The Supreme Court announced its decision in *Perry v. Sindermann* on June 29, 1972. First, the Court could not determine whether Sindermann's speech was the sole reason for nonrenewal, and it did not find for either petitioners or respondent. Second, the Court

decided that Sindermann had First Amendment rights regardless of his employment status. Therefore, as far as the Court was concerned, Sindermann's lack of tenure status was immaterial to his free speech claim. The Court agreed that it was impossible to determine whether Sindermann's free speech rights were violated without a hearing. Third, the Court concluded that Sindermann had a right to due process based on the de facto tenure system that was referenced (albeit unintentionally) in the faculty handbook statement. Finally, the Court reasoned that Sindermann had a right to prove the legitimacy of his free speech and due process claims in a hearing. Consequently, the Supreme Court affirmed the judgment of the Fifth Circuit and remanded the case back to the trial court for review.

Legal implications from the *Perry* decision include the following. First, a due process hearing is required on contract nonrenewal if a teacher whose contract is not renewed can demonstrate property or liberty interests. Second, both tenured and nontenured faculty may have due process rights within the terms of a contract. However, when term contracts expire, nontenured teachers have no due process rights, unless they can demonstrate an expectancy of continued employment. Third, a de facto tenure system can lead to an expectancy of continued employment. Consequently, contract terms and policies must be carefully written according to legal guidelines and reviewed regularly by college counsel. Fourth, because faculty members whose contracts are terminated often claim that their constitutional rights were violated, officials should conduct hearings to ensure that due process is extended to all faculty regardless of employment status.

Robert C. Cloud

See also Due Process; Fourteenth Amendment; School Board Policy; Teacher Rights; Tenure

Legal Citations

Board of Regents v. Roth, 408 U.S. 504 (1972).
Keyishian v. Board of Regents, 385 U.S. 589 (1967).
Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).
Shelton v. Tucker, 364 U.S. 479 (1960).

Personnel Records

Organizations that employ individuals routinely create and need to maintain records concerning their employees. Some records are kept because the law requires that they be kept. Other records are maintained because of employment policy mandates.

Accurate personnel records provide the employer with information that it needs to make good decisions. Personnel records help management determine whether staff resources may be available to meet work requirements and how staff are doing in regard to organizational goals; they also provide a readily available record to assess levels of performance and productivity. Accurate personnel records also help to ensure that employees receive their correct pay and pension contributions as well as other benefits. They help to monitor and promote consistency in regard to employee development, including promotion, discipline, and discharge.

Some records are maintained because state and/or federal law require that they be so maintained. Employers must maintain records to document compliance with state and federal laws prohibiting employment discrimination, for example. Compliance with state and federal tax laws requires employers to maintain records for each employee documenting wages, hours, withholding, and deductions. Similar recordkeeping is important in documenting compliance with the Family and Medical Leave Act, the Fair Labor Standards Act, and similar employment regulations. Maintaining these records allows the employer to monitor compliance with regulatory requirements.

Other records are maintained as a matter of employment policy. Personnel records help employers implement and monitor personnel actions from time of hire to separation. Records concerning attendance, job evaluation, discipline, and professional development fall into these categories.

Many states have laws that regulate personnel files and/or personnel records. The laws generally guarantee access to personnel files by the employee and provide that the records are confidential; that is, they are not subject to review by unauthorized persons. Laws generally give an employee an opportunity to access his or her own personnel file on a periodic basis. An

employee also generally has the right to authorize another person, like an attorney or union representative, to access the records. Many states provide an employee the opportunity to ask that personnel records be modified or removed if the employee believes that the record is not accurate. If the employer agrees with the employee, the record is modified or removed. If not, some states may allow an employee the opportunity to attach a written statement to the record in dispute.

Not all records maintained by an employer concerning its employees are open to inspection. Laws commonly exempt some records from disclosure. Common exemptions are letters of reference from when the employee was hired, information concerning criminal investigations, and other documents that the employer may be using for staff management purposes.

Most employers provide employees with a copy of the documents contained within their personnel files. For example, discipline or evaluation documents are commonly given to employees at the same time as they are put in a personnel file. Providing an employee with these types of documents avoids claims of surprise in the future and will provide an employee with a reasonable opportunity to improve performance.

Personnel records should be maintained as confidential. Records should be kept in a locked file, and access restricted pursuant to the requirements of law and/or policy. Medical records concerning an employee are frequently collected as part of the employer/employee relationship. Special guidelines may apply to such medical information. The Americans with Disabilities Act (ADA) offers strict rules for handling medical information obtained through postoffer medical examinations. Employers covered by the ADA are required to keep such records confidential and separate from other personnel records. Access to this information is restricted to human resource professionals and, in appropriate cases, the employee's supervisor, if needed for an accommodation due to a disability or as otherwise authorized by law.

The Health Insurance Portability and Accountability Act (HIPAA) also imposes confidentiality obligations on many employers who purchase group health plans. State laws may also have special provisions for exempting medical information.

Jon E. Anderson

See also Americans with Disabilities Act; Title VII

Legal Citations

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*

Health Insurance Portability and Accountability Act, codified in part at 29 U.S.C. §§ 1181 *et seq.*; 42 U.S.C. §§ 200gg (various); 42 U.S.C. §§ 1320d, 1320d 1–8; 26 U.S.C. §§ 9801 *et seq.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*

Pickering v. Board of Education of Township High School District 205, Will County

At issue in *Pickering v. Board of Education of Township High School District 205, Will County* (1968) was whether a school board's dismissal of a public school teacher for expressing his opinion about actions taken by the board and its administration violated his First Amendment rights to free speech. In *Pickering,* the U.S. Supreme Court ruled that "absent proof of false statements knowingly or recklessly made" (p. 574), a teacher's statements on public issues can't be used as grounds for dismissal in public schools. According to the Court, teachers are entitled to speak as citizens on matters of public interest, including controversial issues in their own school districts, and their comments on those issues may not be the reason for dismissals even when they are critical of school board officials.

Facts of the Case

The school board at Township High School District No. 205, Will County, Illinois, fired Marvin Pickering for sending a letter to the local newspaper that criticized its fiscal policies and actions of the superintendent. The letter included false statements allegedly damaging the reputations of school officials. Pursuant to Illinois law, the board granted Pickering a hearing at which he could challenge his dismissal.

At the hearing, officials asserted that his statements "would foment controversy, conflict, and dissension

among teachers, administrators, board members, and residents in the district" (p. 570). Finding that Pickering's statements were detrimental to the efficient operation of the schools, the board decided that he should be dismissed. Subsequently, Illinois courts upheld Pickering's dismissal. In response to Pickering's appeal, the Supreme Court granted certiorari and heard his case on March 27, 1968.

The Court's Ruling

In reversing the orders of the state courts, the Supreme Court emphasized that speech relating to matters of public concern is constitutionally protected, holding that the fiscal and policy issues that Pickering raised were clearly of significant public interest. Further, the Court reasoned that because Pickering's comments did not jeopardize his relationships with immediate supervisors and coworkers, they were not likely to cause disharmony in the workplace. Insofar as Pickering did not work closely with the board and superintendent, the Court maintained that it was fallacious to argue that he could not have expressed a dissenting opinion about school operations out of personal loyalty to the system. To the Supreme Court, Pickering's statements were more likely to foster healthy debate on public matters than they were to "foment controversy, conflict, and dissension among [constituents] in the district" (p. 570).

The Supreme Court found no evidence that Pickering's letter damaged the reputations of officials or caused controversy and conflict in the schools as the board claimed. As a matter of fact, the Court pointed out that the record reflected that "Pickering's letter was greeted with apathy and disbelief by everyone except the Board and administration who were the main targets of the letter" (p. 570). While conceding that Pickering's letter did include several false statements, such as his accusation about excessive athletic spending, the Court noted that the school board could easily have rebutted his inaccurate remarks by publishing the facts available to them in school records. The Court acknowledged that Pickering had made erroneous statements but held that this did not interfere with his work as a teacher or cause disruption in the school.

The Court was of the view that whether true or false, Pickering's statements merited public attention. He spoke as a citizen on matters of public concern, namely school funding, the wise use of limited financial resources, and the competence of school officials. The Court recognized that Pickering's statements did not compromise his performance of assigned duties and did not disrupt the efficient operation of the schools or cause controversy in the community. To the contrary, the Court was convinced that Pickering's statements focused needed attention on matters of legitimate concern to the public. Consequently, the Court concluded that the school board had insufficient reason to limit his speech or fire him. As the Supreme Court wrote in summarizing its analysis,

> Free and open debate is vital to informed decision-making by the electorate. Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak freely on such questions without fear of retaliatory dismissal. (pp. 571–572)

While endorsing Pickering's right to speak as a citizen on matters of public concern, the Court acknowledged the right of schools and other government employers to supervise employees properly and provide public services efficiently. As such, First Amendment jurisprudence since 1968 has sought a delicate balance between the free speech rights of public employees such as teachers and the interests of public employers such as school boards in efficient operations. In an effort to locate and maintain a delicate balance, the Supreme Court articulated its now famous *Pickering* balancing test:

> It cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. (p. 568)

In the years following *Pickering,* federal courts have sought a proper balance between the right of public employees to speak as citizens on public issues with the equally legitimate right of public employers to deliver services efficiently and effectively. Maintaining the balance is not easy, and the search continues.

Robert C. Cloud

See also *Connick v. Myers;* School Board Policy; Teacher Rights

Legal Citations

Connick v. Myers, 461 U.S. 138 (1983).
Garcetti v. Ceballos, 547 U.S. 410 (2006).
Keyishian v. Board of Regents, 385 U.S. 589 (1967).
Kinsey v. Salado Independent School District, 950 F.2d 988, 661 (5th Cir. 1992) *en banc, vacating* 916 F.2d 273 (5th Cir. 1990).
Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).
Shelton v. Tucker, 364 U.S. 479 (1960).
Wieman v. Updegraff, 344 U.S. 183 (1952).

Pickering v. Board of Education of Township High School District 205, Will County (Excerpts)

In Pickering v. Board of Education of Township High School District 205, Will County, *the Supreme Court reasoned that public school teachers have the right to speak out on matters of public concern, even if it involved their school boards.*

Supreme Court of the United States

PICKERING

v.

BOARD OF EDUCATION OF TOWNSHIP HIGH SCHOOL DISTRICT 205, WILL COUNTY, ILLINOIS.

391 U.S. 563

Argued March 27, 1968.

Decided June 3, 1968.

Mr. Justice MARSHALL delivered the opinion of the Court.

Appellant Marvin L. Pickering, a teacher in Township High School District 205, Will County, Illinois, was dismissed from his position by the appellee Board of Education for sending a letter to a local newspaper in connection with a recently proposed tax increase that was critical of the way in which the Board and the district superintendent of schools had handled past proposals to raise new revenue for the schools. Appellant's dismissal resulted from a determination by the Board, after a full hearing, that the publication of the letter was 'detrimental to the efficient operation and administration of the schools of the district' and hence, under the relevant Illinois statute that 'interests of the schools require(d) (his dismissal).'

Appellant's claim that his writing of the letter was protected by the First and Fourteenth Amendments was rejected. Appellant then sought review of the Board's action in the Circuit Court of Will County, which affirmed his dismissal on the ground that the determination that appellant's letter was detrimental to the interests of the school system was supported by substantial evidence and that the interests of the schools overruled appellant's First Amendment rights. On appeal, the Supreme Court of Illinois, two Justices dissenting, affirmed the judgment of the Circuit Court. We noted probable jurisdiction of appellant's claim that the Illinois statute permitting his dismissal on the facts of this case was unconstitutional as applied under the First and Fourteenth Amendments. For the reasons detailed below we agree that appellant's rights to freedom of speech were violated and we reverse.

I

In February of 1961 the appellee Board of Education asked the voters of the school district to approve a bond issue to raise $4,875,000 to erect two new schools. The proposal was defeated. Then, in December of 1961, the Board submitted another bond proposal to the voters which called for the raising of $5,500,000 to build two new schools. This second proposal passed and the schools were built with the money raised by the bond sales. In May of 1964 a proposed increase in the tax rate to be used for educational purposes was submitted to the voters by the Board and was defeated. Finally, on September 19, 1964, a second proposal to increase the tax rate was submitted by the Board and was likewise defeated. It was in connection with this last proposal of

the School Board that appellant wrote the letter to the editor (which we reproduce in an Appendix to this opinion) that resulted in his dismissal.

Prior to the vote on the second tax increase proposal a variety of articles attributed to the District 205 Teachers' Organization appeared in the local paper. These articles urged passage of the tax increase and stated that failure to pass the increase would result in a decline in the quality of education afforded children in the district's schools. A letter from the superintendent of schools making the same point was published in the paper two days before the election and submitted to the voters in mimeographed form the following day. It was in response to the foregoing material, together with the failure of the tax increase to pass, that appellant submitted the letter in question to the editor of the local paper.

The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the schools' educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue.

The Board dismissed Pickering for writing and publishing the letter. Pursuant to Illinois law, the Board was then required to hold a hearing on the dismissal. At the hearing the Board charged that numerous statements in the letter were false and that the publication of the statements unjustifiably impugned the 'motives, honesty, integrity, truthfulness, responsibility and competence' of both the Board and the school administration. The Board also charged that the false statements damaged the professional reputations of its members and of the school administrators, would be disruptive of faculty discipline, and would tend to foment 'controversy, conflict and dissension' among teachers, administrators, the Board of Education, and the residents of the district. Testimony was introduced from a variety of witnesses on the truth or falsity of the particular statements in the letter with which the Board took issue. The Board found the statements to be false as charged. No evidence was introduced at any point in the proceedings as to the effect of the publication of the letter on the community as a whole or on the administration of the school system in particular, and no specific findings along these lines were made.

The Illinois courts reviewed the proceedings solely to determine whether the Board's findings were supported by substantial evidence and whether, on the facts as found, the Board could reasonably conclude that appellant's publication of the letter was 'detrimental to the best interests of the schools.' Pickering's claim that his letter was protected by the First Amendment was rejected on the ground that his acceptance of a teaching position in the public schools obliged him to refrain from making statements about the operation of the schools 'which in the absence of such position he would have an undoubted right to engage in.' It is not altogether clear whether the Illinois Supreme Court held that the First Amendment had no applicability to appellant's dismissal for writing the letter in question or whether it determined that the particular statements made in the letter were not entitled to First Amendment protection.

In any event, it clearly rejected Pickering's claim that, on the facts of this case, he could not constitutionally be dismissed from his teaching position.

II

To the extent that the Illinois Supreme Court's opinion may be read to suggest that teachers may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work, it proceeds on a premise that has been unequivocally rejected in numerous prior decisions of this Court. '(T)he theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected.' At the same time it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

III

The Board contends that 'the teacher by virtue of his public employment has a duty of loyalty to support his

superiors in attaining the generally accepted goals of education and that, if he must speak out publicly, he should do so factually and accurately, commensurate with his education and experience.' Appellant, on the other hand, argues that the test applicable to defamatory statements directed against public officials by persons having no occupational relationship with them, namely, that statements to be legally actionable must be made 'with knowledge that (they were) . . . false or with reckless disregard of whether (they were) . . . false or not.' *New York Times Co. v. Sullivan* should also be applied to public statements made by teachers. Because of the enormous variety of fact situations in which critical statements by teachers and other public employees may be thought by their superiors, against whom the statements are directed to furnish grounds for dismissal, we do not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged. However, in the course of evaluating the conflicting claims of First Amendment protection and the need for orderly school administration in the context of this case, we shall indicate some of the general lines along which an analysis of the controlling interests should run.

An examination of the statements in appellant's letter objected to by the Board reveals that they, like the letter as a whole, consist essentially of criticism of the Board's allocation of school funds between educational and athletic programs, and of both the Board's and the superintendent's methods of informing, or preventing the informing of, the district's taxpayers of the real reasons why additional tax revenues were being sought for the schools. The statements are in no way directed towards any person with whom appellant would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant's employment relationships with the Board and, to a somewhat lesser extent, with the superintendent are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning. Accordingly, to the extent that the Board's position here can be taken to suggest that even comments on matters of public concern that are substantially correct, such as statements (1)-(4) of appellant's letter may furnish grounds for dismissal if they are sufficiently critical in tone, we unequivocally reject it.

We next consider the statements in appellant's letter which we agree to be false. The Board's original charges included allegations that the publication of the letter damaged the professional reputations of the Board and the superintendent and would foment controversy and conflict among the Board, teachers, administrators, and the residents of the district. However, no evidence to support these allegations was introduced at the hearing. So far as the record reveals, Pickering's letter was greeted by everyone but its main target, the Board, with massive apathy and total disbelief. The Board must, therefore, have decided, perhaps by analogy with the law of libel, that the statements were per se harmful to the operation of the schools.

However, the only way in which the Board could conclude, absent any evidence of the actual effect of the letter, that the statements contained therein were per se detrimental to the interest of the schools was to equate the Board members' own interests with that of the schools. Certainly an accusation that too much money is being spent on athletics by the administrators of the school system (which is precisely the import of that portion of appellant's letter containing the statements that we have found to be false) cannot reasonably be regarded as per se detrimental to the district's schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest.

In addition, the fact that particular illustrations of the Board's claimed undesirable emphasis on athletic programs are false would not normally have any necessary impact on the actual operation of the schools, beyond its tendency to anger the Board. For example, Pickering's letter was written after the defeat at the polls of the second proposed tax increase. It could, therefore, have had no effect on the ability of the school district to raise necessary revenue, since there was no showing that there was any proposal to increase taxes pending when the letter was written.

More importantly, the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot, in a society that leaves such questions to popular vote, be taken as conclusive. On such a question free and open debate is vital to informed decision-making by the electorate.

Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operations of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

In addition, the amounts expended on athletics which Pickering reported erroneously were matters of public record on which his position as a teacher in the district did not qualify him to speak with any greater authority than any other taxpayer. The Board could easily have rebutted appellant's errors by publishing the accurate figures itself, either via a letter to the same newspaper or otherwise. We are thus not presented with a situation in which a teacher has carelessly made false statements about matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts. Accordingly, we have no occasion to consider at this time whether under such circumstances a school board could reasonably require that a teacher make substantial efforts to verify the accuracy of his charges before publishing them.

What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally. In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public.

IV

The public interest in having free and unhindered debate on matters of public importance—the core value of the Free Speech Clause of the First Amendment—is so great that it has been held that a State cannot authorize the recovery of damages by a public official for defamatory statements directed at him except when such statements are shown to have been made either with knowledge of their falsity or with reckless disregard for their truth or falsity. The same test has been applied to suits for invasion of privacy based on false statements where a 'matter of public interest' is involved. It is therefore perfectly clear that, were appellant a member of the general public, the State's power to afford the appellee Board of Education or its members any legal right to sue him for writing the letter at issue here would be limited by the requirement that the letter be judged by the standard laid down in *New York Times.*

This Court has also indicated, in more general terms, that statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that the statements are directed at their nominal superiors. In *Garrison* [*v. State of Louisiana*], the New York Times test was specifically applied to a case involving a criminal defamation conviction stemming from statements made by a district attorney about the judges before whom he regularly appeared.

While criminal sanctions and damage awards have a somewhat different impact on the exercise of the right to freedom of speech from dismissal from employment, it is apparent that the threat of dismissal from public employment is nonetheless a potent means of inhibiting speech. We have already noted our disinclination to make an across-the-board equation of dismissal from public employment for remarks critical of superiors with awarding damages in a libel suit by a public official for similar criticism. However, in a case such as the present one, in which the fact of employment is only tangentially and insubstantially involved in the subject matter of the public communication made by a teacher, we conclude that it is necessary to regard the teacher as the member of the general public he seeks to be.

In sum, we hold that, in a case such as this, absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment. Since no such showing has been made in this case regarding appellant's letter, his dismissal for writing it cannot be upheld and the judgment of the Illinois Supreme Court must, accordingly, be reversed and the case remanded for further proceedings not inconsistent with this opinion. It is so ordered.

Judgment reversed and case remanded with directions.

Citation: *Pickering v. Board of Education of Township High School District 205, Will County*, 391 U.S. 563 (1968).

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary

In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), the Supreme Court upheld the right of parents to make educational decisions on behalf of their children, while acknowledging the states' right to regulate education, even in nonpublic schools. The decision remains one of the most prominent and frequently cited cases in the area of parental rights.

Facts of the Case

In 1922, the state of Oregon, as part of post–World War I nationalism, amended its compulsory attendance statute to require that "every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him to a public school . . . between [the ages of] 8 and 16" (p. 529).

Two organizations operating private schools in Oregon, the Society of Sisters of the Holy Names of Jesus and Mary and the Hill Military Academy, challenged the constitutionality of the statute under the Fourteenth Amendment, alleging that the statute deprived them of property without due process of law. A three-judge federal district court entered judgment for the schools, enjoining the state from enforcing the statute and finding that "the right to conduct schools was property" and that the state's statute had not only taken the schools' property without due process but had also deprived parents of the right to "direct the education of children by selecting reputable teachers and places" (p. 534).

The Court's Ruling

On appeal, the Supreme Court affirmed that the Oregon statute "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children" (p. 534). In addition, the Court held that the two schools, as Oregon corporations and property owners within the state, were entitled to "protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property" (p. 536). However, the Court circumspectly limited the reach of its decision to the abuse of state power. The Court declared language in dictum that has frequently been cited in cases involving state control of schools:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. (p. 534)

Thus, the *Pierce* Court invalidated only state action that prevents parents from making an educational choice for their children; the Court did not prohibit states from exercising regulatory control over education, including nonpublic schools. In effect, the *Pierce* dictum simply acknowledged a basic principle of federalism, namely that because control over education is an implied state function under the Tenth Amendment to the Constitution, the Supreme Court may prohibit the abuse of state control, but it cannot prevent altogether a state from exercising its constitutional authority over education.

Pierce has been cited in a wide range of cases to protect the rights of parents to make decisions on behalf of their children. The Supreme Court relied on *Pierce* in *Wisconsin v. Yoder* (1972) in prohibiting the state of Wisconsin's application of its compulsory attendance statute in such a manner as to violate the religious beliefs of Amish parents that their children should be educated only through the eighth grade. More recently, the Supreme Court, in *Troxel v. Granville* (2000), used *Pierce* to invalidate an Oregon statute that provided a right of access by grandparents to visit their grandchildren, even when such access was opposed by a parent.

In an interesting federal circuit court of appeals case, *Barrett v. Steubenville City Schools* (2004), the Sixth Circuit expanded *Pierce* to employment, holding that a public school superintendent could not demand that a person remove his child from a religious school and place the child in public school before that person would be given a regular teaching position.

At the same time, federal courts have not been receptive to claims under *Pierce* that address the content of school curriculum. Thus, in *Mozert v. Hawkins* (1987), the Sixth Circuit rejected a parent claim under *Pierce* that her child be taught with a reading series different from the one used by other children, one that did not contain references the parent considered objectionable to her religious beliefs. In *Brown v. Hot, Sexy, and Safer Productions* (1995), the First Circuit refused to recognize some parents' claim under *Pierce* to object to the heavily sexual content of a school assembly that their children were required to attend.

More recently, in *Fields v. Palmdale School District* (2006), the Ninth Circuit rejected outright a parent's objection to a survey concerning students' sexual and religious beliefs, observing that

> the *Pierce* due process right of parents to make decisions regarding their children's education does not entitle individual parents to enjoin school boards from providing information the boards determine to be appropriate in connection with the performance of their educational functions. (p. 1191)

Ralph D. Mawdsley

See also Nonpublic Schools; Parental Rights; *Wisconsin v. Yoder*

Legal Citations

Barrett v. Steubenville City Schools, 388 F.3d 967 (6th Cir. 2004).
Brown v. Hot, Sexy, and Safer Productions, 68 F.3d 525 (1st Cir. 1995) *cert. denied,* 516 U.S. 1159 (1996).
Fields v. Palmdale School District, 447 F.3d 1187 (9th Cir. 2006).
Mozert v. Hawkins County Board of Education, 827 F.2d 1058 (6th Cir. 1987).
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
Troxel v. Granville, 530 U.S. 57 (2000).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary (Excerpts)

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary *stands out not only because the Supreme Court upheld the right of nonpublic schools, whether religiously affiliated or nonsectarian, to operate, but also because it recognized the critical role of parents in directing the upbringing of their children.*

Supreme Court of the United States

PIERCE

v.

SOCIETY OF THE SISTERS OF THE HOLY NAMES OF JESUS AND MARY.

268 U.S. 510

Argued March 16 and 17, 1925.

Decided June 1, 1925.

Mr. Justice McREYNOLDS delivered the opinion of the Court.

These appeals are from decrees, based upon undenied allegations, which granted preliminary orders restraining appellants from threatening or attempting to enforce the Compulsory Education Act adopted November 7, 1922, under the initiative provision of her Constitution by the voters of Oregon. They present the same points of law; there are no controverted questions of fact. Rights said to be guaranteed by the federal Constitution were specially set up, and appropriate prayers asked for their protection.

The challenged act, effective September 1, 1926, requires every parent, guardian, or other person having control or charge or custody of a child between 8 and 16 years to send him 'to a public school for the period of time a public school shall be held during the current year' in the district where the child resides; and failure so to do is declared a misdemeanor. There are exemptions—not specially important here—for children who are not normal, or who have completed the eighth grade, or whose parents or private teachers reside at considerable distances from any public school, or who hold special permits from the county superintendent. The manifest purpose is to compel general attendance at public schools by normal children, between 8 and 16, who have not completed the eighth grade. And without doubt, enforcement of the statute would seriously impair, perhaps destroy, the profitable features of appellees' business and greatly diminish the value of their property.

Appellee the Society of Sisters is an Oregon corporation, organized in 1880, with power to care for orphans, educate and instruct the youth, establish and maintain academies or schools, and acquire necessary real and personal property. It has long devoted its property and effort to the secular and religious education and care of children, and has acquired the valuable good will of many parents and guardians. It conducts interdependent primary and high schools and junior colleges, and maintains orphanages for the custody and control of children between 8 and 16. In its primary schools many children between those ages are taught the subjects usually pursued in Oregon public schools during the first eight years. Systematic religious instruction and moral training according to the tenets of the Roman Catholic Church are also regularly provided. All courses of study, both temporal and religious, contemplate continuity of training under appellee's charge; the primary schools are essential to the system and the most profitable. It owns valuable buildings, especially constructed and equipped for school purposes. The business is remunerative—the annual income from primary schools exceeds $30,000—and the successful conduct of this requires long-time contracts with teachers and parents. The Compulsory Education Act of 1922 has already caused the withdrawal from its schools of children who would otherwise continue, and their income has steadily declined. The appellants, public officers, have proclaimed their purpose strictly to enforce the statute.

After setting out the above facts, the Society's bill alleges that the enactment conflicts with the right of parents to choose schools where their children will receive appropriate mental and religious training, the right of the child to influence the parents' choice of a school, the right of schools and teachers therein to engage in a useful business or profession, and is accordingly repugnant to the Constitution and void. And, further, that unless enforcement of lthe measure is enjoined the corporation's business and property will suffer irreparable injury.

Appellee Hill Military Academy is a private corporation organized in 1908 under the laws of Oregon, engaged in owning, operating, and conducting for profit an elementary, college preparatory, and military training school for boys between the ages of 5 and 21 years. The average attendance is 100, and the annual fees received for each student amount to some $800. The elementary department is divided into eight grades, as in the public schools; the college preparatory department has four grades, similar to those of the public high schools; the courses of study conform to the requirements of the state board of education. Military instruction and training are also given, under the supervision of an army officer. It owns considerable real and personal property, some useful only for school purposes. The business and incident good will are very valuable. In order to conduct its affairs, long-time contracts must be made for supplies, equipment, teachers, and pupils. Appellants, law officers of the state and county, have publicly announced that the Act of November 7, 1922, is valid and have declared their intention to enforce it. By reason of the statute and threat of enforcement appellee's business is being destroyed and its property depreciated; parents and guardians are refusing to make contracts for the future instruction of their sons, and some are being withdrawn.

The Academy's bill states the foregoing facts and then alleges that the challenged act contravenes the corporation's rights guaranteed by the Fourteenth Amendment and that unless appellants are restrained from proclaiming its validity and threatening to enforce it irreparable injury will result. The prayer is for an appropriate injunction.

No answer was interposed in either cause, and after proper notices they were heard by three judges on motions for preliminary injunctions upon the specifically alleged facts. The court ruled that the Fourteenth Amendment guaranteed appellees against the deprivation of their property without due process of law consequent upon the unlawful interference by appellants with the free choice of patrons, present and prospective. It declared the right to conduct schools was property and that parents and guardians, as a part of their liberty, might direct the education of children by selecting reputable teachers and places. Also, that appellees' schools were not unfit or harmful to the public, and that enforcement of the challenged statute would unlawfully deprive them of patronage and thereby destroy appellees' business and property. Finally, that the threats to enforce the act would continue to cause irreparable injury; and the suits were not premature.

No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare.

The inevitable practical result of enforcing the act under consideration would be destruction of appellees' primary schools, and perhaps all other private primary schools for normal children within the state of Oregon. Appellees are engaged in a kind of undertaking not inherently harmful, but long regarded as useful and meritorious. Certainly there is nothing in the present records to indicate that they have failed to discharge their obligations to patrons, students, or the state. And there are no peculiar circumstances or present emergencies which demand extraordinary measures relative to primary education.

Under the doctrine of *Meyer v. Nebraska,* we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. As often heretofore pointed out, rights guaranteed by the Constitution may not be abridged by legislation which has no reasonable relation to some purpose within the competency of the state. The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.

Appellees are corporations, and therefore, it is said, they cannot claim for themselves the liberty which the Fourteenth Amendment guarantees. Accepted in the proper sense, this is true. But they have business and property for which they claim protection. These are threatened with destruction through the unwarranted compulsion which appellants are exercising over present and prospective patrons of their schools. And this court has gone very far to protect against loss threatened by such action.

The courts of the state have not construed the act, and we must determine its meaning for ourselves. Evidently it was expected to have general application and cannot be construed as though merely intended to amend the charters of certain private corporations, as in *Berea College v. Kentucky.* No argument in favor of such view has been advanced.

Generally, it is entirely true, as urged by counsel, that no person in any business has such an interest in possible customers as to enable him to restrain exercise of proper power of the state upon the ground that he will be deprived of patronage. But the injunctions here sought are not against the exercise of any proper power. Appellees asked protection against arbitrary, unreasonable, and unlawful interference with their patrons and the consequent destruction of their business and property. Their interest is clear and immediate, within the rule approved in . . . many . . . cases where injunctions have issued to protect business enterprises against interference with the freedom of patrons or customers.

The suits were not premature. The injury to appellees was present and very real, not a mere possibility in the remote future. If no relief had been possible prior to the effective date of the act, the injury would have become irreparable. Prevention of impending injury by unlawful action is a well-recognized function of courts of equity.

The decrees below are *affirmed.*

Citation: *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary,* 268 U.S. 510 (1925).

PLAGIARISM

Plagiarism means stealing words or ideas from someone else's work without giving that person appropriate credit in some form of documentation. This entry examines three issues related to plagiarism: what kind of information has to be documented, whether the plagiarism must be intentional, and whether the accused is entitled to due process.

The General Knowledge Defense

A person who is charged with plagiarism may raise the defense that material allegedly plagiarized is general knowledge. That defense was used by a university professor whose article about a poem caught the eye of a colleague, who thought parts of the article had been copied from an earlier book by another author. A committee reviewing the charge found several questionable similarities between book and article.

In the ensuing litigation, *Newman v. Burgin* (1991), the professor unsuccessfully claimed that the charge of plagiarism should be dismissed because "most of the common passages simply reflected general knowledge among scholars in the field and did not require attribution." (p. 958). She also noted that her article was the product of her research for a master's degree, completed 20 years earlier and approved by a noted scholar

in the field who recommended the allegedly plagiarized book to her. Nevertheless, the committee found her to be at fault and barred her from participating on specified academic committees or holding administrative offices for five years. The faculty member appealed.

The First Circuit, in upholding the university's discipline of the faculty member, agreed that the similarity between the book used as the basis for the master's thesis and the content of the thesis itself was too close to make credible any defense of general knowledge. In *Newman,* the faculty member had three footnotes in the article referring to the book, but significant portions of the article had no footnote references, resulting in the conclusion by the university faculty investigating the alleged plagiarism that the faulty member's scholarship had been "negligent" and contained "an objective instance of plagiarism" (p. 959). *Newman* highlights an important feature of plagiarism, namely that unless limited by the code of conduct of an academic institution, a charge of plagiarism has no statute of limitations.

Newman also reveals another important issue in plagiarism as to whether a violation requires intent to plagiarize. The First Circuit in *Newman* observed that "one can plagiarize *through negligence or recklessness without intent to deceive*" (p. 962) (emphasis in original).

The Issue of Intent

The leading case illustrating the relationship between intent and plagiarism is *Napolitano v. Princeton University* (1982). A senior at Princeton University with a 3.7 (out of 4.0) grade point average submitted a paper for an elective Spanish literature course during her last semester. The professor charged the student with plagiarism, pursuant to the university's student handbook definition: "the deliberate use of any outside source without proper acknowledgement" (*Napolitano,* p. 281). A faculty-student committee on discipline found the student to have violated the definition. The committee recommended, and the university administration agreed, that the student's diploma would be withheld for one year.

The student filed a lawsuit alleging that her conduct had not satisfied the university's definition of plagiarism. She pointed out that she had cited the source six times in her paper and that the professor had recommended the book and so should not have been surprised at her use of it. However, the state court of appeals, in affirming the university's discipline of the plaintiff student, applied an objective standard to find a mosaic of grammatical and syntactical student choices indicating that plagiarism had occurred. Some pieces of this mosaic were the following: (1) A few statements taken from the source had been put in quotation marks but not the rest; (2) the use of "it is evident," "it is important to note that," and "one can assume that" suggested that following comments were the student's, when in fact they were borrowed from the source; (3) the source's comments about passages in a Spanish novel were borrowed, but only the novel was cited and not the source; (4) verb tenses from the source were changed to the present tense for the sake of consistency; and (5) words were deleted from the source where their presence in the paper would seem to be technical or awkward (p. 276).

As *Napolitano* indicates, the intent to plagiarize is not a necessary element of the charge of plagiarism (unless specifically required as such in a code of conduct), and a charge can be supported by objective evidence, regardless of an accused person's alleged lack of intent to plagiarize. However, the good faith of a person charged with plagiarism will tend to demonstrate lack of intent to plagiarize and, and that in turn may have an impact on the nature of the penalty.

Due Process Hearings

Persons charged with plagiarism in public educational institutions may be entitled to procedural due process rights. However, plagiarism is generally considered to be academic, as opposed to disciplinary, misconduct. The Supreme Court in the leading case of *Board of Curators of University of Missouri v. Horowitz* (1978) held that persons charged with academic misconduct were not entitled to the same "stringent procedural protection" as for disciplinary misconduct, even though the penalties for both can be similar. Nonetheless, state law or university handbook language can confer such rights.

For example, in *Hand v. Matchett* (1992), the Tenth Circuit upheld the authority of the board of regents for the University of New Mexico to establish and enforce procedures that could be used to revoke a student's PhD because his dissertation contained excerpts that

had been plagiarized. The court declared that "the ability to revoke degrees obtained through fraudulent means is a necessary corollary to the Regents' power to confer those degrees" (pp. 794–795).

Yet, in New Mexico, final authority to confer degrees is vested in the Board of Regents, which therefore must have some involvement in degree revocation. In this case, although the process for degree revocation was upheld, the case was remanded and the degree revocation declared void "because the Board of Regents had not exercised final authority in the decision to revoke the alumnus' degree" (p. 795).

Ralph D. Mawdsley

See also Cheating

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Pledge of Allegiance

The Pledge of Allegiance is a brief recited statement of commitment to the United States. First developed at the end of the 19th century, the pledge has become a common feature of classroom activity in schools across the nation, sometimes required by state law. Almost from the beginning, parents challenged the fact that their children were required to participate in the recitation of the pledge. More recently, parents thought that schools should not be using a statement that includes the words "under God." This entry briefly summarizes the history of the pledge and the litigation that has followed it through more than a century.

Historical Background

In 1892, amidst a national desire to promote patriotism in the schools, the U.S. flag salute ceremony with the Pledge of Allegiance originated. In 1898, one day after the United States declared war on Spain, New York passed the first flag salute law. By 1940, 18 states had statutes with a provision for "some sort of teaching regarding the flag." The phrase "under God" was added by a congressional amendment in 1954. The historic role of religion in the political development of the nation was the reason given for this consideration.

The Pledge of Allegiance reads as follows:

> I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands, one Nation under God, indivisible, with liberty and justice for all.

Classrooms throughout the nation responded by having students salute the flag in the morning, as a general response to the statute. Immediately, numbers of religious groups protested, with the Jehovah's Witnesses being the most prevalent, and litigation followed.

Early Litigation

In 1937, the Georgia Supreme Court, in *Leoles v. Landers*, declared that religious freedom had not been violated and that the salute was a patriotic exercise rather than a religious rite. In 1938, California's Supreme Court upheld the expulsion of students for refusing to salute the flag (*Gabrielli v. Knickerbocker*). The next year, New York's high court concluded that because the flag had nothing to do with religion, there were no religious freedoms being offended (*People ex rel. Fish v. Sandstrom,* 1939).

Multiple cases followed, echoing the national patriotic voice, and in 1940, the Supreme Court held that a Pennsylvania statute that required the flag salute and Pledge of Allegiance did not violate the freedom of religion guaranteed by the First Amendment

(*Minersville School District v. Gobitis,* 1940). The justices agreed that the Constitution required the states, as much as Congress, to respect the freedom of religion, but concluded that the state was not violating religious liberty by requiring the pledge of schoolchildren. In contrast, some state courts throughout the country concluded that the flag salute requirements violated their own constitutions.

The Jehovah's Witnesses and others next challenged the constitutionality of a revised regulation of a state board of education, which held that refusal to participate in saluting the flag could be treated as an act of insubordination with a resultant expulsion from school. The Jehovah's Witnesses argued that the pledge violated their rights to religious freedom. The U.S. Supreme Court, in *West Virginia State Board of Education v. Barnette* (1943), overruled *Gobitis*. The Court held that a state may require students to attend patriotic exercises based on American history and to teach unifying patriotic values, but that compulsory activities such as the flag salute were unconstitutional. In so doing, the Court reframed the case as one about free speech rather than the free exercise of religion. Students, according to this ruling could opt out and not participate in the flag salute.

In 1966, the supreme court of New Jersey faced the issue of whether Black Muslim children who refused to pledge allegiance to the flag on the grounds that the ceremony violated their religious beliefs could be excluded from public school (*Holden v. Board of Education,* 1966). School officials excluded the children, and the court, while not stating whether the refusal to salute the flag was religious or political, ordered their return to the schools. The court pointed out that the students stood quietly during the pledge and were not disruptive.

Schools and courts throughout the nation grappled with the issue and reasonably emphasized that as long as there was not a disruption, a student could choose to stand quietly, and in some cases leave the room, but could not be disciplined for choosing not to participate (*Banks v. Board of Public Instruction of Dade County,* 1971; *State of Maryland v. Lundquist,* 1971).

More recently, the Seventh Circuit court found that school officials could lead the pledge, including the words "under God," as long as students were free not to participate (*Sherman v. Community Consolidated School District 21 of Wheeling Township,* 1993). According to the court, the use of the phrase in the context of the secular vow of allegiance was patriotic or ceremonial rather than religious.

A New Century of Conflict

In 2003, legislatures in Colorado, Minnesota, Texas, and Utah addressed the Pledge of Allegiance. Colorado required the daily recitation of the pledge in its public schools. Non-American citizens and those who objected to the recitation of the pledge on religious grounds were released from the obligation. Minnesota required all students in public schools to recite the pledge one or more times each week. Here, the local board could choose to waive the requirement, and students and teachers could also decline to participate. Texas required students to recite the pledge with the option of opting out on parental request, and Utah amended a statute, requiring daily recitation in elementary schools and weekly recitation in secondary schools.

The Ninth Circuit took on this controversy again in 2002, deciding that a school policy requiring the words "under God" violated the Establishment Clause. Michael Newdow, the parent initiating the case, did not seek to exempt his child from the flag salute but rather to bar the practice for children in all public schools as long as the words were present. The court maintained that the policy failed the purpose prong of the *Lemon* test (*Newdow v. U.S. Congress,* 2002). The case addressed two major questions. The first question asked whether the noncustodial father had standing to challenge the board policy that required teachers to lead willing students in reciting the Pledge of Allegiance. The second inquiry addressed whether the policy violated the Establishment Clause.

The Ninth Circuit determined that the father had a right to direct his daughter's religious education and that the school district's policy violated the Establishment Clause. This case was not only controversial but affected schools throughout the entire Ninth Circuit, putting many schools throughout this area on hold with respect to whether they would have students recite the pledge, and in general, confusing

some of the schoolchildren. To further complicate the proceedings, the mother, sole legal guardian, filed a motion to dismiss this case, stating that it was not in the child's interest to become involved in this suit. The Ninth Circuit ruled in favor of *Newdow* on the basis that he retained the right to expose his child to his particular religious views. (He is an atheist.)

The Supreme Court reviewed the controversy under the watchful eyes of a nation divided in sentiments between church and state. Yet, the Court sidestepped the question of the constitutionality of the district's policy that required schoolchildren to recite the pledge. Instead, the Court was of the opinion that because the noncustodial father did not have standing to bring this suit to court, the earlier judgments had to be set aside (*Elk Grove Unified School District v. Newdow,* 2004). This issue had the potential of dividing the nation, and it will almost certainly come before the Supreme Court again. Thus, the constitutionality of the words "under God" in the pledge remain to be litigated at a future date.

In 2005, for example, the Fourth Circuit held that a Virginia state statute providing for daily, voluntary recitation of the pledge did not violate the Establishment Clause, as it was not a religious exercise, despite the existence of the words "under God" (*Myers v. Loudon County Public School,* 2005). The pledge battle also rages in California, as Newdow and other like-minded parents had the policy enjoined (*Newdow v. Congress of the United States,* 2005). Although it seems unlikely that the wording of the pledge will be changed, the law is clear that offended students may not be required to recite the pledge or be punished for declining to participate.

Deborah E. Stine

See also *Elk Grove Unified School District v. Newdow;* First Amendment; Prayer in Public Schools; U.S. Supreme Court Cases in Education; *West Virginia State Board of Education v. Barnette*

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Pledge of Allegiance, 4 U.S.C. § 4 (2006).

Sherman v. Community Consolidated School District of Wheeling Township, 508 U.S. 950 (1993).

State of Maryland v. Lundquist, 278 A.2d 263 (Md. 1971).

Plessy v. Ferguson

In *Plessy v. Ferguson* (1896), the best known of early segregation cases, the U.S. Supreme Court upheld the conviction of Homer Plessy, who was seven-eighths White and one-eighth Black, for attempting to sit in a public railway car reserved for Whites. In its analysis, the Court decided that distinctions based on race did not violate the Thirteenth or Fourteenth Amendments of the U.S. Constitution. By accepting the notion that "separate but equal" facilities met the requirements of the Constitution, the Court laid a firm legal basis for subsequent segregation, although the actual phrase "separate but equal" cannot be found in the Court's opinion. *Plessy* served as the foundation for sustaining the principle of racial segregation for over 50 years in maintaining that separate accommodations—including schools—did not deprive Blacks of equal rights if the accommodations were equal.

Leading up to *Plessy* were the civil rights cases of 1883, in which the Supreme Court ruled that the Fourteenth Amendment prohibited state governments from discriminating against individuals due solely to their race but did not restrict private organizations or individuals from doing so. As a result of the Court's holdings, privately owned railroads, hotels, theaters, and similar enterprises could legally practice segregation. In *Plessy,* the Court also validated state legislation that specifically discriminated against Blacks, in this case, a state law from Louisiana that required separate seating arrangements for the races on railroad cars.

Not long after *Plessy,* in *Cumming v. Board of Education of Richmond County* (1899), the Court went even further by refusing to strike down a state law from Georgia that permitted local school boards to establish separate schools for White children even though officials failed to provide comparable schools for Black students. The Court expressly extended the notion of separate but equal in education in *Gong Lum v. Rice* (1927), a case from Mississippi wherein it permitted officials to exclude a student of Chinese ancestry from a school for White children.

For several decades, a de jure segregated system of schools existed in the South resulting from *Plessy* and its progeny. At the same time, in seeking to comply with the "equal protection" requirement, several states allegedly created "separate but financially equal" education systems, also known as dual systems, one for Whites and another for Blacks. These policies barred minority students from attending the White schools.

Justice John M. Harlan wrote the dissenting opinion for *Plessy* in words that would be remarkably prophetic of early victories in the 1950s civil rights movements. Justice Harlan protested that states could not impose criminal penalties on citizens simply because they wished to use the public highways and common carriers. Harlan's pleas that the Constitution is color-blind fell on deaf ears. Ultimately, a series of suits that the National Association for the Advancement of Colored People filed in the 1950s successfully attacked the injustice of segregated schools, culminating in the Court's landmark decision in *Brown v. Board of Education of Topeka* (1954).

In *Brown,* the plaintiffs raised the issue of whether separation of children for public education created a suspect class of individuals, arguing that separate was inherently unequal. In *Brown* the Court agreed with the plaintiffs, thus for the first time identifying race as a suspect class and outlawing all governmental actions that had the impact of treating individuals differently according to their race.

In coming to grips with the constitutionality of the *Plessy* "separate but equal" doctrine, which it had long left intact, the Court concluded that the segregation of students in public schools solely on the basis of race, even though the physical facilities and other tangible factors may have been equal, deprived the children of the minority group of equal educational opportunities. Yet, for years, the ghost of *Plessy* lingered on as *Brown* served the beginning of the fight to end racial segregation in education based solely on race.

Gary W. Kinsey

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Dual and Unitary Systems; Equal Protection Analysis; *Gong Lum v. Rice;* National Association for the Advancement of Colored People (NAACP); Segregation, De Facto; Segregation, De Jure

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Gong Lum v. Rice, 275 U.S. 78 (1927).
Plessy v. Ferguson, 163 U.S. 537 (1896).

Plyler v. Doe

In the 1982 case of *Plyler v. Doe,* the Supreme Court was asked to rule on the constitutionality of denying undocumented immigrants access to a free K–12

public education. A divided Court issued a 5-to-4 decision, including three concurring opinions and one dissenting opinion. The Court held that Texas education code § 21.031 violated the Equal Protection Clause of the Fourteenth Amendment when it denied schools funding for undocumented children. The opinion emphasized the critical importance of education in our society and the consequences of a complete denial of school access to undocumented immigrants.

Further, the Court stressed that states may not penalize undocumented students for the illegal actions of their parents. Technically, the Court applied rational-basis scrutiny, yet these factors appeared to generate a type of intermediate-level scrutiny, with the Court ultimately declaring that the state did not present a "substantial" state interest to deny undocumented immigrant children a free public education. *Plyler* is a complex case in which the Court straddled immigration law and education policy.

Facts of the Case

The statute in question was passed by the Texas legislature in 1975. It limited state education funding to children who could demonstrate legal residence in the United States. The state was required by law to withhold from local school districts funding for undocumented immigrants. Following two class action suits filed on behalf of—and decided in favor of—undocumented students, the state of Texas asked the U.S. Supreme Court to review the decision of the Fifth Circuit (*Doe v. Plyler,* 1980).

The Court's Ruling

The Supreme Court focused first on how to examine the case. Texas unsuccessfully argued that undocumented immigrants were not "persons" legally within the jurisdiction of the state and therefore did not merit the protections of the Fourteenth Amendment. Texas also argued, this time successfully, that undocumented immigrants are not members of a suspect class, because they voluntarily enter into marginalized group status. Therefore, Texas maintained that the Court did not have to apply strict scrutiny.

However, as noted, the Court did apply a type of intermediate scrutiny, based in part on the classification set forth by a particular statute, as established in *Craig v. Boren* (1976) and also based in part on the critical importance of education in U.S. society and the consequences of a complete denial of school access. *Plyler* is thus notable for this rare decision to expand the reasons for using intermediate scrutiny.

Although education is not a fundamental right, as established by the Court in *San Antonio Independent School District v. Rodriguez* (1973), Justice Brennan's majority opinion recognized that "neither is it [education] merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation" (*Plyler*, p. 221). The Court viewed the critical role of education to be its integrative functions, its transmission of values, and its ability to provide opportunities in the United States. Justice Powell's concurring opinion stressed that if undocumented students are denied the benefits of a free public education, this would effectively create "a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime" (*Plyler,* p. 241, Brennan, J., concurring). The Court also called attention to the unjust penalties that § 21.031 places on children due to their parents' illegal presence in the United States, something the children had no direct control over. The Court deemed such punishment to be illogical.

The dissenting opinion filed by Chief Justice Burger cautioned that the Court's majority overstepped its judicial boundaries, arguing that the Supreme Court was not an arena to set policy.

California's Proposition 187, approved by voters in November of 1994, also sought to deny undocumented immigrants access to social services, including public schooling and health care. The proposition required social service personnel to report all undocumented immigrants to state and federal officials. Relying on the Court's *Plyler* decision, other courts prevented key parts of this law from ever going into effect.

Nevertheless, *Plyler* leaves open three significant questions. First, the Court did not find that it is always unconstitutional for states to deny a free public education for undocumented immigrants. Instead, it requires that a state must prove that providing a free public education would compromise a substantial state interest. Second, the Court addressed a complete denial of education; a partial denial might yield a different legal outcome. Third, in distinguishing education "from other forms of social welfare legislation" (*Plyler,* p. 221), the Court suggested that it may not be unconstitutional to deny other forms of social welfare to undocumented immigrants.

Emily Wexler Love

See also Equal Educational Opportunity Act; Equal Protection Analysis; Fourteenth Amendment

Legal Citations

Craig v. Boren, 429 U.S. 190 (1976).
Doe v. Plyler, 628 F.2d 448 (5th Cir. 1980).
Plyler v. Doe, 457 U.S. 202 (1982).
San Antonio v. Rodriguez, 411 U.S. 1 (1973).

Plyler v. Doe (Excerpts)

In Plyler v. Doe *the Supreme Court ruled that, under the Equal Protection Clause, the right of children to attend school does not depend on the immigration status of their parents.*

Supreme Court of the United States

PLYLER

v.

DOE

457 US 202

Argued Dec. 1, 1981.

Decided June 15, 1982.

Rehearings Denied Sept. 9, 1982.

See 458 U.S. 1131.

Justice BRENNAN delivered the opinion of the Court.

The question presented by these cases is whether, consistent with the Equal Protection Clause of the Fourteenth Amendment, Texas may deny to undocumented school-age children the free public education that it provides to children who are citizens of the United States or legally admitted aliens.

I

Since the late 19th century, the United States has restricted immigration into this country. Unsanctioned entry into the United States is a crime and those who have entered unlawfully are subject to deportation. But despite the existence of these legal restrictions, a substantial number of persons have succeeded in unlawfully entering the United States, and now live within various States, including the State of Texas.

In May 1975, the Texas Legislature revised its education laws to withhold from local school districts any state funds for the education of children who were not "legally admitted" into the United States. The 1975 revision also authorized local school districts to deny enrollment in their public schools to children not "legally admitted" to the country. These cases involve constitutional challenges to those provisions.

No. 80–1538

Plyler v. Doe

This is a class action, filed in the United States District Court for the Eastern District of Texas in September 1977, on behalf of certain school-age children of Mexican origin residing in Smith County, Tex., who could not establish that they had been legally admitted into the United States. The action complained of the exclusion of plaintiff children from the public schools of the Tyler Independent School District. The Superintendent and members of the Board of Trustees of the School District were named as defendants; the State of Texas intervened as a party-defendant. After certifying a class consisting of all undocumented school-age children of Mexican origin residing within the School District, the District Court preliminarily enjoined defendants from denying a free education to members of the plaintiff class. In December 1977, the court conducted an extensive hearing on plaintiffs' motion for permanent injunctive relief.

The District Court held that illegal aliens were entitled to the protection of the Equal Protection Clause of the Fourteenth Amendment, and that § 21.031 violated that Clause. . . . The District Court also concluded that the Texas statute violated the Supremacy Clause.

The Court of Appeals for the Fifth Circuit upheld the District Court's injunction. The Court of Appeals held that the District Court had erred in finding the Texas statute pre-empted by federal law. With respect to equal protection, however, the Court of Appeals affirmed in all essential respects the analysis of the District Court, concluding that § 21.031 was "constitutionally infirm regardless of whether it was tested using the mere rational basis standard or some more stringent test." We noted probable jurisdiction.

No. 80–1934

In re Alien Children Education Litigation

During 1978 and 1979, suits challenging the constitutionality of § 21.031 and various local practices undertaken on the authority of that provision were filed in the United States District Courts for the Southern, Western, and Northern Districts of Texas. Each suit named the State of Texas and the Texas Education Agency as defendants, along with local officials. In November 1979, the Judicial Panel on Multidistrict Litigation, on motion of the State, consolidated the claims against the state officials into a single action to be heard in the District Court for the Southern District of Texas. A hearing was conducted in February and March 1980. In July 1980, the court entered an opinion and order holding that § 21.031 violated the Equal Protection Clause of the Fourteenth Amendment. The court held that "the absolute deprivation of education should trigger strict judicial scrutiny, particularly when the absolute deprivation is the result of complete inability to pay for the desired benefit." The court determined that the State's concern for fiscal integrity was not a compelling state interest; that exclusion of these children had not been shown to be necessary to improve education within the State; and that the educational needs of the children statutorily excluded were not different from the needs of children not excluded. The court therefore concluded that § 21.031 was not carefully tailored to advance the asserted state interest in an acceptable manner. While appeal of the District Court's decision was pending, the Court of Appeals rendered its decision in No. 80–1538. Apparently on the strength of that opinion, the Court of Appeals, on February 23, 1981, summarily affirmed the decision of the Southern District. We noted probable jurisdiction and consolidated this case with No. 80–1538 for briefing and argument.

II

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Appellants argue at the outset that undocumented aliens, because of their immigration status, are not "persons within the jurisdiction" of the State of Texas, and that they therefore have no right to the equal protection of Texas law. We reject this argument. Whatever his status under the immigration laws, an alien is surely a "person" in any ordinary sense of that term. Aliens, even aliens whose presence in this country is unlawful, have long been recognized as "persons" guaranteed due process of law by the Fifth and Fourteenth Amendments. Indeed, we have clearly held that the Fifth Amendment protects aliens whose presence in this country is unlawful from invidious discrimination by the Federal Government.

Appellants seek to distinguish our prior cases, emphasizing that the Equal Protection Clause directs a State to afford its protection to persons within its jurisdiction while the Due Process Clauses of the Fifth and Fourteenth Amendments contain no such assertedly limiting phrase. In appellants' view, persons who have entered the United States illegally are not "within the jurisdiction" of a State even if they are present within a State's boundaries and subject to its laws. Neither our cases nor the logic of the Fourteenth Amendment supports that constricting construction of the phrase "within its jurisdiction." We have never suggested that the class of persons who might avail themselves of the equal protection guarantee is less than coextensive with that entitled to due process. To the contrary, we have recognized that both provisions were fashioned to protect an identical class of persons, and to reach every exercise of state authority.

"The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.' These provisions are universal in their application, to all persons within the territorial jurisdiction, without regard

to any differences of race, of color, or of nationality; and the protection of the laws is a pledge of the protection of equal laws."

In concluding that "all persons within the territory of the United States," including aliens unlawfully present, may invoke the Fifth and Sixth Amendments to challenge actions of the Federal Government, we reasoned from the understanding that the Fourteenth Amendment was designed to afford its protection to all within the boundaries of a State. Our cases applying the Equal Protection Clause reflect the same territorial theme:

"Manifestly, the obligation of the State to give the protection of equal laws can be performed only where its laws operate, that is, within its own jurisdiction. It is there that the equality of legal right must be maintained. That obligation is imposed by the Constitution upon the States severally as governmental entities—each responsible for its own laws establishing the rights and duties of persons within its borders."

There is simply no support for appellants' suggestion that "due process" is somehow of greater stature than "equal protection" and therefore available to a larger class of persons. To the contrary, each aspect of the Fourteenth Amendment reflects an elementary limitation on state power. To permit a State to employ the phrase "within its jurisdiction" in order to identify subclasses of persons whom it would define as beyond its jurisdiction, thereby relieving itself of the obligation to assure that its laws are designed and applied equally to those persons, would undermine the principal purpose for which the Equal Protection Clause was incorporated in the Fourteenth Amendment. The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation. That objective is fundamentally at odds with the power the State asserts here to classify persons subject to its laws as nonetheless excepted from its protection.

Although the congressional debate concerning § I of the Fourteenth Amendment was limited, that debate clearly confirms the understanding that the phrase "within its jurisdiction" was intended in a broad sense to offer the guarantee of equal protection to all within a State's boundaries, and to all upon whom the State would impose the obligations of its laws. Indeed, it appears from those debates that Congress, by using the phrase "person within its jurisdiction," sought expressly to ensure that the equal protection of the laws was provided to the alien population. . . .

. . . .

Use of the phrase "within its jurisdiction" thus does not detract from, but rather confirms, the understanding that the protection of the Fourteenth Amendment extends to anyone, citizen or stranger, who is subject to the laws of a State, and reaches into every corner of a State's territory. That a person's initial entry into a State, or into the United States, was unlawful, and that he may for that reason be expelled, cannot negate the simple fact of his presence within the State's territorial perimeter. Given such presence, he is subject to the full range of obligations imposed by the State's civil and criminal laws. And until he leaves the jurisdiction—either voluntarily, or involuntarily in accordance with the Constitution and laws of the United States—he is entitled to the equal protection of the laws that a State may choose to establish.

Our conclusion that the illegal aliens who are plaintiffs in these cases may claim the benefit of the Fourteenth Amendment's guarantee of equal protection only begins the inquiry. The more difficult question is whether the Equal Protection Clause has been violated by the refusal of the State of Texas to reimburse local school boards for the education of children who cannot demonstrate that their presence within the United States is lawful, or by the imposition by those school boards of the burden of tuition on those children. It is to this question that we now turn.

III

The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The initial discretion to determine what is "different" and what is "the same" resides in the legislatures of the States. A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill. In applying the Equal Protection Clause to most forms of state action, we thus seek only the assurance that the classification at issue bears some fair relationship to a legitimate public purpose.

But we would not be faithful to our obligations under the Fourteenth Amendment if we applied so deferential a standard to every classification. The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. Thus we have treated as presumptively invidious those

classifications that disadvantage a "suspect class," or that impinge upon the exercise of a "fundamental right." With respect to such classifications, it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest. In addition, we have recognized that certain forms of legislative classification, while not facially invidious, nonetheless give rise to recurring constitutional difficulties; in these limited circumstances we have sought the assurance that the classification reflects a reasoned judgment consistent with the ideal of equal protection by inquiring whether it may fairly be viewed as furthering a substantial interest of the State. We turn to a consideration of the standard appropriate for the evaluation of § 21.031.

A

Sheer incapability or lax enforcement of the laws barring entry into this country, coupled with the failure to establish an effective bar to the employment of undocumented aliens, has resulted in the creation of a substantial "shadow population" of illegal migrants—numbering in the millions—within our borders. This situation raises the specter of a permanent caste of undocumented resident aliens, encouraged by some to remain here as a source of cheap labor, but nevertheless denied the benefits that our society makes available to citizens and lawful residents. The existence of such an underclass presents most difficult problems for a Nation that prides itself on adherence to principles of equality under law.

The children who are plaintiffs in these cases are special members of this underclass. Persuasive arguments support the view that a State may withhold its beneficence from those whose very presence within the United States is the product of their own unlawful conduct. These arguments do not apply with the same force to classifications imposing disabilities on the minor children of such illegal entrants. At the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including, but not limited to, deportation. But the children of those illegal entrants are not comparably situated. Their "parents have the ability to conform their conduct to societal norms," and presumably the ability to remove themselves from the State's jurisdiction; but the children who are plaintiffs in these cases "can affect neither their parents' conduct nor their own status." Even if the State found it expedient to control the conduct of adults by acting against their children, legislation directing the onus of a parent's misconduct against his children does not comport with fundamental conceptions of justice.

. . . .

Of course, undocumented status is not irrelevant to any proper legislative goal. Nor is undocumented status an absolutely immutable characteristic since it is the product of conscious, indeed unlawful, action. But § 21.031 is directed against children, and imposes its discriminatory burden on the basis of a legal characteristic over which children can have little control. It is thus difficult to conceive of a rational justification for penalizing these children for their presence within the United States. Yet that appears to be precisely the effect of § 21.031.

Public education is not a "right" granted to individuals by the Constitution. But neither is it merely some governmental "benefit" indistinguishable from other forms of social welfare legislation. Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark the distinction. The "American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance." We have recognized "the public schools as a most vital civic institution for the preservation of a democratic system of government" and as the primary vehicle for transmitting "the values on which our society rests." "[A]s . . . pointed out early in our history, . . . some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." And these historic "perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists." In addition, education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests.

In addition to the pivotal role of education in sustaining our political and cultural heritage, denial of education to some isolated group of children poses an affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit. Paradoxically, by depriving the children of any disfavored group of an education, we foreclose

the means by which that group might raise the level of esteem in which it is held by the majority. But more directly, "education prepares individuals to be self-reliant and self-sufficient participants in society." Illiteracy is an enduring disability. The inability to read and write will handicap the individual deprived of a basic education each and every day of his life. The inestimable toll of that deprivation on the social economic, intellectual, and psychological well-being of the individual, and the obstacle it poses to individual achievement, make it most difficult to reconcile the cost or the principle of a status-based denial of basic education with the framework of equality embodied in the Equal Protection Clause. What we said 28 years ago in *Brown v. Board of Education*, still holds true: "Today, education is perhaps the most important function of state and local governments. . . ."

B

These well-settled principles allow us to determine the proper level of deference to be afforded § 21.031. Undocumented aliens cannot be treated as a suspect class because their presence in this country in violation of federal law is not a "constitutional irrelevancy." Nor is education a fundamental right; a State need not justify by compelling necessity every variation in the manner in which education is provided to its population. But more is involved in these cases than the abstract question whether § 21.031 discriminates against a suspect class, or whether education is a fundamental right. Section 21.031 imposes a lifetime hardship on a discrete class of children not accountable for their disabling status. The stigma of illiteracy will mark them for the rest of their lives. By denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation. In determining the rationality of § 21.031, we may appropriately take into account its costs to the Nation and to the innocent children who are its victims. In light of these countervailing costs, the discrimination contained in § 21.031 can hardly be considered rational unless it furthers some substantial goal of the State.

IV

It is the State's principal argument, and apparently the view of the dissenting Justices, that the undocumented status of these children vel non establishes a sufficient rational basis for denying them benefits that a State might choose to afford other residents. The State notes that while other aliens are admitted "on an equality of legal privileges with all citizens under non-discriminatory laws," the asserted right of these children to an education can claim no implicit congressional imprimatur. Indeed, in the State's view, Congress' apparent disapproval of the presence of these children within the United States, and the evasion of the federal regulatory program that is the mark of undocumented status, provides authority for its decision to impose upon them special disabilities. Faced with an equal protection challenge respecting the treatment of aliens, we agree that the courts must be attentive to congressional policy; the exercise of congressional power might well affect the State's prerogatives to afford differential treatment to a particular class of aliens. But we are unable to find in the congressional immigration scheme any statement of policy that might weigh significantly in arriving at an equal protection balance concerning the State's authority to deprive these children of an education.

The Constitution grants Congress the power to "establish an uniform Rule of Naturalization." Drawing upon this power, upon its plenary authority with respect to foreign relations and international commerce, and upon the inherent power of a sovereign to close its borders, Congress has developed a complex scheme governing admission to our Nation and status within our borders. The obvious need for delicate policy judgments has counseled the Judicial Branch to avoid intrusion into this field. But this traditional caution does not persuade us that unusual deference must be shown the classification embodied in § 21.031. The States enjoy no power with respect to the classification of aliens. This power is "committed to the political branches of the Federal Government." Although it is "a routine and normally legitimate part" of the business of the Federal Government to classify on the basis of alien status and to "take into account the character of the relationship between the alien and this country," only rarely are such matters relevant to legislation by a State.

. . . .

To be sure, like all persons who have entered the United States unlawfully, these children are subject to deportation. But there is no assurance that a child subject to deportation will ever be deported. An illegal entrant might be granted federal permission to continue to reside in this country, or even to become a citizen. In light of the discretionary federal power to grant relief

from deportation, a State cannot realistically determine that any particular undocumented child will in fact be deported until after deportation proceedings have been completed. It would of course be most difficult for the State to justify a denial of education to a child enjoying an inchoate federal permission to remain.

We are reluctant to impute to Congress the intention to withhold from these children, for so long as they are present in this country through no fault of their own, access to a basic education. In other contexts, undocumented status, coupled with some articulable federal policy, might enhance state authority with respect to the treatment of undocumented aliens. But in the area of special constitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education. The State may borrow the federal classification. But to justify its use as a criterion for its own discriminatory policy, the State must demonstrate that the classification is reasonably adapted to "the purposes for which the state desires to use it."

V

Appellants argue that the classification at issue furthers an interest in the "preservation of the state's limited resources for the education of its lawful residents." Of course, a concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate. Apart from the asserted state prerogative to act against undocumented children solely on the basis of their undocumented status—an asserted prerogative that carries only minimal force in the circumstances of these cases—we discern three colorable state interests that might support § 21.031.

First, appellants appear to suggest that the State may seek to protect itself from an influx of illegal immigrants. While a State might have an interest in mitigating the potentially harsh economic effects of sudden shifts in population, § 21.031 hardly offers an effective method of dealing with an urgent demographic or economic problem. There is no evidence in the record suggesting that illegal entrants impose any significant burden on the State's economy. To the contrary, the available evidence suggests that illegal aliens underutilize public services, while contributing their labor to the local economy and tax money to the state fisc. The dominant incentive for illegal entry into the State of Texas is the availability of employment; few if any illegal immigrants come to this country, or presumably to the State of Texas, in order to avail themselves of a free education. Thus, even making the doubtful assumption that the net impact of illegal aliens on the economy of the State is negative, we think it clear that "[c]harging tuition to undocumented children constitutes a ludicrously ineffectual attempt to stem the tide of illegal immigration," at least when compared with the alternative of prohibiting the employment of illegal aliens.

Second, while it is apparent that a State may "not . . . reduce expenditures for education by barring [some arbitrarily chosen class of] children from its schools," appellants suggest that undocumented children are appropriately singled out for exclusion because of the special burdens they impose on the State's ability to provide high-quality public education. But the record in no way supports the claim that exclusion of undocumented children is likely to improve the overall quality of education in the State. As the District Court in No. 80–1934 noted, the State failed to offer any "credible supporting evidence that a proportionately small diminution of the funds spent on each child [which might result from devoting some state funds to the education of the excluded group] will have a grave impact on the quality of education." And, after reviewing the State's school financing mechanism, the District Court in No. 80–1538 concluded that barring undocumented children from local schools would not necessarily improve the quality of education provided in those schools. Of course, even if improvement in the quality of education were a likely result of barring some number of children from the schools of the State, the State must support its selection of this group as the appropriate target for exclusion. In terms of educational cost and need, however, undocumented children are "basically indistinguishable" from legally resident alien children.

Finally, appellants suggest that undocumented children are appropriately singled out because their unlawful presence within the United States renders them less likely than other children to remain within the boundaries of the State, and to put their education to productive social or political use within the State. Even assuming that such an interest is legitimate, it is an interest that is most difficult to quantify. The State has no assurance that any child, citizen or not, will employ the education provided by the State within the confines of the State's borders. In any event, the record is clear that many of the undocumented children disabled by this

classification will remain in this country indefinitely, and that some will become lawful residents or citizens of the United States. It is difficult to understand precisely what the State hopes to achieve by promoting the creation and perpetuation of a subclass of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime. It is thus clear that whatever savings might be achieved by denying these children an education, they are wholly insubstantial in light of the costs involved to these children, the State, and the Nation.

VI

If the State is to deny a discrete group of innocent children the free public education that it offers to other children residing within its borders, that denial must be justified by a showing that it furthers some substantial state interest. No such showing was made here. Accordingly, the judgment of the Court of Appeals in each of these cases is

Affirmed.

Citation: *Plyler v. Doe,* 457 U.S. 202 (1982).

Political Activities and Speech of Teachers

The First Amendment rights of teachers and other school employees—whether they can speak out on various topics and freely associate with the political party of their choice—have been the subject of several Supreme Court cases. In general, the Court has protected speech that is related to issues of community interest but not to internal office operations; it has found that political affiliation may be the basis of hiring and firing for policy-making employees but not for others. This entry briefly summarizes those cases.

Free Speech

In the context of examining the political rights of teachers and other public school employees, it is worth noting that the U.S. Supreme Court first constructed a test for deciding under what circumstances public employers, including school boards, could dismiss employees for speaking out on matters of public concern in *Pickering v Board of Education of Township High School District 205, Will County* (1968). In *Pickering,* the Court held that

> the problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting on matters of public concern and the interest of the State, as an employer in promoting the efficiency of the public services it performs through its employees. (p. 568)

In *Pickering,* the board unsuccessfully sought to discharge a teacher for sending a letter to the editor of a local newspaper that criticized its handling of a bond issue and its allocation of financial resources between a school's educational and athletic programs. While the Court recognized that protecting the interest of the state was important, it believed the application of a balancing test between the teacher's interests as a citizen and the board "in promoting the efficiency of the public services it performs" (p. 568) was at stake.

The *Pickering* Court identified several considerations in evaluating the extent of the efficiency of public service, including whether speech directly impaired the supervisory ability of employers, whether the speech adversely affected the organizational climate, whether the employee's relationship with the board was so close as to suggest a breach of confidence, whether the employee's performance at the job suffered, and whether the speech had an adverse effect on school operations. In applying these tests, the Court concluded that the board violated the teacher's rights.

Refining the Decision

The Supreme Court again reviewed the free speech rights of teachers in *Mt. Healthy City Board of Education v. Doyle* (1977). In *Doyle,* the Court examined the impact of including a constitutionally protected right as a factor in not renewing the contract of a nontenured teacher who had a record of being difficult in school. The teacher claimed that the board

dismissed him because he called into a radio talk show and criticized a memo from his principal dealing with a faculty dress code.

In remanding for further consideration, the Court decided that where a teacher shows that protected conduct about a school matter was a substantial or motivating factor in the nonrenewal of an employment contract, the school or board must be given the opportunity to prove that it would have done the same even absent the protected conduct. On remand, the court accepted the board's assertion that it would not have renewed the teacher's contract regardless of whether he placed the call to the radio talk show (*Doyle v. Mt. Healthy City School District Board of Education,* 1982).

In *Givhan v. Western Line Consolidated School District* (1979), the Court indicated that *Pickering* applies to teachers who express themselves during private conversations with supervisors. When school officials chose not to renew the contract of a nontenured teacher, she was told that this was partly in response for her allegedly making petty and unreasonable demands on the principal and addressing him in an inappropriate manner. In refusing to reinstate the teacher, the justices explained that the lower court erred in declaring that school officials were justified in not renewing her contract, suggesting that under *Doyle,* they may have had sufficient cause on other grounds that would have required further proceedings. The Court thought that under *Pickering,* the judiciary has to consider working relationships of personnel along with the contents of communications in evaluating whether private communications are beyond the scope of First Amendment protection.

A Two-Part Test

The Supreme Court's next case involving the speech of public employees was *Connick v. Myers* (1983). In *Connick,* the Court distinguished the case at bar from *Pickering,* pointing out that *Pickering* applied to situations when employee speech is a matter of public concern. In *Connick,* an assistant district attorney distributed a questionnaire to fellow employees regarding the internal workings of the office. Insofar as only one question was considered to be of public concern, it alone seemed to be protected by *Pickering.* Even after the Court analyzed the one question under *Pickering,* it ruled that the employer did not violate the First Amendment rights of the discharged employee. In the process, the Court created a new two-part *Pickering-Connick* test. Under this test, only if employee speech is a matter of public concern will courts go to step two and evaluate whether that right is outweighed by employers' rights to run efficient organizations.

Courts applied the two-part analysis for over 20 years, until *Garcetti v. Ceballos* (2006). In *Garcetti,* the Supreme Court simplified its interpretation, making it more difficult for employees to enjoy their First Amendment rights. At issue was whether public employees were free to speak on matters pertaining to their official capacity. The Court wrote that insofar as employees talk about topics related to their jobs and are not speaking on matters of public concern, they give up their First Amendment protection with regard to being disciplined.

Political Affiliation

Pursuant to the legal reasoning from the freedom of speech cases, it is possible to evaluate claims dealing with political affiliations. In these cases, the Supreme Court considered whether employees could be discharged from public service due to their political associations.

Politics and Efficiency

In *Elrod v. Burns* (1976), a plurality maintained that dismissing employees due to political affiliations would violate the First Amendment. In this case, the Court applied heightened scrutiny, declaring that

> íf conditioning the retention of public employment on the employee's support of the in-party is to survive constitutional challenge, it must further some vital government end by a means that is least restrictive of freedom of belief and association in achieving that end, and the benefit gained must outweigh the loss of constitutionally protected rights. (p. 363)

The plurality rejected the state's asserted justification for discharging employees based on the need to maintain the organization's efficient operation.

The plurality in *Elrod* disagreed with the board in considering whether or not an organization becomes less efficient because employees are of a different political persuasion than their employers. Even when employees are politically associated with opposing views, the court found that mere political association is not enough reason to assume they would behave badly; the court added that firing employees because they belong to another political party as a means to make other workers better was not the least restrictive way of accomplishing the goal of efficiency. The plurality also examined the state's proffered need for political loyalty, rejecting the notion that partisan loyalty might guarantee that politically motivated policies could best be accomplished by employees who are similarly affiliated. The plurality interpreted this as suggesting that discharging employees along partisan lines might be justifiable under the reasoning that organizational efficiency and the pursuit of political goals would be enhanced by identical party affiliation. In so doing, the plurality made a major distinction between employees who are in policy-making positions and those who are not in such roles. The plurality decided that employees in policy-making positions may be dismissed if they are affiliated with oppositional parties, but those who are not may not be dismissed. Herein is the difference between *Pickering- Connick* and *Elrod.* The plurality required a lower court to apply the balancing test of *Pickering-Connick* for each case, while *Elrod* merely asks whether employees were in policy-making positions when making statements.

Politics and Policy

In 1980, the Supreme Court again revised the standard for addressing when one's political affiliation is cause for employee discharge. In *Branti v. Finkel* (1980), the Court observed that "the ultimate inquiry is . . . whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved" (p 518).

Finally, in *Rutan v. Republican Party of Illinois* (1990), the Supreme Court broadened *Elrod* and *Branti* to include all internal employment decisions such as promotions and transfers based on political affiliation. In fact, *Rutan* actually broadened the protection of *Elrod* as the Court drew a bright line distinction between basic freedom of speech and patronage cases by looking to the freedoms that each protects. In sum, when dealing with employees in policy-making positions, school boards should have greater leeway when dismissing employees who are in policy-making roles as opposed to being classroom teachers.

Marilyn J. Bartlett

See also *Connick v. Myers; Givhan v. Western Line Consolidated School District; Mt. Healthy City Board of Education v. Doyle; Pickering v. Board of Education of Township High School District 205, Will County;* Teacher Rights

Legal Citations

Branti v. Finkel, 445 U.S. 507 (1980).
Connick v. Myers, 461 U.S. 138 (1983).
Elrod v. Burns, 427 U.S. 347 (1976).
Garcetti v. Ceballos, 547 U.S. 410 (2006).
Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979).
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977)*, on remand, Doyle v. Mt. Healthy City School District Board of Education*, 670 F.2d 59 (6th Cir.1982).
Pickering v. Board of Education of Township High School 205, Will County, 391 U.S. 563 (1968).
Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

Prayer in Public Schools

Until the 1950s, prayer was routinely offered in public schools across the nation and generally supported by the courts. This reflected the quest for religious freedom that was part of American history and the religious, mostly Protestant, influences that were common from colonial times to the mid-20th century. Beginning in the 1960s, however, the U.S. Supreme Court issued a series of decisions related to prayer and other religion-oriented activities in schools, setting tests for what is constitutionally permissible, as discussed in this entry.

Early Rulings

More than half the states have, at some point, allowed or required prayer and/or Bible reading in public school classrooms. This was considered to be part of the exercise of freedom of religion, and proponents of religious exercises, mostly prayer and Bible reading, generally argued in defense of the practices as voluntary and traditional. In the 1960s, prayer and Bible reading faced legal challenges. Since the 1960s, there has been a continual battle between church and state, in the form of public schools, over the right of freedom of expression to address prayer in the schools since that time.

Many significant court cases have reflected the will of individuals, areas of the country, and the nation itself. In 1962, in *Engle v. Vitale*, the U.S. Supreme Court resolved its first case involving school prayer, finding that a prayer composed by the New York State Board of Regents was unconstitutional. The dispute arose after a local school board adopted this prayer as part of a policy, requiring it to be recited in class and allowing students to be exempted from this recitation.

Subsequent litigation defined religious exercises as clearly unconstitutional. A year after *Engel,* in the companion cases of *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963), the Supreme Court struck down prayer and Bible reading, creating the first two parts of the tripartite *Lemon v. Kurtzman* (1971) test in deciding that these practices were invalid, because they lacked a secular purpose and they advanced religion.

The *Lemon* Test

The legal battle between religion and the public school sector raged on in the Supreme Court's landmark 1971 decision in *Lemon v. Kurtzman.* While the constitutionality of government aid to religious schools was at issue in *Lemon,* rather than prayer, the Court developed a standard that continues to be applied in questions of the right to prayer in the schools as well as when dealing with state aid to religiously affiliated nonpublic schools. According to the Court, any time that religion and government intersect, first, the statute must have "a secular legislative purpose"; second, its primary effect must neither advance nor inhibit religion; finally, the statute must not foster "an excessive government entanglement with religion" (p. 615). Laws or policies that fail any one of the three parts of the *Lemon* test are invalid.

The Supreme Court turned to the issue of a period of silence in schools in *Wallace v. Jaffree* (1985). At issue were three statutes from Alabama. The Court found that the first, which allowed a period of silence for meditation, was constitutional. Conversely, the Court struck down the second law that authorized teachers to lead willing students in a prayer to "Almighty God . . . the Creator and Supreme Judge of the world" (p. 40). The Court also invalidated a statute that authorized a period "for meditation or voluntary prayer" (p. 57) on the basis that the inclusion of the words, "or voluntary prayer," was made for the specific unconstitutional purpose of returning prayer in public classrooms.

Classroom times for silence for student meditation are constitutional if they are neutrally conducted and if the laws and policies authorizing such times are neutrally written. Applying *Lemon,* the Eleventh Circuit, in *Bown v. Gwinnett County School District* (1997), refused to find an Establishment Clause violation in a law from Georgia that required a moment for silent reflection in all public school classrooms at the beginning of the school day. Similarly, the Fourth Circuit upheld a law from Virginia that provided for a daily observance of one minute of silence in all classrooms, so that students could meditate, pray, or engage in other silent activity (*Brown v. Gilmore,* 2001).

Coercion and Access

The *Lemon* test continues to be applied. Even so, the Supreme Court adopted the coercion test in *Lee v. Weisman* (1992) to evaluate whether individuals were compelled to participate in prayer at graduation ceremonies. In *Lee,* the Court clarified that school-sponsored prayer was unconstitutional. *Lee* arose when a middle school principal invited members of the clergy to give an invocation and benediction at the school's graduation ceremony. Following *Lee,* the lower federal courts remained divided over the question of student-sponsored prayer at graduation.

Eight years later, in *Santa Fe Independent School District v. Doe* (2000), the Supreme Court addressed a school board's policy of permitting student-led, student-initiated prayer at football games. In ruling that the policy violated the Establishment Clause, the Court specified that its purpose and effect were to endorse religion. However, *Santa Fe* did not end this debate. In *Adler v. Duval County School Board* (2001), a high school senior, whom the graduating class elected, was allowed to deliver a message of his own choosing at graduation. These cases demonstrate the controversial and fact-specific nature of the litigation. In *Adler,* the Eleventh Circuit decided that student-initiated prayer was acceptable, because it was part of the entire process of planning the graduation. Yet, in a case from Texas (*Ward v. Santa Fe Independent School District,* 2002), a federal trial court struck down a policy that encouraged students to read religious messages at public events as violating the Establishment Clause.

Additional issues emerged with respect to prayer in schools. In 1984, Congress enacted the Equal Access Act, which allows noncurricular prayer and Bible study clubs to gather during noninstructional time in public secondary schools that receive federal assistance. In *Board of Education of Westside Community Schools v. Mergens* (1999), the Supreme Court upheld the Equal Access Act, reasoning that most high school students could recognize that allowing a religious club to meet in a high school was not the same as a school's endorsing religion.

Recent Issues

Congress has become involved in the status of school prayer in the No Child Left Behind Act (NCLB). The NCLB requires that schools that receive federal funds must certify that they have no policies that either deny or prevent participation in constitutionally protected prayer in schools.

More and more there has been an expression on the part of students to pray before and after school activities. Students may read Bibles or other religious materials, pray, or engage other consenting students in religious instruction during noninstructional time such as passing periods, recess, and lunch. While school officials may impose rules to guarantee order and student rights, they may not prohibit lawful activities that are religiously based. School officials have generally been cautioned not to encourage, discourage, or participate in these activities. Even though the federal Department of Education has supported greater accommodation of religion than in the 1970s and 1980s, courts continue to render controversial decisions in this area. In light of these rulings, the courts are likely to treat challenges to prayer in schools on case-by-case bases.

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See also *Abington Township School District v. Schempp* and *Murray v. Curlett; Board of Education of Westside Community Schools v. Mergens; Engel v. Vitale;* Equal Access Act; *Lee v. Weisman; Lemon v. Kurtzman;* No Child Left Behind Act; Religious Activities in Public Schools; *Santa Fe Independent School District v. Doe*

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Precedent

Precedent refers to the use of previous court decisions in resolving current judicial questions. Precedent is thus, in some ways, a historical recollection of the development of legal matters or conflicts. Under the common-law concept of precedent, decisions that have been rendered on issues should be exemplars or

guides for later cases when similar issue arises. By applying precedent, lower courts are essentially bound by the judgments of higher courts. While precedent is a practice and not a law, its use is binding in judicial decisions. This entry looks at types of precedent, conditions for overruling precedents, and practical application.

Types of Precedent

Precedent can fall into one of two categories: binding or persuasive. Binding precedent is set by higher courts and must be established in their legal reasoning; it is also known as its *ratio decidendi,* literally, "the reason for a decision." Binding precedent refers back to the doctrine of stare decisis, in which lower courts are bound by the decisions of higher courts. The doctrine of *stare decisis,* "to stand by that which is decided," requires adherence to precedent. When courts render their judgments, their doing so dictates future interpretations of a similar dispute unless an even higher court establishes a different outcome, thereby setting new precedent. When higher courts rule, lower courts are bound by their orders in future cases.

Persuasive precedent refers to precedent that is not mandatory or binding. For example, in cases involving circumstances that have not yet been addressed, typically referred to as cases of first impression, courts may rely on persuasive precedent by applying decisions from courts in other jurisdictions. In cases of first impression, there is no mandatory precedent for courts to apply. If earlier judgments dealt with similar circumstances, then courts may rely on persuasive precedent.

Courts can also consider customs and traditions in making their decisions in the absence of binding precedent. In addition, persuasive precedent is created by decisions of courts of the same level, particularly appellate panels. As such, courts should take such judgments into consideration but are not obligated to reach the same outcomes. If higher courts apply persuasive precedent is their opinions, it can become binding.

Insofar as precedent has such far-reaching implications for future cases, courts seek to set it as narrowly as possible. To this end, courts typically rule with great specificity, such that when they use rationales as binding or persuasive precedents, other courts can understand the circumstances under which the precedents were set.

Overturning Precedent

In rare cases, a higher court may overturn precedent. When this happens, courts usually try to distinguish the new rulings from the precedent, again making the scope of their decisions as specific as possible so that different circumstances allow for distinct decisions. For example, in *Brown v. Board of Education of Topeka* (1954), the Supreme Court distinguished its holding from *Plessy v. Ferguson* (1896), which dealt with public railway accommodations, in noting that its judgment applied to public education, because only schooling was at issue. Of course, Brown opened the door to the end of "separate but equal" throughout American society.

When courts overrule precedent, they consider issues including the age of the precedent, the degree to which the public in general or members of a private sector rely on this precedent, and the precedent's harmony and fit with other related laws. In fact, the Supreme Court has explained its reasons for overruling precedents:

> When convinced of former error, this Court has never felt constrained to follow precedent. In constitutional questions, where correction depends upon amendment, and not upon legislative action, this Court throughout its history has freely exercised its power to reexamine the basis of its constitutional decisions. (*Smith v. Allwright,* p. 665)

In adhering to the legal doctrine of *stare decisis* and following precedent, courts typically reverse rulings most often and/or easily in cases involving constitutional issues, particularly those involving due process rights.

How Precedent Is Used

For practical purposes, and due to the sheer volume of judicial decisions that are handed down each year, courts can almost always find previous decisions to support their judgments. Accordingly, precedents are

used to validate, rationalize, or substantiate the conclusion that courts make in addition to actually helping direct or channel opinions.

Case law also greatly impacts the notion of *stare decisis,* meaning that precedent impacts judicial decisions based on a number of criteria, including the degree of similarity between the issues being resolved. In addition, courts consider the time and location of the precedent, such as whether it was set in the same jurisdiction and therefore binding. In this way, courts ask about how long ago a precedent was set and what new rules or circumstances may have arisen in the interim. When ruling, courts first consider whether there is a binding precedent, such as from the U.S. Supreme Court, before looking to more localized cases in the same jurisdiction. After that, courts may give some weight to decisions from lower courts, to disputes on matters that are slightly different, or to cases that are out of date, such as where a new law has been enacted since the precedent was set.

The wisdom behind strict adherence to judicial precedent is debated. Supporters maintain that adherence to precedent allows decisions to be predictable and free from chaos. In essence, proponents assert that because persons should be reasonably sure of the outcome of cases if the facts and issues are similar to those of earlier disputes, then precedent is valuable. On the other hand, critics counter that following the doctrine of precedent and stare decisis may perpetuate judgments such as Plessy v. Ferguson that were not good or sound in the first place.

Similarly, a precedent that was questionable when first established can be used in further decisions, each with slightly different interpretations, to the point that it results in judgments that are grossly incorrect. Insofar as the U.S. Constitution does not require following precedent, opponents argue that ensuring that the Constitution is upheld correctly is more important than ensuring that previous decisions are followed with exactness.

Regardless of which side of the equation one falls on, it is clear that precedent is a useful tool in analyzing judicial trends. Moreover, precedent can be meaningful for predicting future outcomes of cases.

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See also Common Law; Rule of Law; Stare Decisis

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Smith v. Allwright, 321 U.S. 649 (1994).

Preventative Law

The most effective approach for handling legal challenges is to prevent them from occurring in the first place. However, in recent years, school boards have had to allocate a much higher proportion of their overall budgets for legal fees. Unfortunately, as American educational systems become more complex, and the number of laws that schools operate under increases, the amount of litigation also increases. This is particularly true in the field of special education, where the amount of litigation has increased at a greater rate than in any other school-related sphere. At the same time, the amount of litigation in the myriad other areas that fall under the umbrella of education law continues to increase. In addition to their own legal expenses, school boards may be responsible for reimbursing parents for their legal expenses when parents are the prevailing parties in litigation.

School officials, aware of the need to evade unnecessary litigation, have developed an interest in the field of preventative law. Utilizing the principles of preventative law, school personnel try to eliminate legal conflicts before they can surface, thus putting school boards in favorable positions should litigation occur down the road. In order to be most successful, educational officials need to apply preventative law principles on a daily basis by looking for permanent solutions to the situations that give rise to conflict in

school settings. By and large, it is much less expensive to find lasting solutions by enacting proactive policies and procedures than to engage in what amounts to reactive or after-the-fact defenses in long-drawn-out litigation.

A prerequisite to any formal program of preventative law is for school officials, including administrators, teachers, aides, and other support personnel, to be knowledgeable about the legal requirements of their respective roles. School personnel can gain basic knowledge of education law by taking courses offered by local schools of education. In fact, almost all school administrator preparation programs include at least one course in legal issues. Even so, because the law is constantly evolving, it can be a big challenge for school officials to be diligent in their efforts to remain current. New cases that can alter the status of the law are decided daily. Thus, school officials must take positive steps to stay knowledgeable about changes in the legal landscape.

Fortunately, numerous sources of information exist about issues and developments in education law. First, there is a plethora of texts and monographs on the market today dealing with both general issues and specific topics within the field of school law. One professional organization, the Education Law Association (ELA), headquartered at the University of Dayton, in Dayton, Ohio, is devoted to disseminating current information on education law. ELA publishes *The Yearbook of Education Law,* which includes chapters on various topics such as school governance, employee issues, sports, student issues, bargaining, students with disabilities, and torts. ELA also publishes a quarterly newsletter, *ELA Notes,* that includes practical articles, and a monthly reporter, the *School Law Reporter,* as well as monographs that provide up-to-date information on school law.

Many education journals frequently contain articles on legal issues, especially those involving issues relevant to the journal's subscribers. Professional organizations such as the Council for Exceptional Children, the National School Boards Association, the National Association of Elementary School Principals, and the Association of School Business Officials generally include sessions at their annual conferences that address legal issues. In addition, the schools of education in many colleges and universities offer courses on school law that can serve as excellent resources for educators. Workshops on education law should be part of every school system's professional development program. In providing such ongoing professional development for staff, school administrators should consider having the board's attorneys join in the presentations so that they can provide up-to-date legal perspectives.

One of the best ways to steer clear of litigation is always to be equipped for such a possibility. School board officials can reduce their risk of litigation by making sure that all employees understand the law as it applies to their respective positions and know and follow proper procedures. Employees who are familiar with their legal obligations and responsibilities are less likely to make serious errors. In this respect, the need for constant in-service training on legal requirements cannot be overemphasized.

Conflicts are inevitable, and when they do arise, it does not necessarily mean that litigation will follow. Many disagreements can, and should, be resolved through more communication between the parties involved. Parents, school officials, and other stakeholders can smooth over misunderstandings and reach compromises. Further, the parties to disagreements can also engage in less confrontational forms of dispute resolution such as arbitration or mediation to solve their disagreements.

Allan G. Osborne, Jr.

See also Arbitration; Mediation

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Privacy Rights of Students

The Fourth Amendment to the U.S. Constitution, enacted as part of the Bill of Rights in 1791, guarantees all persons the freedom from unreasonable searches and seizures. Specifically, this amendment states that

"the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." This protection requires close examination in one very important context, that of students in public schools; this entry provides a brief survey.

Basic but Limited Rights

The right to privacy is neither explicitly guaranteed nor mentioned in the U.S. Constitution. In addition, students who are enrolled in public schools have even more limited privacy rights than does the average adult citizen. Insofar as school officials are responsible for students when serving in loco parentis, or in the place of the parent, any privacy rights that children might have in educational settings are considered in relation to the overall safety and well-being of others in school environments as a whole. In other words, the duty and ability of school officials to provide a safe and secure learning environment typically outweighs individual students' rights to privacy.

The Supreme Court enunciated perhaps the greatest impact on students' rights to privacy in schools in *New Jersey v. T. L. O.* in 1985. *T. L. O.* involved a high school student who had marijuana in her purse, which was discovered when an assistant principal was actually looking only for cigarettes. In *T .L. O.,* the Court for the first time recognized that the rights of students are protected by the Fourth Amendment. Even so, the Court ruled that this protection is limited in scope by a school's need and the responsibility of educators to maintain safe and orderly learning environments.

In *T. L. O,* the Court exempted school officials from the requirements of probable cause and a warrant (which law enforcement officials must have) for conducting searches of students or their effects. Instead, the Court maintained that school employees are held to the standard of reasonable suspicion in order to justify a search. This means that school officials have to have reasonable cause, based on totality of the circumstances, to suspect that students have broken or are breaking school rules or the law at the inception of searches. In addition, the Court explained that searches must be reasonable in scope depending on the age and sex of students as well as the severity of the alleged offenses. The *T. L. O.* standard applies to all individualized searches of student effects, including their purses, backpacks, desks, pockets, and other such places.

Some Specific Instances

School lockers may also be subject to search without violating the rights of students. Most courts have agreed that school lockers are indeed school property and thus subject to search at any time. It is well settled that students are issued lockers for their own use, but that the lockers are owned by schools and jointly controlled by both schools and students. As such, students' expectations of privacy of items in their lockers is lower than average. Still, "ownership" of lockers should be mentioned explicitly in local board policies in order to avoid conflict.

Likewise, drug dogs that are trained to sniff drugs in school lockers and other areas of school premises constitute individual searches. Courts have reached mixed results over whether the use of drug dogs violates the Fourth Amendment rights of students. However, when it comes to more intrusive actions such as strip searches, the majority of courts have generally agreed that school officials will have violated the privacy rights of students.

Another primary issue is random, suspicionless drug testing. The Supreme Court seemingly answered this question in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002), wherein it upheld a random suspicionless drug testing policy that was directed at all students involved in extracurricular activities but was only applied to those who participated in interscholastic sports. *Earls* allowed for much more liberal testing of students with much more lenient circumstances than previously. The precedent was established in *Vernonia School District 47J v. Acton* (1995), where the student drug testing was upheld but was done so with specific characteristics, including student athletes' decreased expectations of privacy, the relative unobtrusiveness of the search procedures, and the seriousness of the need met by this search.

While students do have some rights to privacy in school settings, they are greatly diminished in light of the duty of educational officials to maintain safe and orderly learning environments. As case law demonstrates with situations involving searches of student effects (whether by persons or dogs) and drug testing, student privacy goes only as far as safety allows; courts are not as understanding when it comes to strip searches. Finally, the courts have gone so far as to rule that even random suspicionless drug testing, if conducted with the intent of establishing safety precautions for students in extracurricular activities, does not violate the Fourth Amendment.

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See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drugs, Dog Searches for; Drug Testing of Students; Locker Searches; *New Jersey v. T. L. O.*; Strip Searches; *Vernonia School District 47J v. Acton*

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Privacy Rights of Teachers

It is commonly believed that teachers, especially in public schools, enjoy a measure of privacy in their personal lives. The freedoms that teachers have on the job regarding what and how they may teach, what they may do and say, what organizations they may join, even what they may wear are under scrutiny and face growing challenges. Within the context of privacy rights, teachers may exercise personal choices, ranging from living with a person of the opposite sex to other lifestyle choices. The constitutional rights considered among the most basic for all include freedom of expression, religion, and association and freedom from discrimination.

Recent years have seen a movement toward reemphasizing teachers' responsibilities as moral exemplars in and out of school. Many parents have demanded that school officials reinforce traditional values among students, and school district policies generally require that teachers serve as positive role models. Based in part on such requirements, the supreme court of Colorado upheld the dismissal of a tenured teacher for immorality, because she violated board policy by drinking beer with students while acting in her official capacity as cheerleader sponsor (*Blaine v. Moffat County School District RE No. 1,* 1988). This case represents one of many that stand for the proposition that teacher misbehavior outside the school that reduces teachers' capacity to serve as positive role models can justify reprimands or dismissals as long as procedural and substantive due process rights are not violated. Against this backdrop, the interpretation of teachers' constitutional rights—such as freedom of expression, freedom to express religious views inside or outside of the classroom, and freedom of association—continues to evolve.

Speech and Religion

Teachers have the freedom and knowledge to educate America's youth. Yet, this freedom comes with significant responsibilities and some restrictions because of the potential impact on impressionable children. Consequently, what teachers may or should say is often scrutinized. The U.S. Supreme Court, in the landmark case *Pickering v. Board of Education of Township High School District 205, Will County* (1968), explained that teachers maintain some rights of expression as long as they are commenting on

matters of public concern. In this case, the Court noted that there should be a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern, and the interest of the state.

In *Pickering,* the Supreme Court held that the teacher had the right to express his views on a matter of legitimate public concern and that his criticism of school policy was not adequate grounds for dismissal. At the same time, if a teacher's comments are sarcastic, unprofessional, insulting, or based on private disagreements, many cases support the notion that the teacher may be disciplined or even dismissed. Like all determinations on the limits of speech, the comments of teachers are subject to time, place, and manner restrictions. In litigation related to teacher rights and responsibilities, the courts typically examine the consequences and the context of teachers' actions or words and factor them into an equation balancing the public interests of school boards against the private rights of teachers.

On another matter, just like any citizen, teachers have the right to practice their religion outside of the normal hours of employment. However, this cannot include proselytizing or indoctrinating students in schools, a ban that may also include efforts to present a religious viewpoint outside of class. The rationale is that a teacher's position of authority could lead students to assume that the teacher's view is endorsed by the school. Therefore, teachers may not subject others, especially their students, to expressions of their religious beliefs or ideologies. With respect to religion, they must remain neutral in their relationship with students. In one such case, for example, the federal trial court in Connecticut ruled that a teacher could not wear a T-shirt with a religious message on it because of the impact that it might have on her students (*Downing v. West Haven Board of Education,* 2001).

Association and Behavior

Teachers may associate with whomever they wish as long as their associations do not involve illegal activity and their behavior does not render them unfit to perform their teaching functions effectively. While some teachers may be prohibited from some political activity because of federal and local regulations, they are not generally penalized for their political activity or association. Teachers may feel the indirect retribution of an administration unhappy with that activity. It is important to note that teachers enjoy a constitutional right to associate, to run for a political office, and to join unions, although this last right is limited in some states.

Teachers must exhibit prudent professional behavior and ensure that their participation in political or external organizations does not interfere with their classroom duties or disrupt the operations of their school systems. In one such case, the Second Circuit upheld the dismissal of a tenured teacher due to his membership in an organization that identified its primary goal as seeking to bring about a change in the attitudes and laws governing sexual activity between men and boys while advocating the abolition of laws governing the age of consent for such activities (*Melzer v. Board of Education of City School District of City of New York,* 2003, 2004). The court ruled that the orderly operation of a high school outweighed the teacher's interest in commenting on matters of public concern through his membership in the group and that the school board was not retaliating against him due to his belonging to the organization.

In exercising preferences in areas such as dress, grooming, and lifestyle choices, teachers must be mindful of the professional nature of their positions and the impact that their appearance and behavior may have on their students. The right of school boards to penalize teachers for private conduct rests on their ability to demonstrate that such conduct impaired their effectiveness in classrooms.

When teachers have demonstrated a consistent and effective record of teaching, have an effective and professional relationship with students, and are respected in their communities, it is unlikely that school officials will succeed in such serious action as dismissal or revoking their certificates. Even so, school officials may act if the private conduct of teachers becomes publicized to the point that it impairs their reputation and relationships with parents and students, thus

rendering them ineffective in executing their duties. Teacher rights to privacy should be respected to the extent that teachers are not engaging in criminal acts that violate the trust of the community or render teachers ineffective in performing their professional duties. Teachers are entitled to constitutional rights, as are other citizens, and these rights must be protected.

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See also Collective Bargaining; Due Process Rights: Teacher Dismissal; *Pickering v. Board of Education of Township High School District 205, Will County;* Political Activities and Speech of Teachers; Teacher Rights

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R

Raney v. Board of Education

At issue in *Raney v. Board of Education* (1968) was the adequacy of a freedom-of-choice plan in terms of its compliance with the mandate of *Brown v. Board of Education of Topeka II* (1955). The U.S. Supreme Court, ruling on three related cases on the same day, found that the plan was not adequate to ensure the required unitary school system.

Facts of the Case

In *Brown II,* the U.S. Supreme Court ordered school boards in segregated school systems to transition to racial nondiscriminatory unitary systems. *Raney* involved a freedom-of-choice plan that a local board in Arkansas adopted in 1965. Prior to that time, the board operated a state-imposed segregated school system in a town where there was no residential segregation. The African American elementary and high schools were called the "Field Schools," and the White elementary and high schools were identified as the "Gould Schools."

As part of the freedom-of-choice plan, the board required students to select between the two sets of schools. Students who did not make a choice were assigned to the schools they previously attended. About 85 African American students attended the Gould Schools; no White students sought attendance at the Field Schools. In short, both the Gould Schools and Field Schools continued to preserve their racially identifiable characteristics as segregated schools, as they had been prior to the freedom-of-choice plans. The African American students unsuccessfully filed suit when they were denied admission at the Gould Schools because the enrollment of children for the 5th, 10th, and 11th grades exceeded the number of places available. The Eighth Circuit affirmed the dismissal of the suit.

The Court's Ruling

On further review in *Raney,* one of three desegregation cases that it handed own on the same day, the Supreme Court unanimously reversed and remanded in favor of the African American students. In examining the adequacy of the plan under *Brown II,* the Court relied heavily on *Green v. County School Board of New Kent County* (1968), the second of the three cases that it decided the same day as *Raney* and one that involved a similar freedom-of-choice plan. The Court used its extensive review of *Green* in striking down the freedom of choice in *Raney* insofar as *Brown* directed school boards to develop realistic plans that had promise of dismantling desegregated systems immediately and turning them in unitary systems.

In both *Raney* and *Green,* the Supreme Court found that rather than dismantling the segregated school systems, the boards perpetuated dual systems. According to the *Raney* Court, the freedom-of-choice plan burdened students and parents with the responsibility that *Brown II* clearly mandated should have been the

affirmative duty of school boards. In both *Raney* and *Green,* the Court reasoned that the plans were inadequate to move the segregated dual systems to unitary nonracial systems. *Green* also provided what became known as the "*Green* factors," which continue to be widely applied in evaluating overall effectiveness of desegregation plans and whether dual systems have achieved unitary status. These factors address the composition of a student body, faculty, staff, transportation, extracurricular activities, and facilities.

The *Raney* Court thus reversed and remanded for further proceedings that would include the issue of the location of a new high school. At the same time, the justices made it clear that the trial court's rejection of the complaint was an inappropriate exercise of its discretion. To this end, the justices concluded that the trial court should have maintained jurisdiction over the dispute in order to ensure that the board adopted constitutional plans and achieved the goal of a nonracial system. As Justice Douglas noted in his concurring opinion in *Jones v. Alfred H. Mayer Company* (1968) and as reflected in *Raney,* the Court was tiring of the contrivances states had invented to ignore the command of *Brown I.*

In the third case completing the trilogy with *Raney* and *Green, Monroe v. Board of Commissioners* (1968), the Supreme Court struck down another freedom-of-choice plan. In *Monroe,* the Court was of the opinion that a free transfer plan from Tennessee was inadequate for the same reasons as in *Raney* and *Green.* In *Raney, Green,* and *Monroe,* the Court did not declare that freedom-of-choice plans were per se unconstitutional. Rather, the Court examined the facts in each dispute in noting that the plans at issue did not pass constitutional muster.

Deborah Curry

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Dual and Unitary Systems; *Green v. County School Board of New Kent County*

Further Readings

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Jones v. Alfred H. Mayer Company, 392 U.S. 409 (1968).
Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968).
Raney v. Board of Education, 391 U.S. 443 (1968).

Reduction in Force

Almost all states have statutes directly addressing the abolition of teaching or other jobs in schools without fault on the part of individual employees, a practice commonly referred to as *reduction in force* (RIF). The grounds for RIF, the order in which employees are released or can "bump" others from their jobs, and call-back rights are matters of state law subject to modifications by school board policies and operative collective bargaining agreements. Unless school boards modify their RIF policies pursuant to the agreements in effect with their employees, state statutes control.

State laws typically permit RIFs due to declines in student enrollments, financial exigencies, elimination of jobs or programs, and board discretion. While courts ordinarily defer to the discretion of school boards on the need for RIFs, if challenged, school officials must demonstrate that their use of RIFs complied with state laws, board policies, or collective bargaining contracts. In addition, courts expect RIF policies to include descriptions of the criteria that boards used in selecting employees to be dismissed, who made the judgments, and how the criteria were weighed in implementing RIFs.

Once school boards decide upon a RIF, they must establish the order of release. Insofar as RIFs are ordinarily based on seniority, courts typically treat this as a rational, but not exclusive, factor in selecting employees

for RIFs. Courts thus often interpret tenure statutes broadly as including seniority rights within the category of probationary employees, so that those with more time on the job have greater rights compared with those employees with fewer years of service. Courts have also upheld board policies to rely on criteria such as race and gender as well as academic subject matter in high-demand areas, including science and mathematics, when implementing RIFs, as long as the boards can demonstrate justifiable bases for acting, thereby granting protected individuals additional years of seniority in order to help them to preserve their jobs.

The courts place the burden of proving that positions are unnecessary on school officials. In evaluating seniority, absent modifications based on board polices or collective bargaining agreements, the first criterion is number of years of full-time service in school systems. Beyond that, the methods that boards rely on must be reasonable and not prohibited by either state or federal law, such as dismissing individuals in protected categories, such as race or gender.

By way of illustration, a controversial legal case involving RIF, race, and seniority was days away from oral argument at the U.S. Supreme Court when the parties reached a settlement agreement, thereby ending the litigation. At issue was a dispute from New Jersey wherein a school board mistakenly believed that its affirmative action program required it to terminate the contract of a White rather than an African American teacher, due solely to race. The board dismissed the White woman, even though the two had virtually identical credentials. The Third Circuit affirmed that since the board's RIF plan, which was adopted to promote racial diversity rather than remedy discrimination or its past effects in the district, violated the rights of nonminorities, it was unconstitutional (*Taxman v. Board of Education of the Township of Piscataway,* 1996, 1997a, 1997b).

When tenured staff members lose their jobs as part of RIFs, nontenured employees usually cannot be retained, nor may boards grant them the status of tenured staff. In other words, current employees who are about to have their jobs eliminated as part of RIFs are entitled to "bump" less-senior staff members. "Bumping" makes it possible for employees with more seniority and at least the same credentials to retain the jobs for which they were certificated, even if those positions are occupied by equally qualified staff members with less seniority.

Individuals who lose their jobs in RIFs must assure school officials that their credentials or certifications for other positions are valid when it is time for bumping. Courts generally agree that since being eligible for certification is not the same as having certification, those who lack certificates in areas where RIFs may occur do not have the legal right to bump others. Moreover, courts rule that bumping rights apply only to staff members who are qualified for their jobs, not those who seek to have new positions created within their school systems in an attempt to retain their employment.

Subject to board policies and collective bargaining agreements, RIF statutes usually stipulate that the jobs of certificated employees who have been released cannot be filled until they have first been offered their jobs back. State law, board policies, and bargaining contracts may even specify how much seniority individuals retain while on preferred eligibility or call-back lists. Moreover, these laws, policies, and bargaining contracts may also specify how long former employees remain on preferred eligibility lists, typically for periods of 2 or 3 years, time frames that can be extended by bargaining agreements. Under preferred eligibility provisions, employees are usually called back to work in the order of seniority, such that the first to be released from their jobs are the first to be called back.

Charles J. Russo

See also Collective Bargaining; Contracts; Tenure; Unions

Further Readings

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Legal Citations

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Regents of the University of California v. Bakke

In *Regents of the University of California v. Bakke* (1978), the question before the U.S. Supreme Court was whether a medical school admissions policy that allowed for a separate process for minority applicants was constitutional. The unusual split decision endorsed diversity as a compelling government interest but set limitations on how race could be used in admissions to ensure a diverse student body, with a lasting impact on race-conscious education policy.

Facts of the Case

Alan Bakke, a White male, applied to the University of California at Davis medical school in 1973 and 1974 but was denied admission both times. Bakke then filed suit against the university, alleging so-called reverse discrimination. Bakke also contended that the admissions process discriminated against him on the basis of his race, violating his rights under both the Equal Protection Clause of the Fourteenth Amendment and Title VI of the 1964 Civil Rights Act.

University officials relied on an admissions process that separated Whites from minority students during deliberations, reserving 16 spots in a class of 100 specifically for minority applicants. In addition, the minority applicants were considered in the majority pool. Applicants to the medical school were required to have a minimum college grade point average (GPA) of 2.5. Five reviewers assessed each applicant's Medical College Admissions Test (MCAT) score, GPA, letters of recommendation, extracurricular activities, and other biographical data and assigned each factor a "benchmark" score of 0 to 100. These benchmark scores were added up so that each applicant received a final application score between 0 and 500.

Applicants who indicated their minority status (Black, Chicano, Asian, or American Indian, as determined by the university) on their applications went through a separate review process. Minority applicants were not required to meet the minimum 2.5 GPA, but their applications did undergo the same "benchmark" scoring system as nonminority applicants. The 16 spots reserved in this process were insulated from competition with the outside applicant pool. Bakke's attorney maintained that his scores were substantially higher than those of students who were admitted through the affirmative action process.

After the Supreme Court of California vitiated the admissions policy, the university sought further review.

The Court's Ruling

The Supreme Court struck down the university's policy on the basis of equal protection because of its quota nature, shielding minority applicants from competition with a larger applicant pool. Even so, Justice Powell's key concurring opinion effectively approved the use of race in college admissions in order to promote a diverse student body.

In its analysis, the Supreme Court ruled that in order to be acceptable, governmental programs that rely on suspect classifications such as race must pass *strict scrutiny analysis,* meaning that they must serve a compelling governmental purpose and must be narrowly tailored to suit that purpose. The medical school argued that its program passed strict scrutiny for four reasons: to help to reduce the historic deficit of minority groups in medical schools and professions, to counter the effects of societal discrimination, to increase the number of physicians serving in underserved areas, and to achieve the educational benefits that flow from a diverse student body. The Court considered each of these reasons.

Four justices signed on to an opinion upholding the university's policy based on the second rationale, to remedy societal discrimination. Four other justices signed on to an opinion that rejected all rationales and that struck down the policy as unconstitutional. Justice Powell, the ninth justice, filed an opinion that concurred with the latter four justices, striking down the policy. However, in so doing, Powell's concurrance endorsed the fourth, or diversity, rationale. According to Powell, an affirmative action policy in university admissions would be narrowly tailored to achieve this diversity interest if it met two conditions. First, he noted that he would uphold a policy if there were no racial quotas involved and all students were evaluated under common standards by a common admissions committee.

Second, Powell thought that race could be used only as a "plus" factor, on a par with other diversity factors designed to yield a heterogeneous student body. Interpreting the disputed policy at issue as a quota, Powell was of the view that it was unconstitutional.

Insofar as the Court was split 4-4-1, Justice Powell's concurring opinion is generally perceived as setting forth the relevant law that colleges and universities were required to follow. Yet the split decision in *Bakke,* coupled with subsequent Supreme Court decisions striking down affirmation action programs in hiring, promotion, and contracting (*Wygant v. Jackson Board of Education,* 1986; *Richmond v. J. A. Croson Company,* 1989; *Adarand Constructors, Inc. v. Pena,* 1995), resulted in confusion as to whether Justice Powell's judgment was still binding.

For example, in *Hopwood v. Texas* (1996), the Fifth Circuit ruled in favor of four White plaintiffs who sued the University of Texas Law School alleging that the university's affirmative action policy was discriminatory on equal protection grounds. This court concluded that Powell's *Bakke* opinion was not binding law. Other lower courts reached similar conclusions.

The uncertainty over *Bakke* continued until 2003, when a majority of the Court effectively adopted Powell's opinion in *Grutter v. Bollinger.* In upholding the affirmative action policy of the University of Michigan Law School, the Court held that the attainment of a diverse student body was, in fact, a compelling governmental interest and that the policy was sufficiently narrowly tailored to withstand judicial scrutiny. In a companion case, *Gratz v. Bollinger* (2003), involving undergraduates at the same university, the Court agreed that diversity was a compelling governmental interest, but it was not convinced that the policy was sufficiently narrowly tailored.

Lauren P. Saenz

See also Affirmative Action; Equal Protection Analaysis; Fourteenth Amendment; *Gratz v. Bollinger; Grutter v. Bollinger; Wygant v. Jackson Board of Education*

Legal Citations

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Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
Richmond v. J. A. Croson Company, 488 U.S. 469 (1989).
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

Regulation

Although education is primarily an issue reserved for state and local control, federal involvement in the form of funding, legislative enactments, and subsequent regulations has dramatically increased. Thus, numerous regulations have emerged from federal departments and agencies such as the U.S. Department of Education and the Office for Civil Rights. These regulations provide guidance to state and local educational agencies regarding educators' responsibilities and students' rights. For example, the rights of students with disabilities are protected under the Individuals with Disabilities in Education Act (IDEA) and are further explained in the IDEA regulations, which are issued by the Department of Education. Likewise, the educational rights of English language learners (ELLs) are protected by Title VI of the Civil Rights Act of 1964 and are enforced through regulations issued by the Office for Civil Rights. The legal background of regulations and how they are created are discussed in this entry.

Legal Context

Governmental powers are vested by the U.S. Constitution in three separate branches: the executive, legislative, and judicial. Following a strict concept of separation of powers, each of these three governmental branches has the power and responsibility to act according to constitutional guidelines. The legislative branch has the primary power to make laws and to provide for the necessary policies and procedures to enact the laws. Regulations typically emerge as a direct result of this exercise of lawmaking power by the legislative branch.

Federal or state legislatures may delegate rulemaking authority and regulatory powers to specific agencies or departments in the executive branch of

government. These governmental agencies or departments may then fulfill these delegated powers and responsibilities by issuing, or promulgating, regulations. During the 1930s, a surge of New Deal legislation emerged from Congress that began to delegate greater authority for issuing detailed regulations to various federal departments and agencies.

Regulations are issued by governmental agencies in order to accomplish the specific purposes of federal, state, or local statutes. In other words, governmental agencies are granted the authority and responsibility to promulgate reasonable rules and regulations in furtherance of the delegated legislative powers. While governmental agencies may be granted specific authority to carry out the terms of a given law, this authority is subject to various limitations upon such regulatory functions.

These limitations include, for example, a limit upon the regulatory authority of governmental agencies based upon constitutional rules and legal standards. Another limitation upon the regulatory authority is the mandate requiring that regulations conform to or not exceed the delegated powers inherent in the originating statute. Finally, governmental agencies are expected to adopt regulations in order to provide a mechanism for understanding, interpreting, enforcing, and overseeing the legislative purpose of a given statute or law.

How Regulations Are Made

Regulations typically emerge following consultation with the various individuals, industries, and institutions that will be affected by the regulations. In fulfillment of these expectations, governmental agencies publish a proposed regulation and then offer a period of time during which interested and affected parties are given an opportunity to comment on the proposed regulation. Federal agencies mush adhere to the Administrative Procedure Act, which mandates the publication of proposed and final regulations or rules in the *Federal Register* following the provision of notice and the opportunity for interested persons to share their views via written or oral presentation.

At the federal level, the proposed regulation appears in the *Federal Register,* which is published 5 days a week, while at the state level, the commentary process varies widely and may depend heavily upon which state agency is proposing the regulation. During and following the public commentary period, a proposed regulation may be altered significantly. The final regulation, however, is expected to provide practical guidance to affected individuals and to the public agency responsible for implementing the originating statute. Final regulations issued by federal agencies are published in the Code of Federal Regulations and are arranged by subject. Regulations affecting education can be found primarily in Title 34 (Education) of the Code of Federal Regulations.

Even though the definition of regulation is typically broad, this term does not encompass all agency pronouncements. First, courts have determined that federal regulations have the full force and effect of law only when they have been adopted by governmental agencies for the purpose enforcing acts of Congress. Second, courts have repeatedly held that regulations must be filed and published in order to be effective as a matter of law. In theory, however, regulations do not have the effect of law because they are not the work of legislatures. Yet given the practice of judicial review of administrative action, regulations are typically a significant factor influencing the outcome of cases in which regulatory activity is involved.

Legislative efforts to reauthorize existing federal statutes and to adopt new laws are likely to continue. With the passage of the Elementary and Secondary Education Act of 1965 (ESEA), currently reauthorized as the No Child Left Behind Act of 2001, the legislative and executive branches of government have demonstrated a heightened interest in state and local educational issues. As a result of this interest, federal departments and agencies have issued and continue to issue regulations that directly impact state and local educational agencies.

Susan C. Bon

See also English as a Second Language; No Child Left Behind Act

Legal Citations

Elementary and Secondary Education Act of 1965, 20 U.S.C. §§ 6301 *et seq.*

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Rehabilitation Act of 1973, Section 504

Section 504 of the Rehabilitation Act of 1973 was the first civil rights law explicitly ensuring the rights of individuals with disabilities to employment and services. Section 504 specifically prohibits discrimination against individuals with disabilities in programs receiving federal funds. The provisions of Section 504 are similar to those in Titles VI and VII of the Civil Rights Act of 1964, which forbid employment discrimination on the basis of race, color, religion, sex, or national origin in programs that receive federal financial assistance. Individuals who have physical or mental impairments that substantially limit one or more major life activities, have a record of such impairments, or are regarded as having impairments are covered by Section 504 (29 U.S.C. § 706(7)(b)). Major life activities are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working" (28 C.F.R. § 41.31). Specifically, Section 504 states as follows:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. (29 U.S.C. § 794(a))

U.S. Supreme Court decisions have indicated that individuals are "otherwise qualified" under the terms of Section 504 if they are capable of meeting all of a program's requirements despite their disabilities (*School Board of Nassau County v. Arline,* 1987; *Southeastern Community College v. Davis,* 1979). Thus, to be "otherwise qualified," individuals with disabilities must be able to participate in programs or activities despite impairments as long as they can do so with reasonable accommodations. If individuals are otherwise qualified, recipients of federal funds are required to make reasonable accommodations that will allow them to participate in programs or activities, unless doing so would create undue hardships on the programs (34 C.F.R. § 104.12(a)). Reasonable accommodations may require adaptations to allow access, such as the construction of a wheelchair ramp, but do not require program officials to eliminate essential prerequisites to participation or to lower their standards. In the educational context, Section 504 applies to employees; students; and others, such as parents, who may access schools and their programs.

Application to Employees

To maintain discrimination claims under Section 504, employees with disabilities must show that they were treated differently than other employees or that an adverse employment decision was made because of their disabilities. Employees with disabilities will not be successful in their discrimination claims if they do not have the skills to perform the job in question, even when provided with accommodations, or if their alleged disabilities are not covered by Section 504. Further, courts do not uphold discrimination claims when school boards can show that officials made adverse employment decisions for nondiscriminatory, or legitimate business, reasons.

Persons with disabilities are "otherwise qualified" if they can perform all essential requirements of the position in question despite their impairments. Accordingly, individuals who cannot perform essential functions of the position, even with reasonable accommodations, are not otherwise qualified. For example, in the school context, failure to meet teacher certification requirements could disqualify individuals, even if the failures were allegedly due to disabilities. In one case, a teacher from Virginia, who claimed to be learning disabled but had not passed the communications section of the National Teachers Examination after several attempts, was not deemed to be otherwise qualified for teacher certification (*Pandazides v. Virginia Board of Education,* 1991). The court wrote that the skills measured by the communications part of the examination were necessary for competent performance as a classroom teacher. Section 504 also does not protect misconduct, even when it can be attributed to a disability.

Employers need to provide reasonable accommodations so that otherwise-qualified employees with disabilities can work and compete with other employees who do not have disabilities. Accommodations may include adjustments to an employee's schedule, minor

changes in the employee's job responsibilities, or changes in the physical work environment. Even so, school boards are not required to furnish accommodation if doing so would place an undue burden on the board. For the most part, it is the school board's responsibility to show that requested accommodations would create an undue financial or administrative burden.

School boards are also not required to make accommodations that would fundamentally alter the nature of the position. However, board officials could be required to reassign employees with disabilities to other vacant positions that involve tasks that the employees are able to carry out. Even so, reassignment is not required when no other positions are available for which the employees are qualified. In addition, boards are not required to create new positions or accommodate employees with disabilities by eliminating essential aspects of their current positions.

Application to Students and Others

Section 504 offers protection against discrimination to students who have disabilities but are not eligible for special education. For example, students with infectious diseases, such as HIV/AIDS, cannot be discriminated against or excluded from schools under Section 504 unless there is a high risk of transmission of their diseases. A federal trial court in Illinois decided that a student who had been diagnosed with AIDS was entitled to the protection of Section 504 because he was regarded as having a physical impairment that substantially interfered with his life activities (*Doe v. Dolton Elementary School District No. 148,* 1988). He could not be excluded from school because there was no significant risk that he would transmit AIDS in the classroom setting. Students with physical challenges are also protected. One court has even required a school to allow a student to be accompanied by a service dog (*Sullivan v. Vallejo City Unified School District,* 1990).

In making accommodations for students, school personnel must provide aid, benefits, and/or services that are comparable to those available to children who do not have impairments. Thus, students with disabilities must receive comparable materials, teacher quality, length of school term, and daily hours of instruction. In addition, programs for students with disabilities should not be separate from those available to students who are not impaired unless such segregation is necessary to provide needed services. When programs are offered separately, facilities must, of course, be comparable (34 C.F.R. § 104.34(c)).

School boards are also required to provide reasonable accommodations to others who may access a school's facilities or programs. For example, parents who have disabilities may need accommodations so they can participate in activities essential to their children's educations. For example, a federal trial court in New York required a school board to provide a sign language interpreter so that parents who were hearing impaired could take part in school-initiated conferences related to the academic and disciplinary aspects of their child's educational program (*Rothschild v. Grottenthaler,* 1989). On the other hand, school boards would not be required to provide accommodations for other school functions in which parental participation is not necessary, such as school plays or even graduation ceremonies.

Allan G. Osborne, Jr.

See also Civil Rights Act of 1964; *School Board of Nassau County v. Arline; Southeastern Community College v. Davis*

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Rehnquist, William H. (1924–2005)

During his long career on the U.S. Supreme Court, William Rehnquist went from an associate justice with conservative views on a predominantly liberal

Court where his role was primarily that of dissenter, to a powerful chief justice who in areas such as affirmative action, states' rights, and First Amendment freedom of religion helped turn the Court in a new direction. Insofar as the Court has now accepted a majority of Justice Rehnquist's formerly minority views, his impact has been especially significant in the field of education law.

Early Years

William H. Rehnquist was born on October 1, 1924, in Milwaukee, Wisconsin, where his political ideology was molded at an early age. He grew up in a predominantly Republican suburban community to staunch conservative parents who disliked President Franklin Roosevelt and opposed most of his New Deal programs. In high school, Rehnquist excelled academically and was awarded a scholarship to a small, liberal arts school, Kenyon College. He dropped out after one quarter and joined the Army Air Corps, serving as a weather observer in North Africa during World War II.

After the war, Rehnquist enrolled at Stanford University, where he earned a bachelor's and a master's degree in political science and was elected to Phi Beta Kappa. He then received a second master's degree in government from Harvard University. Rehnquist returned to Stanford to attend law school. He was an outstanding student and graduated first in his class. At Stanford, he was a classmate and friend of Sandra Day O'Connor, with whom he would later serve on the Supreme Court.

Rehnquist was selected to serve as a clerk for Supreme Court Justice Robert H. Jackson. During his clerkship, Rehnquist often disagreed with his fellow clerks, many of whom he believed to be far too liberal in their political views. As a clerk, he drafted a memo to Justice Jackson arguing the position that the doctrine of "separate but equal" should not be overturned.

Following his clerkship, Rehnquist married and moved to Phoenix, Arizona, where he practiced law and became an active member of the Republican Party. He was an outspoken opponent of school busing, and according to critics at his Senate confirmation hearing, he participated in a scheme to make it more difficult for African Americans to register and vote. Through participation in Arizona politics, Rehnquist became friends with Richard Kleindienst. When Kleindienst was appointed deputy attorney general by President Richard Nixon, he helped Rehnquist secure a post as assistant attorney general in the Justice Department Office of Legal Counsel.

On the Bench

At the Justice Department, Rehnquist vigorously defended the Nixon administration's programs of surveillance and wiretapping of civil rights and anti–Vietnam War protestors. He also was involved in the process of screening potential nominees for federal judgeships. In 1971, when justices John Harlan II and Hugo Black retired from the Supreme Court, Rehnquist was high on the list of possible replacements. President Nixon barely knew Rehnquist, but administration insiders highly recommended him because of his strong conservatism, loyalty, and intellect. Rehnquist was nominated to fill the seat held by Harlan, and despite his lack of judicial experience and what opponents considered to be radically conservative views, his appointment was approved by the Senate by a vote of 68 to 26.

In January 1972, Rehnquist and Lewis Powell, who was nominated to fill Justice Black's post, took their seats on the Supreme Court. Powell went on to be a judicial moderate, but Rehnquist staked out his position as the Court's most conservative member. In his first few years on the Court, he frequently cast the sole dissenting vote and was dubbed by some observers as the "Lone Ranger."

Over the years, as the membership of the Court changed, Rehnquist began to exert more influence. A turning point in his career was in the case of *National League of Cities v. Usery* (1976), where writing for the majority, Rehnquist ruled that provisions of the Fair Labor Standards Act applying federal wage and hour regulations to state employees violated the reserve powers of the states under the Tenth Amendment. Although *Usery* was subsequently overturned, Rehnquist's restricted interpretation of congressional power under the Commerce Clause of Article I § 8 and expansive view of state power under the Tenth Amendment resurfaced. In *United States v. Lopez* (1995), he wrote the majority opinion maintaining that Congress exceeded its authority to regulate interstate commerce when it passed the Gun-Free School Zones Act.

In 1987, when Chief Justice Warren Burger retired from the Court, President Ronald Reagan nominated Justice Rehnquist as his replacement. The Senate confirmation hearings on Rehnquist's nomination were, at times, acrimonious. Senator Edward Kennedy led the opposition, attacking Rehnquist's voting record on the Court as too extreme to be chief justice. Critics reintroduced the memo that Rehnquist wrote while clerking for Justice Jackson criticizing racial desegregation, along with the allegations that he harassed Black voters as a young lawyer in Phoenix. Rehnquist unapologetically defended his conservative record, and the charges of racial bias proved too tenuous. The Senate approved his nomination by a vote of 65 to 33. Rehnquist thus became only the third chief justice in United States history to be elevated from associate justice to chief.

Supreme Court Record

As chief justice, Rehnquist proved to be more flexible and less of an ideologue than his critics feared. He was more collegial and less austere than his predecessor, Warren Burger, and earned the respect of liberals, such as Justice William Brennan, who despite their ideological differences praised Rehnquist for his leadership style and effectiveness as a manager.

Race and Schools

Throughout his career, Justice Rehnquist gave a narrow construction to the Fourteenth Amendment Equal Protection Clause. He opposed affirmative action and joined the majority of the Supreme Court in *City of Richmond v. J. A. Croson Company* (1989), holding that the city's minority set-aside plan for the construction industry unlawfully discriminated against White contractors and that strict scrutiny should be the proper standard to apply in cases of reverse discrimination. More recently as chief justice, Rehnquist authored the Court's opinion in *Gratz v. Bollinger* (2003), striking down as unconstitutional the University of Michigan's undergraduate admissions system of awarding extra points to racial minorities. He dissented in the companion case of *Grutter v. Bollinger* (2003), wherein the Court allowed racial diversity to be considered as a factor in admission to law school at the University of Michigan.

In school desegregation cases, Rehnquist made it easier for formerly segregated schools systems to be released from supervision by federal courts. In *Dowell v. Board of Education of Oklahoma City Public Schools* (1991), he wrote the opinion of the Court noting that desegregation orders were not meant to operate in perpetuity, finding that in cases in which previously unlawfully segregated school systems had resegregated as the result of private residential housing patterns, federal trial courts should inquire as to whether the school boards complied in good faith with desegregation decrees and whether the vestiges of past discrimination had been eliminated to the extent practicable.

In *Missouri v. Jenkins* (1995), Rehnquist wrote for the majority in pointing out that the lower federal courts exceeded their authority by ordering salary increases for staff and funding for quality education programs for the district because student achievement was at or below national norms. Rehnquist reasoned that improved achievement on test scores was not required for the state to achieve unitary status. Since these factors were not the result of segregation, he did not think that they should have figured into the remedial calculus.

Gender Issues

Justice Rehnquist was reluctant to extend the constitutional guarantees of equal protection in gender discrimination cases. He dissented in *Craig v. Boren* (1976), wherein the Supreme Court invalidated a statute from Oklahoma requiring males to be 21 to purchase 3.2 beer but allowing females to purchase it at the age of 18. Rehnquist argued that traffic safety statistics provided a rational basis for the state legislation; he also questioned the basis for the Court's adoption of a new "midlevel" test as a standard of review in gender discrimination cases.

As chief justice, Rehnquist occasionally modified his views to build consensus, as exemplified by his vote in *United States v. Virginia* (1996) rejecting the state-funded Virginia Military Institute's policy of admitting male cadets only. Also, in cases involving statutory interpretation of laws enacted by Congress,

he was more supportive of claims of gender discrimination. Writing for the Court in *Meritor Savings Bank v. Vinson* (1986), Rehnquist ruled that in the case in which a bank employee was subjected to repeated demands for sex and other forms of inappropriate sexual conduct by her supervisor, she stated a "hostile environment" claim under Title VII, even if she did not suffer an economic detriment.

Religious Freedom

One of the areas in which Justice Rehnquist brought about jurisprudential change was in First Amendment religion cases. An accommodationist, he believed that for years, the Supreme Court had erred in adhering to a policy of strict separation between church and state. In his dissenting opinion in *Wallace v. Jaffree* (1985), wherein the Court invalidated Alabama's moment of prayer or silent meditation statue, Rehnquist asserted that since its landmark ruling in *Everson v. Board of Education of Ewing Township* (1947), the Court had overly relied on Thomas Jefferson's metaphor of a "Wall of Separation" of church from state, incorrectly interpreting the "original intent" of the founders regarding what constituted an "establishment of religion." In Rehnquist's view, the First Amendment prohibited government creation of an "established church," or preference for one religion over another, but did not prevent government assistance to religion in general or favoring religion over nonreligion.

One of Rehnquist's first major victories in Establishment Clause jurisprudence was in *Mueller v. Allen* (1983). Writing for the Court, he upheld a statute from Minnesota that provided income tax reimbursements to parents for expenses incurred for tuition, texts, and transportation in sending their children to nonpublic or public schools. His philosophy, that government assistance to religious schools was constitutionally permissible if it only indirectly benefited religion or was the result of individual private choices, became the accepted view of a majority of the Court.

In *Zobrest v. Catalina Foothills School District* (1993), Rehnquist authored the opinion of the Court, acknowledging that government providing a sign language interpreter for a deaf student attending a religious school did not violate the Establishment Clause. Perhaps the ultimate triumph for Rehnquist's philosophy came in the case of *Zelman v. Simmons-Harris* (2002), wherein he authored the Court's opinion upholding the constitutionality of a school voucher program from Cleveland, rejecting the argument that allowing public funds to directly fund religious schools violated the First Amendment.

Rehnquist also took an accommodationist position on issues regarding religious activities in public schools and access of religious groups to public facilities. He voted to uphold the constitutionality of granting equal access to public school facilities to noncurricular religious student organizations and by community church groups. In *Rosenberger v. Rector and Visitors of University of Virginia* (1995), Rehnquist joined the Court in agreeing that denying university student activity funds to support the printing of a Christian organization's newsletter violated freedom of speech.

Justice Rehnquist dissented in *Stone v. Graham* (1980), wherein the Supreme Court invalidated the posting of the Ten Commandments in public school classrooms. More recently, in the case of *Van Orden v. Perry* (2005), he authored the opinion of the Court upholding the public display of the Ten Commandments on Texas statehouse grounds as merely one of numerous monuments honoring the nation's and states' historical traditions. He dissented in the companion case, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005), wherein the Court invalidated the posting of the Ten Commandments at a county court house. Rehnquist also dissented in disputes over whether to allow prayer at public school graduation ceremonies (*Lee v. Weisman,* 1992) and at public-school-sponsored football games (*Santa Fe Independent School District v. Doe,* 2000).

In First Amendment free-exercise cases, Rehnquist often declined to support the rights of religious minorities. He joined the majority in *Employment Division, Department of Human Resources of Oregon v. Smith* (1990), denying an exemption to Native Americans to use peyote in religious ceremonies when a state law prohibiting its use was neutral on its face and of general applicability. However, as in his rulings in gender discrimination cases, he was more likely to find violations of religious freedom if the claims were

based on federal statutes. For example, in a dispute involving granting school leave to fulfill a teacher's religious obligations, *Ansonia Board of Education v. Philbrook* (1986), Rehnquist authored the Court's opinion interpreting Title VII as requiring employers to make reasonable accommodations to meet the religious needs of their staff.

Student Issues

In students' right cases, Rehnquist generally sided with school officials. He voted to uphold random drug testing of student athletes and participants in extracurricular activities in *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002). He also supported restrictions on student speech that was vulgar but not obscene and speech that was part of school-sponsored expressive activities in *Bethel School District No. 403 v. Fraser* (1986).

One of the most important opinions written by Justice Rehnquist, though not directly a school law case but one that has had tremendous impact on education law, was *DeShaney v. Winnebago Department of Social Services* (1989). In finding that employees of a state family services agency owed no constitutional duty to a minor to protect him from injury while in the custody of an abusive father, the Court established the principle that the state has no constitutional obligation to protect its citizens from assaults by fellow citizens. Other courts have relied on this precedent in ruling that school boards have as a general rule no constitutional duty to protect students from harm by other students.

Teacher Issues

In the area of employment law, Justice Rehnquist's rulings made it more difficult for teachers and administrators to assert their First and Fourteenth Amendment rights to freedom of speech and protection of procedural due process. In *Mt. Healthy City School District Board of Education v. Doyle* (1977), Rehnquist wrote the majority opinion of the Court establishing the standard of review for "mixed-motive" cases involving termination of employment or nonrenewal of contracts. In cases in which protected conduct, such as the exercise of freedom of speech, is shown to be a substantial or motivating factor in the school board's decision, the Court pointed out that school boards must be given the opportunity to demonstrate that they would have reached the same employment decision in the absence of the protected conduct.

Justice Rehnquist had a mixed record in cases dealing with the law of special education. In the first Supreme Court case interpreting the meaning of a "free appropriate public education," *Board of Education of Hendrick Hudson Central School District v. Rowley* (1982), Rehnquist authored the opinion of the Court giving the phrase a limited interpretation. Rejecting the plaintiff's contention that federal special education law mandated the school board provide a student who was deaf with a sign language interpreter, Rehnquist decided that the law did not require such children to receive special services sufficient to maximize the child's education to a level commensurate with those of peers who were not disabled. Instead, he explained that a program must only confer "some educational benefit" on students. On the other hand, in *Burlington School Committee v. Department of Education, Commonwealth of Massachusetts* (1985), Rehnquist wrote the Court's opinion asserting that parents who disagree with the placement of their children may enroll them in private schools and recover the costs of tuition if they can show that school officials failed to provide appropriate placements and their chosen nonpublic school placements were appropriate.

Legacy

In his last years on the Court, Rehnquist's health began to suffer. In October 2004, it was publicly announced that he was diagnosed with thyroid cancer. In the next few months, his condition deteriorated, and although he still participated in some decisions, he missed most oral arguments. Rumors circulated about his impending retirement, especially after the resignation of his colleague Sandra Day O'Connor. On September 3, 2005, Rehnquist died, just short of his 81st birthday.

During his tenure on the Supreme Court, Chief Justice Rehnquist had a major impact on the field of education law. He was an incrementalist, not a revolutionary. While liberals criticize many of his opinions as overly restrictive as to the civil rights of minorities, students, and teachers, the Rehnquist Court did not completely roll back precedents established by the Warren and Burger courts. For example, school-sponsored prayer is still prohibited, and race may be considered as a factor in school admissions. Even though the powers of Congress under the Commerce Clause have been restricted, the authority of the federal government to regulate education is still great.

Even so, significant changes in education law have occurred. School boards may not engage in de jure segregation, but it is easier for them to be released from federal court supervision. The constitutional standard in "reverse discrimination" cases has been heightened, whereas the standard in free exercise cases has been lowered. Student free speech is still protected, but major exceptions have emerged. State aid to religiously affiliated nonpublic schools is more acceptable, and access by religious organizations to public institutions is more readily granted. Chief Justice Rehnquist brought about conservative change, but he did not usher in a whole new conservative era.

Michael Yates

See also Burger Court; Free Appropriate Public Education; Rehnquist Court; Segregation, De Facto; Segregation, De Jure; Tuition Tax Credits; U.S. Supreme Court Cases in Education; Vouchers; Warren Court

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Rehnquist Court

The term *Rehnquist Court* refers to the period from October 1986 to June 2005, when William H. Rehnquist served as chief justice. During this period, the U.S. Supreme Court was sharply divided along

liberal and conservative lines. Between October 1986 and October 1991, the Court arguably had a liberal majority. From October 1991 until June 2005, the Court arguably had a conservative majority. However, during both of these eras, there were numerous circumstances in which one or more justices switched sides and rendered liberal or conservative opinions. Insofar as the Court was sharply divided and some justices had a tendency to "swing," it was difficult for the Court to reach clear and logical decisions. Thus, the Rehnquist Court's jurisprudence, particularly during its last 5 years, could be characterized as embodying "split the difference" jurisprudence.

Legacy on Federalism

Despite the ambiguity of the Rehnquist Court's decisions, it did leave a significant legacy in one area, federalism. Prior to the Rehnquist Court, the principles of federalism, which is more appropriately called "dual sovereignty," were largely useless as a limitation on the powers of the national government. Change began to emerge with *Gregory v. Ashcroft* (1991), wherein the Court held that the states could impose mandatory retirement on state judges. A year later, in *New York v. United States* (1992), the Court ruled that Congress could not compel the states to enact specific legislation. Similarly, in *Printz v. United States* (1997), the Court found that Congress could not compel state officials to enforce federal law.

Beginning with *Seminole Tribe of Florida v. Florida* (1996) and extending through a series of other cases, the Court limited the power of Congress to abrogate the states' sovereign immunity, a development that is particularly important to states' litigation strategies. However, the more significant federalism cases were those that limited the power of Congress over interstate commerce, *United States v. Lopez* (1995) and *United States v. Morrison* (2000), and those that limit the power of Congress to enforce the Fourteenth Amendment, *City of Boerne v. Flores* (1997) and *Morrison.*

Legacy on Education

The Rehnquist Court's legacy for education law is also significant. As with its jurisprudence in other areas, the Supreme Court largely "split the difference" in cases involving education law.

On Race

First, the Court pursued a "split the difference" approach to race. Most obviously in the University of Michigan racial preference cases, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), the Court, respectively, upheld the law school admissions system, which utilized race as one factor among many, but invalidated the undergraduate admissions system, which assigned a specific number of points based on race.

In doing so, the Court noted that the achievement of the educational benefits of a broadly defined diversity was a compelling governmental interest that might justify the use of race. At the same time, the Court emphasized that a system in which race was the determining factor was not narrowly tailored. The practical effect of these cases is that they have adopted the diversity rationale that Justice Powell presented in *Regents of the University of California v. Bakke* (1978). Yet the cases also impose significant limitations on how institutions may use race.

In like fashion, the Rehnquist Court steered a middle course with respect to desegregation. Although the Court did not end court-ordered busing, it did substantially limit the power of the lower courts to use it as a remedy. *Dowell v. Board of Education of Oklahoma City Public Schools* (1991) significantly narrowed the definition of a unitary school system, thereby making it substantially easier for boards to end federal court supervision. In *Freeman v. Pitts* (1992), the Court pointed out that there was no duty to remedy a racial imbalance that was caused by residential housing patterns rather than intentional discrimination by the school board; the Court added that districts can be declared unitary incrementally. Subsequently, in *Missouri v. Jenkins* (1995), the Court placed limits on the ability of trial courts to order broad remedies.

On Religion

Second, the Rehnquist Court followed a "split the difference" approach in religion cases involving education. On one hand, the Court upheld actions in

which the government favored religion, at least indirectly. In *Zelman v. Simmons-Harris* (2002), the Court reasoned that Ohio could implement a school choice program wherein parents choose to send their children to religiously affiliated nonpublic schools at public expense. The Court's rationale here was similar to *Zobrest v. Catalina Foothills School District* (1993), wherein the justices decided that a student in a religious school was entitled to receive special education services at public expense. *Board of Education of Westside Community Schools v. Mergens* (1990), *Rosenberger v. Rector and Visitors of the University of Virginia* (1995), and *Good News Club v. Milford Central School* (2001) all agreed that student religious clubs must be treated the same as nonreligious clubs. Moreover, *Lamb's Chapel v. Center Moriches Union Free School District* (1993) ensured that outside religious groups had the same rights of access to school facilities as outside nonreligious groups.

On the other hand, the Rehnquist Court invalidated assistance to religion or religious expression. In *Lee v. Weisman* (1990), the Court rejected prayers by nonstudents at graduation ceremonies, while in *Santa Fe Independent School District v. Doe* (2000), it struck down the practice of prayer at the beginning of high school football games. Previously, in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), the Court had invalidated a school district that was drawn to benefit only a small religious sect.

On Sexual Harassment

Third, the Rehnquist Court displayed its "split the difference" rationale in school sexual harassment cases. After *Franklin v. Gwinnett County Public Schools* (1992) established that school boards were liable for damages for Title IX violations, *Gebser v. Lago Vista Independent School District* (1998) pointed out that boards could be liable when their employees sexually harassed students. Even so, the Court limited liability to those situations in which school officials actually knew of the misconduct and responded with deliberate indifference. As such, the Court charged a middle course between absolute liability (the position of the plaintiff) and no liability whatsoever (the position of the school board). In *Davis v. Monroe County Board of Education* (1999), the Court essentially extended *Gebser* to sexual harassment in situations involving student-on-student harassment.

On Special Education

Fourth, the Rehnquist Court's special education decisions reflect an expansion of the rights of the disabled. *Honig v. Doe* (1988) established that school boards could not unilaterally expel or impose lengthy suspensions on students with disabilities if their misbehaviors were manifestations of their disabilities. In *Cedar Rapids Community School District v. Garret F.* (1999), the Court was of the opinion that school boards can be required to provide related services, such as the full-time care of nurses, for qualified students with disabilities. Previously, in *School Board of Nassau County, Florida v. Arline* (1987), the Court had required school board officials to accommodate the needs of teachers with disabilities.

On Student Rights

Finally, although the Rehnquist Court refused to overturn the student rights that the justices recognized, starting in *Tinker v. Des Moines Independent Community School District* (1968) and *New Jersey v. T. L. O* (1985), it did impose significant limitations on those rights. In *Bethel School District No. 403 v. Fraser* (1986), the Court upheld the authority of school officials to discipline a student for a vulgar but not obscene speech that he delivered as part of school-sponsored expressive activities. Further, in *Hazelwood School District v. Kuhlmeier* (1988), the Court indicated that since student expression in school-sponsored publications was not absolute, it was subject to control by school officials whose actions were reasonably related to legitimate pedagogical concerns. Moreover, in *Vernonia School District No. 47J v. Acton* (1995), the Court held that student athletes could be subjected to random drug tests. The Court extended this holding in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002).

William E. Thro

See also Burger Court; Federalism and the Tenth Amendment; Rehnquist, William H.; U.S. Supreme Court Cases in Education; Warren Court

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Related Services

The Individuals with Disabilities Education Act (IDEA) requires states to provide related, or supportive, services through local school boards to students with disabilities to the extent that such children may need these services to benefit from their special education programs. In its definition of *related services,* the IDEA specifically lists developmental, supportive, and corrective services such as transportation, speech-language pathology, audiology, interpreting services, psychological services, physical therapy, occupational therapy, recreation (including therapeutic recreation), social work services, school nurse services, counseling services (including rehabilitation counseling), orientation and mobility services, and medical services (for diagnostic or evaluative purposes only) (20 U.S.C. § 1401(26)).

Since this list is not exhaustive, however, other unlisted services may be considered to be related services if they help students with disabilities to benefit from special education. Thus, services such as artistic and cultural program or art, music, and dance therapy could be related services under the appropriate circumstances. Related services may be provided by persons of varying professional backgrounds with a variety of occupational titles. The only limit placed on

what school officials must provide as related services is that medical services are exempted unless they are specifically for diagnostic or evaluative purposes. The 2004 IDEA amendments clarified that related services do not include a medical device that is surgically implanted or the replacement of such a device.

Related services must be provided only to students who are receiving special education services. By definition, children have a disability under the IDEA only when they require special education services. Accordingly, there is no requirement to provide related services to students who are not receiving special education. On the other hand, inasmuch as many related services could qualify as accommodations under Section 504 of the Rehabilitation Act of 1973, it is not uncommon for school boards to provide these to students who are qualified to receive assistance under Section 504 but do not qualify for special education services under the IDEA. This entry looks at court rulings on two related services.

Health Services

One of the more controversial aspects of the IDEA's related services mandate, in part due to their cost, involves the extent to which school health services must be furnished. In one of its early special education cases, the U.S. Supreme Court in *Irving Independent School District v. Tatro* (1984) ruled that catheterization was a required related service. In this case, because the student could not voluntarily empty her bladder due to spina bifida, she had to be catheterized every 3 to 4 hours. The Court emphasized that services, such as catheterization, that allow a student to remain in class during the school day are no less related to the effort to educate than services that allow the student to reach, enter, or exit the school. Inasmuch as the catheterization procedure could be performed by a school nurse or trained health aide, the Court was convinced that Congress did not intend to exclude these services as medical services.

Tatro indicates that services that may be provided by school nurses, health aides, or even trained laypersons fall within the IDEA's mandated related-services provision. However, many students with disabilities have fragile medical conditions that require the presence of full-time nurses. A decade and a half after *Tatro,* in its second case dealing with the IDEA's related-services provision, the U.S. Supreme Court ruled in *Cedar Rapids Community School District v. Garret F.* (1999) that a school board was required to provide full-time nursing services for a student who was quadriplegic. The Court commented that although continuous services may be more costly and may require additional school personnel, this alone does not make them more medical. Stressing that cost was not a factor in the definition of related services, the Court insisted that even costly related services must be provided to help guarantee that students with significant medical needs are integrated into the public schools.

Transportation

In *Tatro,* the Supreme Court acknowledged that school health services may sometimes need to be provided for a student to be physically present in the classroom. It almost goes without saying that a student cannot benefit from educational programs if the student cannot get to school. Thus, school boards must provide special transportation arrangements for students who are unable to access standard transportation provisions. The term *transportation,* as used in the IDEA's regulations, encompasses travel to and from school, between schools, and around school buildings. Moreover, school boards must provide students with disabilities with specialized equipment, such as adapted buses, lifts, and ramps, if needed for transportation.

In an early case, the First Circuit maintained that transportation may encompass moving a student from a building to a vehicle (*Hurry v. Jones,* 1983, 1984). In this case, the student challenged the denial of his request for assistance in getting from his house to a school bus. When the student could not get to the vehicle without assistance, his father brought him to school for a time. When the father was unable to bring his son to school, the student was unable to attend classes. The situation was finally resolved, but the First Circuit awarded the parents compensation for their efforts in transporting him to school after insisting that transportation clearly was the responsibility of the school board.

In a similar situation, the federal trial court for the District of Columbia ordered the school board to provide an aide to convey a student from his apartment to the school bus (*District of Columbia v. Ramirez,* 2005). Even so, door-to-door transportation is required only when a student cannot get to school without such assistance (*Malehorn v. Hill City School District,* 1997).

Allan G. Osborne, Jr.

See also *Cedar Rapids Community School District v. Garret F.;* Compensatory Services; Disabled Persons, Rights of; *Irving Independent School District v. Tatro*

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Released Time

School boards and state officials have attempted to devise plans to allow for the delivery of religious instructions to public school students during the academic day. According to the Rutherford Institute, 19 states have enacted statutes that allow released-time instruction off campus during the school day. This entry looks at case law related to this practice.

Supreme Court Cases

The Supreme Court of the United States first dealt with religious instruction in public schools in 1948, in *Illinois ex rel. McCollum v. Board of Education.* At issue was a board program that allowed religious instruction during the public school day. Under the program, Protestant, Catholic, and Jewish members of the community entered the schools to provide 30 minutes of religious instruction per week to lower-level students. Upper-level students received 45 minutes of instruction.

In addition, school officials kept attendance records on the students who attended the religious instruction classes with parental permission. Insofar as the program used school buildings and facilities and officials cooperated closely with the released-time program, the Supreme Court struck it down on the basis that the state's compulsory attendance law abetted the religious instruction. More specifically, the Court spoke of the need for the complete separation of church and state.

Fours years later, the Supreme Court addressed released time directly in *Zorach v. Clauson* (1952). In *Zorach,* the City of New York released students for religious instruction during the school day as long as their parents gave their permission. The religious school reported attendance to public school officials on a weekly basis. Unlike *McCollum,* the instruction was not conducted in public school classrooms, and no public funds were used to support the program. The Court found that this program did not amount to the establishment of religion because it accommodated the religious wishes of the parents. Since *Zorach,* courts have reached mixed results in cases involving released-time programs.

Other Rulings

The Supreme Court of Washington (*Perry v. School District No. 81, Spokane,* 1959) struck down a released-time program on the basis of the state constitution. The court was of the opinion that the program was unconstitutional because it allowed public funds to be used for religious purposes and public educational officials made announcements about it in school to captive student audiences.

In a case with a twist, a federal trial court in Virginia granted a temporary restraining order that essentially stopped a released-time program from operating (*Doe v. Shenandoah County School Board,* 1990). The court maintained that the program was unacceptable because its sponsors parked the school buses they owned and used for the instruction, which looked like the public school's buses, on or close to

school premises and sought to enter the schools to solicit student participants.

On the other hand, the Fourth Circuit previously upheld a released-time program in Virginia (*Smith v. Smith,* 1975). In applying the tripartite *Lemon v. Kurtzman* (1971) test, the traditional standard in matters involving religion and public education, the court ruled that the program had the secular purpose of accommodating parental wishes, did not advance or inhibit religion, and did not create excessive entanglement because the involvement of school officials was minimal and passive.

In like fashion, the Tenth Circuit largely upheld a released-time program in Utah (*Lanner v. Wimmer,* 1981). The court was satisfied that although the program did not constitute a per se violation of the Establishment Clause, some aspects of it were unconstitutional. The court specified that the program had the secular purpose of accommodating parental wishes for such instruction and was not concerned with the fact that public school officials prepared and distributed standard attendance forms to the released-time programs. However, the court declared that there were entanglement problems with having the students return the attendance forms in their schools, along with requiring educators in the public schools to evaluate what content was religious and what was secular in order to grant academic credit.

Most recently, the Second Circuit upheld a released-time program from New York in *Pierce ex rel. Pierce v. Sullivan West Central School District* (2004). The court affirmed that the program was constitutional insofar as it did not use public funds or on-site religious instruction and was voluntary and that school officials did not apply any coercion or pressure on students to participate

J. Patrick Mahon

See also *Illinois ex rel. McCollum v. Board of Education; Lemon v. Kurtzman;* Religious Activities in Public Schools; *Zorach v. Clauson*

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Perry v. School District No. 81, Spokane, 344 P.2d 1036 (Wash. 1959).
Pierce ex rel. Pierce v. Sullivan West Central School District, 379 F.3d 56 (2d Cir. 2004).
Smith v. Smith, 523 F.2d 121 (4th Cir. 1975).
Zorach v. Clauson, 343 U.S. 306 (1952).

Religious Activities in Public Schools

Over the past four decades, the U.S. Supreme Court has regularly addressed disputes governing religious activities in public schools. Although school prayer is the issue that has received the most attention, the Court's decisions in this area have also considered the allowable sources, methods, places, times, and content for the distribution of religious materials, as well as the permissible content of classroom assignments. Other cases have examined the development of school policies on the distribution of materials dealing with evolution and materials with religious content submitted by members of the larger community. This entry reviews the main cases in these areas and considers the responses that schools can make as a result of the Court's judgments.

Supreme Court Rulings on Prayer in Public Schools

In three separate opinions spanning 32 years, the Supreme Court struck down efforts by school boards to incorporate prayer into their schools or school events, in *Engel v. Vitale* (1962), *Lee v. Weisman* (1992), and *Santa Fe Independent School District v. Doe* (2000). Beyond that, the Court has addressed issues such as student-sponsored prayer clubs in school and access to school facilities by non-school groups (*Lamb's Chapel v. Center Moriches Union Free School District,* 1993; *Good News Club v. Milford Central Schools,* 2001), and such curricular

issues as evolution (*Edwards v. Aguillard,* 1987; *Epperson v. State of Arkansas,* 1968). Lower federal courts have dealt with an array of similar issues. In light of the contentious relationship between prayer and religious activity in public schools, this entry examines the wide range of issues that have given rise to litigation over the past half century.

Decisions on Prayer in Schools

Engel v. Vitale

In *Engel,* the Supreme Court invalidated a directive of the Board of Education of Union Free School District No. 9, New Hyde Park, New York, to a principal that the following voluntary prayer to be said aloud by each class in the presence of a teacher at the beginning of the school day: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country" (*Engel,* p. 422). The Court observed that "neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause" (p. 430).

Lee v. Weisman

Thirty years later, in *Lee v. Weisman,* the Supreme Court addressed prayer at a middle school graduation that students were not required to attend. Invoking but not relying on the Establishment Clause principles from the *Lemon v. Kurtzman* (1971) test, the Court struck down a long-standing school practice of permitting a member of the clergy to deliver an invocation and benediction at school district graduations. The Court found that the middle school principal's involvement in the prayer was the same "as if a state statute decreed that the prayers must occur" (*Lee,* p. 587). The principal determined that prayer would be delivered at the graduation, the principal selected the clergy member to conduct the prayers, and the principal submitted to that person a set of guidelines for preparing a nonsectarian prayer. Although attendance at graduation was voluntary, the Court was of the opinion that since graduations are life-changing, family-celebratory events that are likely to be well attended, such prayer carried "a particular risk of indirect coercion" and "a reasonable perception" that a "dissenter of high school age . . . is being forced by the State to pray in a manner her conscience will not allow" (p. 593).

Santa Fe Independent School District v. Doe

Eight years after *Lee,* in *Santa Fe Independent School District v. Doe* (2000), the Court invalidated a student-initiated and student-led prayer prior to high school football games in Texas. Invoking the coercion test from *Lee,* the Court in *Santa Fe* declared the school-authorized prayer was impermissibly coercive to cheerleaders, football players, and band members, for whom attendance prior to the start of the game was not voluntary. The Court broadly ruled that the policy violated the Establishment Clause insofar as the prayer took place on government property at a government-sponsored, school-related event and expressed the purpose of a school district policy encouraging selection of a religious message. The Court added that the policy was unacceptable because it was perceived as public expression of majority views delivered with the school board's approval.

Distribution of Religious Materials in Public Schools

Navigation of the shifting sands between what is prohibited by the Establishment Clause and what is required under the Free Speech Clause has not always been an easy journey for public school districts. Although the Supreme Court has recognized that public school endorsement of religion and religious messages is prohibited under the Establishment Clause, it has conceded that public school enablement of private speech is protected by the Free Speech Clause in the First Amendment. Distribution of materials in schools is an access issue and presents a variety of factual patterns involving the source of distribution, such as students or community organizations; the method of distribution, whether by hand or over school intercoms; the place of distribution, such as in classrooms or hallways; the time of distribution, whether during noninstructional or instructional time; and the

content of distributed information as proselytizing or nonproselytizing.

Sources of Materials: Community Organizations and Students

The Supreme Court's decisions in *Lamb's Chapel* and *Good News Club* determined that community organizations had a right of access to public school facilities during nonschool hours as long as other nonreligious groups were permitted to meet. However, neither *Lamb's Chapel* nor *Good News* addressed whether these organizations have a free speech right to distribute their information during school time. Over 30 years ago, in *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court ruled that students in public schools had private free speech expression rights in public schools. Yet similar to community organizations, *Tinker* did not consider the extent to which private speech included religious expression. In 1984, Congress gave students an added advantage under the Equal Access Act (EAA), which prohibited school districts with limited open forums from discriminating on the basis of "religious, political, philosophical, or other speech content" (EAA, 20 U.S.C. § 4071(a)). The result of the EAA is that while both community organizations and students have limited rights regarding access to public schools, the rights are not necessarily the same for both groups.

Methods of Distribution

The communication of religious information has been challenged involving a number of different forms of distribution. In *Child Fellowship of Maryland v. Montgomery County Public Schools* (2006), the Fourth Circuit held that an elementary school engaged in viewpoint discrimination when it refused to include Good News Club flyers as part of its "take-home flyer forum." The forum permitted governmental and nonprofit organizations to submit their materials to the school, where they were placed in student packets to be collected by the students at the end of the school day and taken home to their parents. The Fourth Circuit reversed an earlier order that refused to grant the club's request for an injunction, while rejecting the board's rationale that it could refuse the club's nonproselytizing flyers because its after-school meetings were proselytizing. In addition, the Fourth Circuit pointed out that including the nonproselytizing religious flyers in the take-home folders did not violate the Establishment Clause. In its analysis, the court relied on the position established in *Board of Education of Westside Community Schools v. Mergens* (1990). In *Mergens,* the Supreme Court noted that right of access under the EAA could include "access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair" (p. 247). Consistent with *Mergens,* in *Prince v. Jacoby* (2002), the Ninth Circuit indicated that the EAA required a school board to provide a religious club equal access to its public address system in order to publicize its activities.

In *Child Evangelism Fellowship of New Jersey v. Stafford Township School District* (2004), the Third Circuit maintained that like other community groups, a Good News Club was entitled to distribute promotional material in elementary schools at back-to-school nights and to post materials on a school bulletin board. Insofar as school officials had no part in writing, paying for, producing, or approving the materials, the court explained that they constituted private speech and that educators could not regulate their content under the theory that they were part of the school's "pedagogical concerns" under *Hazelwood School District v. Kuhlmeier* (1988).

In *Rusk v. Clearview Local Schools* (2004), the Sixth Circuit reached a similar result to *Montgomery County* regarding the Establishment Clause and distribution of Good News Club flyers. The notable difference between *Montgomery County*/*Stafford* and *Rusk* is that Clearview Local Schools wanted to include the Good News Club flyers in student folders. As a result, the Sixth Circuit in *Rusk* court saw no need to address whether distribution was required under the Free Speech Clause.

A federal trial court in *Westfield High School L. I. F. E. Club v. City of Westfield* (2003) suggested the outer limits of free speech for students in elementary schools. In *Westfield,* the court pointed out that an elementary student could distribute candy canes with proselytizing religious messages as part of "private, school-tolerated speech" (p. 114). The result of this litigation suggests that student rights

under free speech to distribute religious materials may be somewhat more extensive than for community organizations. The effect of enactment of the EAA by Congress has been to extend student rights of distribution of religious material to noninstructional time.

Places of Distribution

Courts have distinguished between classrooms and other locations within schools in terms of free speech rights. Generally, classrooms are reserved for curriculum-related information and are not accessible for distribution of materials by either students or community organizations (*Walz v. Egg Harbor Township Board of Education,* 2003). Distribution of materials in nonclassroom areas, such as hallways, depends on whether school officials created a limited public forum (*Hills v. Scottsdale Unified School District,* 2003) and whether the distribution is considered disruptive under *Tinker* (*Westfield,* p. 105). While school officials can engage in government speech without including other viewpoints, they may be subject to viewpoint discrimination analysis under free speech as long as they choose to permit views other than religious ones (*Hansen v. Ann Arbor Public Schools,* 2003).

Time of Distribution

Any right by students or community organizations to distribute materials applies to noninstructional time. The concept of noninstructional time owes its clearest definition to the EAA, which for schools that created limited open forums limit meeting times for student groups only to noninstructional time (EAA, 20 U.S.C. § 4071(b)). What constitutes "noninstructional time" under the EAA differs, with the Third Circuit holding in *Donovan v. Punxsutawney Area School Board* (2003) that an activity period during which noncurriculum-related clubs were permitted to meet was noninstructional even though attendance was taken. On the other hand, in *Prince v. Jacoby* (2002), the Ninth Circuit ruled that a meeting time at which attendance was taken could not be noninstructional under EAA, but could be a limited public forum under free speech. As such, the court decided that a religious club could meet during a student/staff period because officials created a limited public forum in permitting other student groups to gather. Further, in *Ceniceros v. Board of Trustees* (1997), the Ninth Circuit interpreted noninstructional time under the EAA as applying to lunchtime.

Community organizations in such cases as *Montgomery County, Rusk,* and *Hills* have designated noninstructional time for purposes of distributing curriculum-related and noncurriculum-related materials as that time at the end of the instructional day but prior to dismissal. In all three cases (*Montgomery County, Rusk,* and *Hills*), the material included flyers or brochures for religious organizations. Similar to the reasoning in *Prince,* the courts in *Montgomery County* and *Hills* agreed that the end of the school day fell within free speech protection, even though still subject to compulsory attendance, since officials created a limited public forum by permitting distribution of nonreligious, noncurriculum-related materials.

Content of Materials

No court to date has protected the distribution of the proselytizing materials of community organizations. *Montgomery County* and *Rusk* upheld distribution of nonproselytizing materials, a result not dissimilar to high school graduation cases in which school officials required student religious messages to be nonproselytizing and nondenominational (*American Civil Liberties Union of New Jersey v. Black Horse Pike Regional Board of Education,* 1995). Courts have not been as restrictive for student distribution and have permitted distribution of materials with religious messages outside classrooms during noninstructional time, such as in hallways or at lunch, where educators created limited public forums for distribution of materials by other students, as in *Walz* and *Westfield.*

Constructing School-District Policies on Distribution of Religious Materials

School boards and educators must be aware that their policies will be reviewed under free speech. As such, public school boards have too often created policies or practices that do not treat religious materials the

same way they treat nonreligious materials. As a result, courts tend to look with disfavor on policies that permit distribution of nonreligious materials but exclude those that are religious.

As reflected in the litigation on this contentious topic, past habits of treating religious access issues differently than access by other groups have been hard to break. School boards that seek to exclude only religious messages will find such practices challenged today. In *Montgomery County,* subsequent to the Fourth Circuit's decision requiring distribution of a religious community organization's flyers in student end-of-the-day packets, the school board voted to limit classroom distribution of materials to parent-teacher associations, government agencies, student groups, day care centers, nonprofit sports leagues, and the school system. The board claimed that this new policy was necessary to keep out proselytizing material. On appeal, the Fourth Circuit again maintained that this policy violated the free expression rights of Child Evangelism Fellowship (*Montgomery County,* 2006). Such methodical efforts to exclude all religious distribution could have an effect on other community organizations, such as the Scouts or 4-H Clubs, that could likewise be directly affected by a prohibition as well. Chief Justice Rehnquist in *Santa Fe Independent School District v. Doe* (2000) questioned whether such efforts to exclude religious influences "bristle with hostility to all things religious in public life" (*Santa Fe,* p. 318).

Evolution and the Public School Curriculum

The teaching of evolution in public schools has become a lightning rod in some states and school districts, galvanizing public opinion as to the appropriate approach to take in instructing students about the origin of life. Opposition to evolution has taken a number of forms, from imposing limitations on the instructional content about evolution to requiring that alternative theories be presented.

In the past several decades, a number of technical articles and books have challenged the creative power of Darwin's mutation/selection process (e.g., *Of Pandas and People: The Central Question of Biological Origins,* by Percival Davis and Dean H. Kenyon). Some instructional content limitations included requiring that science teachers teach evolution as a theory only and inserting into science books written disclaimers emphasizing the theoretical nature of evolution. A more limited restriction on instruction has not restricted the teaching of evolution, but has permitted parents to remove their children from the portions of courses in which evolution is presented. The most persistent pressure has been to require alternative theories of origins of life when evolution is taught. Past debate centered on the teaching of creation science, and that theory still has its advocates, but the current popular alternative to evolution is "intelligent design" or, as it has been expressed in some cases, "divine design" (e.g., *The Design Inference: Eliminating Chance Through Small Probabilities,* by William Dembski). "Design theory" holds that intelligent causes rather than undirected natural causes best explain many features of living systems. During recent years, design theorists have developed both a general theory of design detection and many specific empirical arguments to support their views. (e.g., the article "Teaching the Origins Controversy: Science, or Religion, or Speech," by David DeWolf, Stephen Meyer, and Mark DeForest).

Supreme Court Guidelines on Teaching Evolution

The Supreme Court has twice entered the arena of state restrictions on the teaching of evolution. In *Epperson v. State of Arkansas* (1968), the Court invalidated two Arkansas statutes that prohibited and criminalized "the teaching in its public schools and universities of the theory that man evolved from other species of life" (p. 98). The Supreme Court of Arkansas, in a two-sentence opinion, had upheld the constitutionality of the statutes, declaring that "statutes pertaining to teaching of theory of evolution [are] constitutional exercise of state's powers to specify curriculum in public schools" (*Epperson,* p. 322). The Supreme Court reversed the state supreme court, finding a violation of the Establishment Clause because there can be no doubt that Arkansas sought to prevent teachers from discussing the theory of evolution insofar as it is contrary to the belief of some that the book of Genesis must be the exclusive source of doctrine

as to the origin of man. In its analysis, the Supreme Court was unable to uncover any suggestion that Arkansas law may have been justified by considerations of state policy other than the religious views of some of its citizens.

It is worth noting in *Epperson* that, because the Court ruled that there was an Establishment Clause violation, it chose not to address the constitutional Liberty Clause rights of teachers and students "to engage in any of the common occupations of life and to acquire useful knowledge" (p. 107). Thus, it was left for the future as to whether a state's curricular choice regarding the teaching of evolution while not violating the Establishment Clause nonetheless might violate the Fourteenth Amendment's Due Process Clause as explicated by the Supreme Court in *Meyer v. Nebraska* (1923).

In a second decision 19 years later, *Edwards v. Aguillard* (1987), the Supreme Court struck down a Louisiana balanced-treatment statute that required that creation science be taught if evolution was taught in public schools. Even though, unlike *Epperson,* the Louisiana statute did not prohibit the teaching of evolution, the Court still determined that it facially violated the Establishment Clause. The Court in *Edwards* rejected the state's claim that "the purpose of the Act [was] to protect a legitimate secular interest, namely, academic freedom" (p. 581), observing that, instead,

> It is equally clear that requiring schools to teach creation science with evolution does not advance academic freedom. The act does not grant teachers a flexibility that they did not already possess to supplant the present science curriculum with the presentation of theories, besides evolution, about the origin of life. (p. 587)

The *Edwards* Court did not explicitly address whether public school teachers have academic freedom to teach differing theories of origins. Instead, the Court simply responded to the state's claim, namely, that if pursuance of academic freedom was its purpose, it failed to achieve that purpose because the statute had "a distinctly different purpose of discrediting evolution by counterbalancing its teaching at every turn with the teaching of creationism" (*Edwards,* p. 589). In sum, the Court concluded that the statute violated the Establishment Clause because it "require[d] either the banishment of the theory of evolution from public school classrooms or the presentation of a religious viewpoint that rejects evolution in its entirety" (p. 596).

Against this Supreme Court less-than-clear backdrop, lower federal courts, state boards of education, and local school boards have been expected to determine how much constitutional latitude exists in teaching origins of life. Much of the debate regarding evolution has focused on creation science and the federal district court decision, *McLean v. Arkansas Board of Education* (1982), in which the Court maintained that a state statute requiring a balanced teaching of evolution and scientific creationism violated the Establishment Clause. More recently, a federal trial court invalidated an attempt by a local school board to include a statement to students that intelligent design is an alternative to evolution (*Kitzmiller v. Dover Area School District,* 2005). Yet even if religious-based alternative theories of origin were to escape Establishment Clause scrutiny, that clause is by nature permissive and not mandatory. As such, eluding an Establishment Clause proscription does not ensure a right to present alternative theories of origins as a matter of free speech.

The Supreme Court's opinions in *Lamb's Chapel* declared religious speech to be a fully protected subset of First-Amendment-protected speech. Even so, that protection has not readily extended into the classroom, in large part because of the Court's earlier ruling in *Hazelwood* (1988). In *Hazelwood,* the Court upheld a reasonableness standard for administrative control over curriculum. As a result, lower courts have sustained school board requirements that classroom teachers follow their curricular guidelines, even if it means instruction only in the naturalistic approach to evolution. Courts have been willing to accord constitutional protection to teachers for out-of-classroom remarks that affect instructional services being provided students. Still, courts are reluctant to grant free speech protection to teacher comments in classrooms, especially when those remarks might be associated with religious views about evolution.

Classroom Assignments and Student Religious Speech

Classrooms traditionally are nonpublic forums, meaning that limitations on speech are established by a

reasonableness standard, as opposed to the *strict scrutiny standard* associated with speech in public or limited public forums. Until recently, the Sixth Circuit's opinion in *Settle v. Dickson County School Board* (1995) was a fairly accurate representation of the law of student expressive rights in the classroom. In *Settle,* the court upheld a teacher's rejection of a ninth-grade student's assignment to research and write on a topic that was "interesting, researchable and decent" and that required four sources (p. 153). When the teacher denied the student's request to write a biography of Jesus Christ, the teacher indicated that "deal[ing] with personal religious beliefs . . . is just not an appropriate thing to do in a public school" and that "the law says that we are not to deal with religious issues in the classroom, and that the only sources . . . documenting the life of Jesus Christ derive from one source, the Bible" (p. 154). Even though the teacher's reasoning was both legally and factually inaccurate, the court affirmed a grant of summary judgment in favor of the board, observing that "so long as the teacher violates no positive law or school policy, the teacher has broad authority to base her grades for students on her view of the merits of the students' work" (p. 155).

Referencing *Hazelwood,* in which the Supreme Court permitted school officials' exercise of "editorial control over the style and context of student speech in school-sponsored activities [school newspaper] so long as their actions are reasonably related to legitimate pedagogical concerns" (p. 273), the Sixth Circuit in *Settle* explained that "student speech may be even more circumscribed [in the classroom] than in the school newspaper or other open forum" (p. 155). The Court in *Settle* further noted in dictum as follows:

> So long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere. (p. 155)

Settle suggests that students have few, if any, protected rights associated with classroom assignments. Even so, one needs to consider whether *Lamb's Chapel* has changed that status for students. In *Lamb's Chapel,* the Supreme Court ruled that public school officials cannot prohibit religious viewpoints on subject matter as long as secular viewpoints have been permitted. While *Lamb's Chapel* did not involve a classroom, two post–*Lamb's Chapel* federal appellate cases, *Peck v. Baldwinsville Central School District* (2005) and *C. H. v. Oliva* (2000), suggest that the same reasoning could apply there as well.

Legal principles can be applied only to the facts before courts. As such, an understanding of the facts that generated particular principles is useful. Insofar as the protection of the free expressive rights of students in classrooms is an emerging concept with few relevant cases and since the impact of such rights on the operation of schools could be significant, an examination of the facts of *Peck* and *C. H.* is important.

Analysis of Peck

In *Peck,* the Second Circuit addressed a display of a kindergarten student's poster prepared as "an assignment in which students in the class were instructed to create a poster showing what they had learned about the environment [during a 2-month environmental unit]" (p. 617). To assist in preparing the posters, part of a larger end-of-school-year environmental program, the teacher sent two notes home to parents, the first informing them that "the children may use pictures or words, drawn or cut out of magazines or computer drawn by the children depicting ways to save our environment, i.e., pictures of the earth, water, recycling, trash trees, etc. This should be done by the student with your assistance" (p. 621). The second note notified parents that the posters would "be hung up at the [environmental] program. Ideas should involve ways to save our earth and it should be the child's work. Pictures drawn, cut out of magazines, or computer drawn are all great ideas" (p. 621).

The teacher, supported by the principal and superintendent, rejected the student's first poster submission replete with religious images because "she [the teacher] legally didn't think she could hang the poster for religious reasons, and because the poster didn't demonstrate Antonio's learning of the environmental lessons" (*Peck,* p. 622). The student's second poster depicted, on its left side, the same robed, praying figure pictured in the first poster. It also showed, in the center, a church with a cross. To the right of the church were pictures of people picking up trash and placing it in a

recycling can; children holding hands encircling the globe; and clouds, trees, a squirrel, and grass.

The teacher and principal chose to display the second poster, with the "kneeling figure folded under," but when actually displayed, "both the kneeling figure and half of the church [were] folded under" (*Peck,* pp. 622, 623). Both the teacher and principal deposed that the kneeling figure had no relationship to the assignment and that the work conceptually was not that of the student. While the principal testified that he "did not object to [the poster] solely on its religious content," neither the principal nor the teacher had "asked [the student] to explain the relevance to the environmental unit of the images on either of his posters" (p. 623).

A federal trial court responded to the boy's mother's Free Speech and Establishment Clause claims by granting the school board's motion for summary judgment. In reversing the summary judgment motion and remanding for trial on the free speech claim, the Second Circuit noted that although the school was a nonpublic forum with respect to the creation and display of the posters as part of a curricular assignment, this did not end the free speech analysis. The court recognized that while *Hazelwood* requires only a reasonable relationship between a school's curricular actions and its pedagogical interests, the school still cannot engage in viewpoint discrimination. Thus, even as to "school-sponsored student speech," the court interpreted *Hazelwood* as meaning that "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, even if reasonably related to legitimate pedagogical interests" (*Peck,* p. 633). Further, the appellate court affirmed dismissal of the establishment clause claim because of no evidence "demonstrat[ing] hostility toward religion" (p. 634). On remand, the trial court had to determine whether the school officials acted pursuant to a viewpoint-neutral reason in the display of the poster, such as the fact that it did not meet the requirements of the course or that not displaying the full poster was necessary so as not to violate the Establishment Clause.

Analysis of C. H.

The Third Circuit in *C. H.* dealt with a set of facts similar to *Peck.* A kindergarten student responded to a teacher's assignment near Thanksgiving Day "to make posters depicting what they [the students] were 'thankful for'" by producing a poster "indicating that he was thankful for Jesus" (*C. H.,* p. 201). The poster was placed on the wall of a hallway, was removed the following day, when the teacher was absent from school, by unknown school employees "because of the poster's religious theme," and was replaced by the teacher on her return but "at a less prominent location at the end of said hallway" (p. 201).

C. H.'s mother sued, alleging a free speech violation for both the removal and the less prominent display of the poster. In a case resolved on the pleadings, the federal trial court found that since the school and the classroom were nonpublic forums, pursuant to *Hazelwood,* educators could impose content-based restrictions on speech that it needed only to be reasonable in light of the purpose served by the forum and viewpoint neutral. The Third Circuit, in an evenly divided en banc judgment, affirmed with a vigorous dissent by then-judge and now Supreme Court Associate Justice Samuel Alito. Given his new prominence on the Supreme Court, his comments regarding the interface of *Hazelwood* and free speech, and the possibility that a case raising a set of facts similar to *Peck* or *C. H.* may reach the Court, a brief examination of his reasoning is useful. In addressing the merits of plaintiff's claim in *C. H.,* Justice Alito held as follows:

> Public school students have the right to express religious views in class discussion or in assigned work, provided that their expression falls within the scope of the discussion or the assignment and provided that the school's restriction on expression does not satisfy strict scrutiny. (p. 210)

According to Alito, this standard of strict scrutiny would have applied even in a nonpublic forum. Insofar as the subject of the student's poster in *C. H.* fell within the assignment, namely, something that the student was thankful for, removal and then less favorable placement constituted impermissible viewpoint discrimination unless school officials "[could] show that allowing [the student's] poster to be displayed with his classmates' on a non-discriminatory basis" would have "materially disrupt[ed] classwork or involve[d] substantial disorder or invasion of the rights of other

[students]" (*C. H.,* p. 212). School officials made no such showing in their pleadings. In addition, the board had no compelling interest under the Establishment Clause because "the Establishment Clause is not violated when the government treats religious speech and other speech equally and a reasonable observer would not view the government practice as endorsing religion" (p. 212). Even had any danger existed that someone might have reasonably interpreted the display of the student's poster as seeking to constitute "an effort by the school to endorse Christianity or religion, the school could have posted a sign explaining that the children themselves had decided what to draw" (p. 213).

The Second Circuit's decision in *Peck* and Justice Alito's dissent in *C. H.* raised the bar in terms of viewpoint discrimination in public schools. The notion that teachers and school boards may be liable for expressive speech in student assignments may be alarming when one considers the number of assignments that elementary teachers make in the course of a school year. Clearly, not all assignments raise expressive issues, but some probably will.

Practical Suggestions for Public School Teachers

1. Teachers have the authority to specify both the subjects that students may discuss and that their assignments be limited to material covered in class. Thus, if teachers ask students to solve problems in mathematics or to write essays on great American poets, they clearly do not have a right to speak or write about the Bible instead.
2. Teachers can prohibit students from expressing religious viewpoints in their assignments but must also exclude secular viewpoints. The difficulty in excluding religious content is that teachers may find themselves mired in factual dilemmas as to the treatment of secular topics. While teachers can prohibit students from offering their personal opinions as part of written assignments, they need to be aware that student expression can occur, as in *C. H.* and *Peck,* through symbols. Prohibiting religious content up front can be problematic if doing so is later used to demonstrate viewpoint discrimination.
3. Teachers can limit student work to the material taught in class, while asking students to explain the relevance of their assignments to course content. Thus, in *Peck,* the teacher and principal prolonged a controversy that should not have had to be remanded by failing to ask the student how the robed figure and church related to course content. Of course, the teachers would have to demonstrate their experience of, or at least commitment to, making the same inquiry regarding nonreligious content.
4. Teachers may enforce viewpoint-neutral rules on matters such as the length of oral presentations or written assignments. If papers are limited to 20 pages, educators may insist that all students, including any who wish to express religious viewpoints, adhere to that rule.
5. Teachers can to some extent change assignments if they consider students' religious viewpoints offensive. Absent proof of disruption under *Tinker,* religious viewpoints that teachers consider personally offensive are not a basis for differential treatment. However, teachers can treat all student submissions in the same way. In other words, if the teacher and principal in *Peck* thought that the religious symbols were offensive, they could have changed the directions on the assignment and refused to post any student displays. Whatever public relations problems that such an approach may create, it avoids a problem with viewpoint discrimination.
6. If teachers and/or principals are concerned about the public's response to religious viewpoints on displayed student work, they can post signs stating that the work represents the viewpoints and interpretation of the students, not the school.

Solicitations of Community Expression on Public School Premises

When school board officials invite members of the public to present personal messages to be displayed on school premises, they thereby invite legal scrutiny on the criteria for message content and the steps that they will take to enforce their standards. Not surprisingly, litigation has arisen over whether individuals can place religious messages on tiles or bricks that are located on the grounds of public schools.

Opposing Religious Content

The most prominent of the cases is *Fleming v. Jefferson County School District* (2002), in which the school board decided to reopen Columbine High

School, in Colorado, in the fall of 1999 following the shooting of 12 students and one teacher that April. To assist the community healing process, the school board invited a group of persons, including family members of the victims, to paint 4″ x 4″ tiles that would be displayed in the high school halls. In the directions they distributed, school officials indicated that "religious symbols" were not permitted. When officials refused to display titles with religious messages painted by one of the parents of a victim, such as "Jesus Christ is Lord," they unsuccessfully sued, alleging violations of their right to free speech.

On further review, the Tenth Circuit upheld the school board's ban on religious messages, finding that the tile painting and display constituted school-sponsored speech within a nonpublic forum for purposes of free speech. Relying extensively on *Hazelwood,* the court determined that the board's extending the painting of tiles to community members had not affected the nature of the forum or its pedagogical interest in "disassociating itself from speech inconsistent with its educational mission" (*Fleming,* p. 931). When a school board's own speech is at stake, the court maintained that "viewpoint neutrality is neither necessary nor appropriate, as the school is . . . responsible for determining the content of education it provides" (p. 927).

Supporting Religious Content

In contrast, two federal trial courts, *Seidman v. Paradise Valley Unified School District* (2004) and *Demmon v. Loudon County Public Schools* (2004), rejected the Tenth Circuit's analysis and the claims of school officials who refused to allow religious messages on tiles and bricks. In *Seidman,* officials at an elementary school encouraged parents to purchase 4" × 8" tiles on which to "immortalize their child or family" with no limitation on religious content. After officials rejected parent inscriptions such as "God Bless Haley" because they were concerned about separation of church and state, the parents successfully sued the school board. A federal trial court held that the parents' messages clearly fit within the criteria of "love, praise, encouragement, and recognition of students" (*Seidman,* pp. 1110–1111) and that no reasonable person would have thought that the school was sponsoring religion. In fact, the court concluded that the rejection of the religious message constituted viewpoint discrimination in violation of the parents' rights to free speech. Another federal trial court in *Demmon* reached a similar result regarding the sale of bricks for a path near the entrance to a high school. Parents wished to place a Latin cross on their brick. After officials withdrew the cross as an acceptable symbol, the court ruled in favor of the parents in rejecting the school's claim that the bricks were school sponsored and that controlling their content amounted to a valid pedagogical interest under *Hazelwood.* As in *Seidman,* the *Demmon* court determined that school officials engaged in impermissible viewpoint discrimination.

Options for School Districts

Encouraging members of the community to submit messages for display on school premises can be fraught with problems. School officials basically have three options available:

Option 1: Permit no personal expression and limit comments to prepared words, for example, "John/Mary Doe, 2007."

Option 2: Permit no religious expression but face the possibility of lawsuits for viewpoint discrimination.

Option 3: Prohibit only those messages that disrupt or threaten to disrupt a school's educational function, thereby facially eliminating whether the content of a message is religious.

Ralph D. Mawdsley

See also *Board of Education of Westside Community Schools v. Mergens; Edwards v. Aguillard; Engel v. Vitale; Epperson v. State of Arkansas; Good News Club v. Milford Central School; Hazelwood School District v. Kuhlmeier; Lamb's Chapel v. Center Moriches Union Free School District; Lee v. Weisman; Lemon v. Kurtzman, Santa Fe Independent School District v. Doe; Tinker v. Des Moines Independent Community School District*

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Religious Freedom Restoration Act

The Religious Freedom Restoration Act (RFRA), in its original and amended versions, represents Congress's side of an exchange with the U.S. Supreme Court on the issue of state interference with individual religious practice. The RFRA was an attempt to ameliorate a ruling of the Court that came down on the side of the state in such conflicts. This entry summarizes that dialogue.

The Original Law and Response

Congress enacted the RFRA in 1993 in response to the Supreme Court's decision in *Employment Division, Department of Human Resources v. Smith* (1990). In that case, the Court held that people could no longer seek exemption from neutral, generally applicable laws on the grounds that those laws violated their First Amendment rights. Congress pointed out that "laws 'neutral' toward religion may burden religious exercise as surely as laws intended to interfere with religious exercise" (RFRA, § 2000bb(a)(2)).

In enacting the RFRA, Congress identified two purposes: restoration "of the compelling interest test as set forth in *Sherbert v. Verner* (1963) and *Wisconsin v. Yoder*" (1972); and provision of "a claim or defense to persons whose religious exercise is substantially burdened by government" (RFRA, § 2000bb(b)).

Congress allowed government to substantially burden a person's exercise of religion only if it demonstrated that the burden was "(1) in furtherance of a compelling governmental interest; and (2) [was] the least restrictive means of furthering that compelling governmental interest" (RFRA, § 2000bb-1(b)). The RFRA specifically directs that the statute not be applied to alleged violations of the Establishment Clause, declaring that "granting government funding, benefits, or exemptions, to the extent permissible under the Establishment Clause, shall not constitute a violation of this chapter" (RFRA, § 2000bb-4)).

In *City of Boerne v. Flores* (1997), the Supreme Court struck down the RFRA as applied to a city zoning ordinance in Texas as interfering with the constitutional relationship between federal and state governments. In invalidating RFRA as applied to states, the Court observed that the law's impact on the states, in terms of both a heavy litigation burden and restrictions on its traditional regulatory power, "far exceed[s] any pattern or practice of unconstitutional conduct under the Free Exercise Clause as interpreted in [*Employment Division*]" (*City of Boerne,* p. 534).

While the Court acknowledged that Congress has authority under Section 5 of the Fourteenth Amendment to legislate rights protected under the Fourteenth Amendment, it added that Congress may not do so in a manner that "pervasively prohibits constitutional state action in an effort to remedy or to prevent unconstitutional state action" (*City of Boerne,* p. 533).

The Revised Law and Response

In response to *City of Boerne,* Congress amended the RFRA in 2000 by limiting the application of the RFRA enacted in 1997 to only the federal government (RFRA, § 2000bb-2(1)). Congress also added a new statute, Religious Land Use and Institutionalized Persons Act (RLUIPA), which although not technically an amendment to RFRA, immediately follows RFRA in the federal code and applies the same principles of RFRA to local, state, and federal governments. RLUIPA prohibits any government from imposing or implementing a land use regulation that treats a religious assembly or institution any differently from nonreligious ones or from discriminating against a religious assembly or institution (RLUIPA, § 2000cc(b)).

RLUIPA, unlike RFRA, is grounded in Congress's spending power and prohibits government at any level from "impos[ing] a substantial burden on the religious exercise of a person . . . in a program or activity that receives Federal financial assistance" (RLUIPA, § 2000cc(1) and (2)). In addition, RLUIPA prohibits a substantial burden on religious exercise that affects interstate commerce (RLUIPA, § 2000cc(2)(b)). RLUIPA imposes on all levels of government the same "compelling government interest" and "least restrictive means" tests required under RFRA (20 U.S.C. § 2000cc(a)(1)).

Following Congress's 2000 amendment to RFRA, the Supreme Court has not addressed another challenge to the statute. However, in *Hankins v. Lyght* (2006), the Second Circuit upheld the constitutionality of the statute against a separation-of-powers claim that Congress had imposed greater protection from federal actors and statutes than was required by the Supreme Court. The Second Circuit pointed out that "Congress can provide more individual liberties in the federal realm than the Constitution requires without violating vital separation of powers principles" (p. 107).

Hankins is an interesting case because although the Second Circuit remanded the case to a federal district court for trial, the appellate panel indicated that RFRA could serve as a church's defense against a former bishop's Age Discrimination Employment Act (ADEA) claim that he had been compelled by the church to retire at age 70; this was a somewhat extraordinary position, since the RFRA protects against federal, not individual, actions. In a more recent case involving the federal government and a more contemporary issue, the District of Columbia Circuit in *Holy Land Foundation for Relief and Development v. Ashcroft* (2003) found no violation of RFRA in the Department of the Treasury's designation of the Holy Land Foundation for Relief and Development as a Specially Designated Global Terrorist.

In another case involving the federal government, in *O'Bryan v. Bureau of Prisons* (2003), the Seventh Circuit decided that since the RFRA applied to Bureau of Prison personnel, it governed a federal prison

inmate's action challenging the bureau's rule against "casting of spells/curses" that effectively prohibited the inmate from practicing his Wiccan religion. *O'Bryan* is a useful case because it clarified the Supreme Court's decision in *City of Boerne.* The Seventh Circuit noted in *O'Bryan* that the Supreme Court in *City of Boerne* had not declared the RFRA to have violated any substantive constitutional right. Rather, the RFRA "permit[ted] Congress to determine how the national government will conduct its own affairs" but offered no "source of authority to apply the RFRA to state and local governments" (*O'Bryan,* p. 401), including public schools.

Ralph D. Mawdsley

See also *City of Bourne v. Flores; Wisconsin v. Yoder*

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Holy Land Foundation for Relief and Development v. Ashcroft, 333 F.3d 156 (D.C. Cir. 2003).
O'Bryan v. Bureau of Prisons, 349 F.3d 399 (7th Cir. 2003).
Religious Freedom Restoration Act, 42 U.S.C. §§ 2000bb *et seq.*
Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*
Sherbert v. Verner, 374 U.S. 398 (1963).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

Remedies, Equitable Versus Legal

Remedies represent the manner in which parties may determine their legal rights and/or assert enforcement of those rights to recover for harm, loss, injury, or deterioration. In most cases, remedies also evaluate the appropriate relief for parties that exercise their legal rights. Insofar as remedies are intended to correct or compensate for wrongdoing from one party to another, multiple forms of remedies are available.

A significant distinction among types of remedies available to parties resides between *remedies at law* and *remedies in equity.* Historically, the distinction between remedies at law and in equity arose because monetary damages were at times inappropriate methods to judicial relief of a matter. Consequently, special courts were created to address matters that could not have been resolved through monetary awards. Today, the distinctions between remedies at law and remedies in equity typically occur in two ways: the form of the remedy and the right to a jury. This entry describes both kinds of remedies, with examples from education.

Remedies at Law

Although cases at law and in equity are now typically heard by the same courts, the remedies available for each are distinct. Remedies at law typically assert some monetary value for damages sustained or restitution, such as repayment for property. For example, when a contractor fails to fulfill material portions of its contract with a school board, absent a valid legal excuse, the system, as an injured party, may seek redress by collecting money damages sustained from the contractor's failure to comply with the material terms of their agreement. A remedy of this type acknowledges the board's legal rights and for this illustration awards money damages. Of course, a board can also seek the equitable form of relief known as *specific performance,* discussed below.

Damages as legal remedies are the financial awards for the harm, loss, injury, or detriment from one party to another. However, various forms of legal damages exist; common forms of damages issued in education law cases are compensatory, nominal, liquidated, statutory, and punitive. Depending on the right violated and the severity, courts can award one or more type of damages.

Compensatory damages, sometimes simply referred to as *actual damages,* represent an amount to compensate the injured party for value of the harm, loss, injury, or detriment caused by the other party. The purpose of compensatory damages is to place the injured party in the original position before the occurrence.

Liquidated damages represent a predetermined value of loss from a violation of a party's rights. Typically, liquidated damages apply to contract breaches,

and the terms of their contracts spell out good-faith estimates of actual damages when one party fails to properly execute a contract.

Statutory damages outline the parameters for the calculation of damages. In some states, when teachers resign without providing proper notice, statutory provisions permit their school boards to deduct ordinary and necessary expenses associated with finding replacements. Similarly, some statutes, particularly antitrust and fraud legislation, contain provisions of treble damage awards, permitting plaintiffs to seek three times their actual damage awards.

Punitive damages represent awards above and beyond compensatory or nominal damages. The purpose of punitive damages is to punish parties for their willful, malicious, reckless, or fraudulent conduct and deter repetition of the act by the wrongdoer as well as others.

Remedies in Equity

In contrast, remedies in equity compel parties to act or refrain from acting. Remedies in equity are awarded when monetary damages or other remedies at law are insufficient or inadequate means of relief. Perhaps the best-known example of equitable relief occurred as a result of *Brown v. Board of Education of Topeka* (1954), wherein the Supreme Court ruled that segregation based on race was unconstitutional, thereby opening the door to a plethora of litigation designed to implement integration.

In addition, courts are capable of and do not violate maxims of fairness by ordering equitable relief along with legal damages. For instance, if a school board receives government construction funding and the funding is conditioned for a special purpose, the government entity may compel the contractor to complete the terms of the contract as another form of equitable remedy known as *specific performance.* Here, specific performance would require a board to use the building under terms of the agreement unless there is a legal excuse to void the conditions, such as a tornado having swept the building or the expressed purpose does not exist.

Typically, coercive remedies occur in one of two forms, as either injunctive relief (or a restraining order) or relief through specific performance. An injunction is a court-mandated prohibition of some act, and it applies to both criminal and civil cases. Generally, the party requesting the injunction must demonstrate likelihood of winning the case on its merits, threat of irreparable injury absent the injunction, and injury outweighing the threatened harm of an injunction; also, its issuance must not run counter to the public's interest. For example, a school may host a program that parents truly believe violates the Establishment Clause of the First Amendment. In such an instance, if parents can show that the four components to an injunction are met, a court may issue a preliminary injunction to restrain the school from continuing that program.

A special variation of an injunction applies to the special education context. Under the Individuals with Disabilities Education Act (IDEA), a *stay-put injunction* is essentially a preliminary injunction, which may be asserted pending the case outcome (20 U.S.C. § 1415(j)). A stay-put injunction permits a party to keep the child in the current setting until the case is decided.

Relief through specific performance is a contractual remedy when monetary damages by itself cannot fulfill the obligations of the parties. When plaintiffs successfully obtain specific performance, courts direct the other parties to perform the material terms of their contracts.

Second, the role of judges and juries may differ depending on the remedies that a plaintiff seeks. Based on the Seventh Amendment, remedies at law in federal cases generally provide a right to a jury trial. Although the Seventh Amendment does not apply to state courts, cases with remedies at law frequently afford jury trial options. Remedies in equity are decided by judges. Insofar as equitable relief grants courts powers to control the acts of others and the judicial administration required to follow up on these remedies can be burdensome, the law considers coercive remedies as extraordinary relief. Put another way, equitable remedies are exercised only upon showing that they are required to avoid, mitigate, or address wrongful acts.

Jeffrey C. Sun

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities

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Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Rendell-Baker v. Kohn

In *Rendell-Baker v. Kohn* (1982), the U.S. Supreme Court decided that actions of administrators in discharging teachers at a private school that provided mandatory services to maladjusted students did not rise to the level of a "state action," regardless of the amount of state (or more properly "commonwealth," since Massachusetts is not a state) and federal funding the school received. In a companion case that did not arise in a school setting, *Blum v. Yaretsky* (1982), the Court similarly ruled that when hospital staff transferred patients from one level of care to another, lower level, there was no state action involved. In both cases, since the alleged wrongdoings did not rise to the level of state actions, the Court found that the aggrieved parties were not afforded the due process protections of the Fourteenth Amendment.

Facts of the Case

The dispute in *Kohn* arose after a teacher was fired because she supported a student's petition to the board that requested that students be given more responsibility on the student-staff council concerning hiring decisions. Insofar as the school's director was opposed to students having a greater say on the committee, she had dismissed the platintiff becauses the teacher supported the petition.

On being dismissed, the teacher unsuccessfully filed suit under 42 U.S.C. §1983 (Section 1983) in the federal trial court in Massachusetts. The court rejected the claim on the basis that the plaintiff failed to present a cause of action involving the state that would allow it to exercise jurisdiction under Section 1983, which allows citizens to seek redress if their constitutional rights have been violated by state actions such as legislation or regulation. When the plaintiff appealed to the First Circuit, her case was consolidated with five other teachers who were similarly dismissed because they had in some way opposed the administration as to the school's learning environment and lack of free speech rights for students. The First Circuit largely affirmed, noting that the plaintiff failed to present a claim of state action under Section 1983.

The Court's Ruling

On further review, the Supreme Court affirmed that since school officials had not acted under color of state law in discharging the teachers, the latter failed to present a Section 1983 claim. In its rationale, the Court performed three levels of analyses in ruling out any possibility of state action being present. First, the Court considered the nature of the relationship between the private facility and the state, namely, whether a "symbiotic relationship," a "nexus," and/or "public function" existed. Insofar as the Court could not uncover any symbiotic relationship between the school and the state, it focused on the "nexus" and "public function" analyses.

When considering the "nexus" relationship, the Court examined two elements separately: the existence of state funding and the requirement that the facility follow state and federal regulations. The Court was of the opinion that since there was no such nexus present, there could be no state action to bring the dispute under the aegis of Section 1983. In addition, the Court pointed out that even though the school received public funding, there was no nexus between the funds and the actions of the officials in discharging the teachers. Insofar as Massachusetts officials did not coerce the school to release the employees, the Court was sastified that the mere receipt of public funding did not implicate state action. In other words, the Court explained that funding was not synonymous with state control.

Turning to the school's complying with state and federal regulations, the Supreme Court determined

that even though public officials regulated the educational programs to a great extent, especially in private schools that received special education funding, that alone was insufficient to suggest that commonwealth officials were involved in discharging the teachers. As such, the Court again reasoned that there were no grounds on which to base a Section 1983 claim.

In a final issue, the Supreme Court did acknowledge that the special education mandate in Massachusetts was a public function. Even so, in evaluating whether the fact that the school provided special education services brought the issue to the level of coming exclusively under the province of the commonwealth, the Court handily rejected the teachers' arguments. The Court contended that to the extent that the school was not basicially any different from a variety of private corporations whose busineses depended largely on governmental contracts and that this did not turn the actions of its adminsitrators into state action, the teachers failed to present a claim under Section 1983.

Marilyn J. Bartlett

See also Civil Rights Act of 1871 (Section 1983); Due Process Rights: Teacher Dismissal; Fourteenth Amendment; Nonpublic Schools; Teacher Rights

Legal Citations

Blum v. Yaretsky, 457 U.S. 991 (1982).
Rendell-Baker v. Kohn, 457 U.S. 830 (1982).

Response to Intervention (RTI)

Response to intervention (RTI) is an alternative assessment approach used in identifying students with specific learning disabilities (SLD). The 2004 revision of the Individuals with Disabilities Education Act (IDEA) authorized RTI as a permissible method for identifying SLD students. The IDEA allows states, through local educational agencies or school boards, to use scientific, research-based interventions in determining which students are eligible for SLD services, rather than relying on a severe discrepancy between intellectual ability and achievement.

The RTI approach is typically a multitiered, systematic method of providing research-based interventions to students with reading difficulties and carefully monitoring their progress in order to evaluate the need for future educational services. RTI is not mandated, but provides an additional method for state educational agencies to use in assessing students who have special educational needs.

RTI, as part of IDEA, was authorized by Congress and signed into law by President George W. Bush in December 2004. The changes in IDEA, which led to the addition of RTI as a method for improving the identification of SLD students, were largely based on influential reports from the President's Commission on Excellence in Special Education and other experts in special education. The commission reported that reliance on the typical evaluation process, made up of academic achievements, behavioral functioning, and intelligence, is expensive and burdensome to an educational agency that already has limited resources in terms of staff and finances. The commission's findings suggested that allowing for RTI-based assessments would provide better outcomes to students by implementing intervention-based assessments sooner and alleviate the resource drain on educational agencies.

RTI was developed in response to the growing need to develop an assessment tool, which provides early educational assistance to students with learning difficulties and accurately places students within appropriate special education programs. One goal of RTI is to reduce the number of students identified with SLD and unnecessarily placed in special education programs. The use of RTI may also improve the accuracy of identifying students whose academic difficulties arise from improper instruction rather than problems related to intellectual ability. The use of RTI allows for students to receive interventions earlier than they would have otherwise obtained them had they been referred to special education services using traditional evaluation methods. In addition, RTI allows for educators to receive individualized data on students' response, which can be used in providing specialized services targeted directly to the particularized needs of individual children.

States may no longer require the use of the severe discrepancy model in identifying SLD students. Instead, states must allow the use of scientific, research-based interventions in considering eligibility of SLD services. Prior to the 2004 revisions, state educational agencies were mandated to assess students for SLD using a model based on discrepancy between IQ and ability, sometimes referred to as the "IQ discrepancy" or "severe discrepancy" model. With the IDEA revisions, state educational agencies may not require the use of the severe discrepancy model in evaluating students and must permit local agencies to use RTI to assess student educational needs.

Specific documentation is required when officials at educational agencies use RTI as a method of determining SLD eligibility. The federal regulations require that documentation include, along with additional criteria, the type of strategies used and the student-centered data that were collected, documentation of parental notification, and strategies for increasing learning rates in students. Each member of student evaluation teams must individually certify concurrence with the findings. RTI student response data should be collected at reasonable intervals. In making final SLD recommendations, agency officials should compare the results of RTI to state standards for grade- and age-level learning.

Many experts hope that the use of RTI will show greater educational benefit in SLD students as well as an increased efficiency in the use of special education resources. Results from the use of RTI will assist educational agencies in further strategizing methods for improving outcomes.

Aimee N. Gravelle

See also Disabled Persons, Rights of; Free Appropriate Public Education; Individualized Education Program (IEP)

Further Readings

President's Commission on Excellence in Special Education.(2002). *Final Report to the President, President's Commission on Excellence in Special Education.* Retrieved from http://www.ed.gov/inits/commissionsboards/whspecialeducation/reports/index.html

Legal Citations

Code of Federal Regulations, "Specific Learning Disabilities," 34 CFR §§ 300.307 *et seq*.

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Rights of Students and School Personnel With HIV/AIDS

Following the growth of HIV/AIDS in the general population since it was first classified as a separate disease in 1981 in the United States, litigation ensued concerning the rights of students and educators who suffer from this pernicious illness. All but one of the suits directly addressing the rights of individuals with HIV/AIDS in regular school settings involved students; the final case dealt with a teacher.

Medical evidence is clear that students with HIV/AIDS do not pose significant health risks to peers. Even so, parents have had to resort to litigation to protect the rights of their children who were infected with HIV/AIDS to attend school, primarily under Section 504 of the Rehabilitation Act of 1973 (Section 504, 2006). Parents also filed suit under the Individuals with Disabilities Education Act (IDEA) (2005) and the Americans with Disabilities Act (ADA, 2005).

The earliest and perhaps best-known case involving a child with AIDS concerned Ryan White, a student in Indiana with hemophilia who contracted the disease through a blood transfusion. A state court, in refusing to interpret a statute on the rights of students with communicable diseases as prohibiting him from attending school, ordered Ryan to be admitted to a regular classroom (*Bogart v. White,* 1986).

Students with AIDS have successfully challenged state and local policies that would have limited their ability to attend school. A trial court in New York overturned a board policy that would have automatically excluded students with AIDS from school, subject to individual reviews (*District 27 Community School Board v. Board of Education of New York,* 1986). The court explained that a blanket exclusion would have violated Section 504 since the children were otherwise

qualified to attend public schools. Even though a similar dispute from New Jersey was rendered moot when school officials admitted students who suffered from AIDS and related illnesses, the state's high court decided that the policy guidelines, which provided adequate due process protection for individuals and the public at large, were valid as modified (*Board of Education of Plainfield v. Cooperman,* 1987).

Two cases from Illinois rejected attempts by school systems to exclude children with AIDS for failing to exhaust administrative remedies under the IDEA. Both courts rebuffed the arguments on the ground that insofar as the parents filed suit pursuant to Section 504, they were not bound by the IDEA's exhaustion of remedies doctrine (*Doe v. Belleville Public School District No. 118,* 1987; *Robertson v. Granite City Community Unit School District No. 9,* 1988). Further, in a case filed pursuant to the IDEA, a federal trial court in Oklahoma rejected an attempt by officials who sought to bar an HIV-positive, hemophiliac child with an emotional disorder from school under a state law on contagious diseases. The court found that since the child had an identifiable mental disability under the IDEA, he was entitled to its protections (*Parents of Child, Code No. 870901W v. Coker,* 1987).

Three courts refused to allow schools officials to place children with AIDS on homebound placements in order to remove them from general school populations. Courts in Florida (*Ray v. School Dist. of De Soto County,* 1987), California (*Phipps v. Saddleback Valley Unified School District,* 1988), and Illinois (*Doe v. Dolton Elementary School District No. 148,* 1988) agreed that such actions violated the rights of the students for a variety of reasons.

Two cases examined issues in which students may have presented risks of harm to others. In California, a federal trial court permitted a kindergarten-aged child with AIDS who bit a classmate to attend school since there were "no reported cases of the transmission of the AIDS virus in a school setting" and the "overwhelming weight of medical evidence [was] that the AIDS virus is not transmitted by human bites, even bites that break the skin" (*Thomas v. Atascadero Unified School District,* 1987, p. 380). The court also found that the child was otherwise qualified to attend regular kindergarten under Section 504 insofar as there was no evidence that he posed a significant risk to others. A lengthy dispute from Florida reached a similar outcome in which a federal trial court, on remand from the Eleventh Circuit (*Martinez v. School Board of Hillsborough County, Florida,* 1988, 1989), directed educators to admit a "trainable mentally handicapped" kindergarten child with AIDS who was incontinent, often had blood in her saliva, and sucked her fingers in class, in light of the low overall risk of her transmitting AIDS.

The only case that was not resolved in favor of a child with AIDS, albeit as a nonschool case under the ADA, arose in Virginia. The Fourth Circuit affirmed that the proprietor of a private karate school, whose parents had not disclosed their son's condition in advance, was not required to admit the child to a group class because his condition posed a direct threat to the health and safety of others (*Montalvo v. Radcliffe,* 1999).

The only case involving the rights of a teacher with AIDS was litigated in California. A teacher successfully challenged his being reassigned to an administrative position by relying on Section 504. In ordering the teacher's reinstatement, the Ninth Circuit held that absent adequate medical evidence that he would pass the disease on to his students or coworkers, there was no reason to ban him from work (*Chalk v. United States District Court, Central District of California,* 1988).

In a case that did not address the merits of the claims of a teacher who was HIV positive, the federal trial court in Puerto Rico dismissed the case he filed under the ADA alleging that his contract was not renewed due to his illness (*Velez Cajigas v. Order of St. Benedict,* 2000). The court held that school officials relied on legitimate nondiscriminatory grounds that the teacher was often late for work and was unable to control his students.

In sum, while reported litigation involving students and teachers with HIV/AIDS has lessened dramatically, it is clear that those affected by this dreadful disease cannot legally be excluded from school or work based on medical conditions associated with their conditions.

Charles J. Russo

See also Americans with Disabilities Act; Inclusion; Least Restrictive Environment; Rehabilitation Act of 1973, Section 504; Zero Reject

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Right-to-Work Laws

Right-to-work laws prohibit making union membership a condition of employment. Although federal law allows states to pass such laws, fewer than half have done so, and a national law is being considered. This entry describes these laws, relevant U.S. Supreme Court rulings, and arguments offered by supporters and opponents of such legislation.

Background

The National Labor Relations Act as amended in 1947 allows states to enact right-to-work laws. The U.S. Department of Labor records show that at least 23 states have enacted right-to-work laws and state constitutional amendments: Alabama, Arizona, Arkansas, Florida, Georgia, Idaho, Indiana, Iowa, Kansas, Louisiana, Mississippi, Nebraska, Nevada, North Carolina, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, and Wyoming. The federal government is currently working on the National Right to Work Act, which would extend the right to refuse union membership to all states. Other states have not formally enacted such laws, but some of these have state codes or other legal language in state laws that identify and control union activities.

Right-to-work state statutes vary greatly in language, though all contain basic commonalities in the provision stating that union membership cannot be made a condition of employment; it is best for educators to consult with the attorneys for their school boards for specific requirements of their states of residence. Principally, the National Right to Work Act would repeal other federal labor laws that allowed dismissal of employees for failure to pay union dues or loss of union membership. Right to work is an important area of law, given the current growth in the number of teachers' unions and associations being formed.

Right to work specifically addresses the *closed shop.* In closed shops, employers are permitted to hire only union members to fill open positions. Right-to-work laws ban closed shops and require *fair share,* also known as *agency shops,* or *open shops.* Further, right-to-work laws afford employees the opportunity to withdraw from union membership at any time without fear of the loss of their jobs. Another provision required by the right-to-work law is fair and equal representation of employees regardless of membership status.

In contrast to closed shops, open shops do not limit employees hired to fill positions. The middle ground is fair share or agency shops. These require nonmembers to

pay a fair share (agency fee) of the dues associated with negotiating salaries and benefits. The fair share or agency fee amount must be disclosed by the union when requested by an employee prior to payment. Unions must identify the portion of their dues used solely for the purpose of negotiating salary and benefits.

The Supreme Court ruled that the fair share or agency fee cannot be used for activities not related to negotiations of salaries and benefits (*Chicago Teachers Union Local No. 1 v. Hudson,* 1986). The Court found that the formula used by the union to calculate the fee was constitutionally inadequate. In *Lehnert v. Ferris Faculty Association* (1991), the Court clarified expenses that are chargeable to nonunion members as part of the fair share or agency fee. The Court most recently decided that it does not violate the First Amendment to require teacher unions to receive affirmative authorization from nonmembers before spending their agency shop fees for election related purposes (*Davenport v. Washington Education Association,* 2007).

Pros and Cons

Supporters of right-to-work laws argue that employees should be able to freely choose whether to join or not join the union. Proponents also invoke the First Amendment right to freedom of association, which allows employees the choice of membership or nonmembership. Finally, this group believes that right-to-work laws increase competition in the marketplace and thus contribute to economic growth. A commonly cited factor in an employee's decision not to join a union is the use of union dues to support causes that are contrary to the employee's political beliefs.

Labor leaders oppose right-to-work laws because they feel nonmembers are "free riders" who share in the benefit of union negotiations without contributing toward the outcomes. Opponents of right-to-work laws argue that the laws weaken the union and therefore contribute to lower wages and safety concerns. Further, union members see right-to-work laws as a threat to their very existence. Given a choice between membership or nonmembership in unions without repercussions, some employees choose not to join labor organizations. This choice is seen as weakening the union's membership while requiring the union to expend resources in representing nonmembers fairly and equally in any work-related grievances or disputes.

Looking Ahead

As the House of Representatives and the Senate consider the National Right to Work Act, some states have passed laws or constitutional amendments identifying right-to-work language. Although the National Right to Work Act is in committee and has not become law, states are free (under the Taft-Hartley Act) to enact their own right-to-work laws or identify specific requirements in state codes regarding collective bargaining, unions, and other conditions of employment.

Educators must be aware of state collective bargaining and/or right-to-work laws prior to engaging in negotiations with the representative(s) of teachers or support staff. Failure of administrators to know what state laws or codes identify as legally negotiable items and management rights (nonnegotiable) will not be a defense when they try to recover items reserved as management rights.

Michael J. Jernigan

See also *Abood v. Detroit Board of Education; Chicago Teachers Union, Local No. 1 v. Hudson; Davenport v. Washington Education Association;* First Amendment; Teacher Rights; Unions

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Roberts, John G., Jr. (1955–)

John G. Roberts, Jr., became the 17th chief justice of the United States on September 29, 2005, and currently serves in that post. Prior to becoming chief justice, Roberts served as a judge on the U.S. Court of Appeals for the District of Columbia Circuit from June 2, 2003, to September 29, 2005.

Early Years

Chief Justice Roberts was born on January 27, 1955, in Buffalo, New York. He was raised in a small town in Indiana and attended a Roman Catholic boarding high school in LaPorte, Indiana. Roberts earned his undergraduate degree summa cum laude, with a degree in history and a Phi Beta Kappa key from Harvard College in 1976. In 1979, he earned his law degree magna cum laude from Harvard Law School, where he was managing editor of the *Harvard Law Review.*

Roberts began his legal career as a law clerk to Judge Henry Friendly of the Second Circuit in 1979 to 1980 and to Associate Justice William Rehnquist in 1980 to 1981. At the conclusion of his Supreme Court clerkship, he served as special assistant to the attorney general of the United States (1981 to 1982) and as associate counsel to the president of the United States (1982 to 1986). Roberts then entered private practice as an appellate attorney with the Washington law firm of Hogan & Hartson but returned to government service in 1989 as principal deputy solicitor general of the United States (1989 to 1993). In 1992, President George H. W. Bush nominated him to be a judge on the District of Columbia Circuit. However, after Bush lost the 1992 election, Roberts's nomination expired.

Having missed an opportunity to serve on the federal bench, Roberts returned to private practice at Hogan & Hartson. Having argued 17 cases before the Supreme Court while serving in the solicitor general's office, Roberts already had a reputation as an outstanding appellate advocate. In arguing 22 additional cases between 1993 and 2003, he established a reputation as one of the best Supreme Court advocates of his generation.

On the Bench

In 2001, President George W. Bush nominated Roberts for a second time for a seat on the District of Columbia Circuit, but the Democratic majority in the Senate refused to act on his nomination. When the Republican Party won a Senate majority in 2002, the president again nominated him. He was confirmed shortly thereafter.

After Associate Justice Sandra Day O'Connor announced her retirement from the Court in the summer of 2005, the president nominated Roberts to replace her. When Chief Justice Rehnquist died in early September 2005, the president withdrew his nomination of Roberts for associate justice and nominated him for chief justice.

Roberts, a Roman Catholic, is married to Jane Marie Sullivan Roberts and has two adopted children.

William E. Thro

See also Roberts Court

Further Readings

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Roberts Court

The phrase *Roberts Court* refers to the era during which John G. Roberts, Jr., has served as chief justice of the U.S. Supreme Court. The Roberts Court began with the October 2005 term and continues to the present day.

Following the completion of the October 2004 term, Justice Sandra Day O'Connor announced her retirement. At that time, President George W. Bush nominated Judge John Roberts to take her place. However, before Roberts's confirmation hearings could begin, Chief Justice William H. Rehnquist died. The president then withdrew Roberts's nomination for Justice O'Connor's seat and nominated Roberts for chief justice. Justice O'Connor remained on the Court until January 2006, when she was replaced by Justice Samuel Alito.

While the short tenure of the Roberts Court makes it difficult to draw decisive conclusions regarding its

general direction and ultimate place in history, it has rendered significant decisions in cases involving education law. The remainder of this entry discusses these cases and closes with brief reflections.

Record on Education

In *Parents Involved for Community Schools v. Seattle School District* (2007), a plurality of the Supreme Court in an opinion written by Chief Justice Roberts agreed that "a public school that had not operated legally segregated schools or has been found to be unitary" (p. 2746) may not "choose to classify students by race and rely upon that classification in making school assignments" (p. 2746). Significantly, the Court indicated that the achievement of diversity was a compelling governmental interest only in the higher-education context. Effectively, *Parents Involved* precludes school boards from using race in the assignment of individual students. As a practical matter, *Parents Involved* makes it extraordinarily difficult for urban school systems to maintain racially balanced schools.

Two days prior to ruling in *Parents Involved,* in *Morse v. Frederick* (2007) in another opinion by Chief Justice Roberts, the Court held "that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" (p. 2622). Even though *Morse* leaves many questions unanswered regarding the exact scope of student free-expression rights, it does provide clarity on speech that encourages illegal drug use.

In *Zuni Public Schools Dist. No. 89 v. Department of Education* (2007), the Supreme Court upheld the U.S. Department of Education standards for the distribution of federal impact aid monies. Specifically, the Court found that the secretary could consider the population of individual school systems in determining whether states had programs in place that equalized expenditures among their districts.

Winkelman ex rel. Winkelman v. Parma City School District (2007) was the third of a trilogy of Supreme Court cases addressing special education. In *Winkelman,* the Court was of the opinion that the parents of a student with disabilities have rights under the Individuals with Disabilities Education Act (IDEA) that were separate and distinct from the rights of their child. As such, the Court decided that since the parents have their own personal rights, they can bring pro se actions challenging the decisions of school officials in determining appropriate placements for their children. *Winkelman* seems to expand the scope of IDEA litigation.

A year earlier, in *Arlington Central School District Board of Education v. Murphy* (2006), the Supreme Court reasoned that the IDEA, which was enacted pursuant to congressional authority under the Spending Clause in Article I of the U.S. Constitution, did not impose conditions on states unless they were set out unambiguously in the statutory text. The Court's interpretation meant that states could not be required to reimburse parents for the cost of expert witnesses and other fees, the issue at bar, absent a clear congressional intent to do so. Accordingly, *Murphy* makes it more difficult for litigants to advocate expansive interpretations of the IDEA. Moreover, because *Murphy* applies to all Spending Clause statutes, it has significant ramifications of Title IX, Title VI, and Section 504 claims that remain to be seen.

In *Schaffer ex rel. Schaffer v. Weast* (2005), the Supreme Court noted that when parents and school board officials cannot agree on the contents of a child's individualized education program (IEP), the party challenging the IEP bears the burden of proof in the absence of a state statute to the contrary. The Court observed that since a board-proposed IEP constitutes the status quo, the party challenging the status quo must bear the burden of proof.

The Supreme Court's major case involving higher education during the Roberts term was *Rumsfeld v. Forum for Academic and Institutional Rights* (2006). In *Rumsfeld,* a judgment that came after years of legal wrangling surrounding the question of military recruitment on college and university campuses, the Court said that the Solomon Amendment is constitutional. At issue in *Rumsfeld* was the fact that many institutions of higher learning sought to exclude military recruiters from their campuses because they thought that the federal law concerning homosexuality in the military and the resultant sexual orientation discrimination was offensive to their institutional values.

Directions

Insofar as the Solomon Amendment was enacted to override those exclusions by mandating that educational institutions afford military recruiters the same access provided to other recruiters or lose specified federal funds, the Court maintained that its mandate was consistent with the First Amendment. According to the *Rumsfeld* Court, the Solomon Amendment did not violate institutional freedoms of speech or association.

Clearly, two terms are not enough time in which to render clear conclusions about the direction of the Roberts Court. Yet in light of a collection of cases that demonstrate clarity and judicial humility, it appears that the Supreme Court may be heading into a period within which the justices apply judicial restraint rather than activism. While it is still too early to tell what direction the justices will ultimately adopt collectively, it is evident that under the discretion of Chief Justice John Roberts, the Supreme Court will continue to have a major impact on education law and American life in general.

William E. Thro

See also *Arlington Central School District Board of Education v. Murphy; Morse v. Fredrick; Parents Involved in Community Schools v. Seattle School District No. 1*; *Schaffer ex rel. Schaffer v. Weast; Winkelman ex rel. Winkelman v. Parma City School District*

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Parents Involved in Community Schools v. Seattle School District, 127 S. Ct. 2738 (2007).
Rumsfeld v. Forum for Academic and Institutional Rights, 547 U.S. 126 (2006).
Schaffer ex rel. Schaffer v. Weast, 546 U.S. 49 (2005).
Winkelman ex rel. Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007).
Zuni Public Schools Dist. No. 89 v. Department of Education, 127 S. Ct. 1534 (2007).

Roberts v. City of Boston

At issue in *Roberts v. City of Boston* (1849) was whether Sarah C. Roberts was unlawfully excluded from public school instruction under an 1845 Massachusetts statute that allowed any child to recover damages based on such exclusion. *Roberts* is noteworthy because it stands out as the first recorded opinion in the United States to address, and essentially uphold, the concept of "separate but equal."

Facts of the Case

At the time of the Roberts's suit, the city of Boston was divided into 21 nonterritorial primary school districts. While the city supported and provided instruction to each of the district's several primary schools, two of the primary schools were for the exclusive education of Black students. White students could attend any of the schools and were not required to attend the school that was geographically closest to their homes.

The primary school committee was responsible for overseeing primary school admissions. Pursuant to the committee's regulations, students could not be admitted without tickets of admission from district committee members, every committee member should have accepted all appropriately qualified applicants, and students should have been admitted to the schools geographically closest to the their homes. Black citizens of Boston requested that the primary school committee eliminate schools exclusively for Black children. However, the committee decided that separate schools were legal, just, and best suited to provide education to Black students.

In 1847, Sarah C. Roberts was a 5-year-old Black child whose father properly applied for admission to a school near the family's home. The nearest all-Black student school was Belknap, located 2,100 feet from Sarah's home; other schools were closer. The committee denied Sarah's application to attend a closer school because she was Black and there were two schools exclusively for Black children. Sarah appealed this decision to the primary school committee for the district and then the general primary school committee but was denied admission by both.

After Sarah's father was notified that she could attend Belknap, he refused to send her there. In February 1848, Sarah went to the primary school geographically closest to her home, approximately 900 feet away. Sarah did not have a ticket of admission or other permission to attend the all-White school, and she was removed by the teacher. Sarah's father then unsuccessfully filed suit for her to attend the school closer to her home.

The Court's Ruling

On further review, the Supreme Judicial Court of Massachusetts affirmed that the Roberts family did not have a claim. In its opinion, the court discussed constitutional and legal rights in Massachusetts, where commonwealth law directed that each town should raise money for schools and divide itself into districts. The court pointed out that the law did not require specific organization, qualifications of admission, quantity of schools, or age of entry. Instead, the court noted that legislature granted these decision-making powers to the individual school committees. The court added that the superintendent had the authority to determine the methods for distribution and classification of students to individual schools based on the proficiency and welfare of individual children. The court explained that there were conditions under which different populations of students should be taught separately from others, such as on the basis of age, gender, or poverty.

The court next declared that the committee had acted within its authority in deciding that separate schools were good for both Black and White students. According to the court, the committee should have continued to use its reason and judgment when regulating school assignments. The court further thought that integrating Black and White students might have increased prejudice and discrimination. Even so, the question before the court was not the legality of separate primary schools, but whether students could be prevented from attending the schools closest to their homes. The court was of the opinion that Sarah was not unlawfully excluded from public school, because she had access to a school that was capable of providing equally qualified instruction as the other primary schools; that the committee had the authority to determine school assignments; and that officials acted under this authority when they required Black students to attend one of two schools. The court thus concluded that the requirement that Sarah travel further to school was not unreasonable or illegal and did not amount to unlawful exclusion from a public school, and her action was properly dismissed below.

Suzann VanNasdale

See also *Brown v. Board of Education of Topeka; Gong Lum v. Rice; Plessy v. Ferguson*

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
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Plessy v. Ferguson, 163 U.S. 537 (1896).
Roberts v. City of Boston, 59 Mass. 198 (1849).

Robinson v. Cahill

Robinson v. Cahill (1973) is the name of the initial dispute in the long-running school finance litigation from New Jersey. *Robinson* stands out not only because it lasted so long but also because it exemplifies the kind of analysis that arises in disputes over funding for public education.

The Initial Ruling

After the U.S. Supreme Court refused to intervene in *Robinson* (1975) for the first time, the Supreme Court of New Jersey found that the state's system of school finance violated the state's education clause pertaining to the provision of a thorough and efficient system of education. According to the court, the "thorough and efficient" clause gave the state the ultimate responsibility to ensure that students receive a thorough and efficient education. Further, the Court ruled that a funding system that is reliant on local taxes was not thorough and efficient.

In *Robinson,* the Supreme Court of New Jersey examined two questions: whether the state or local

boards had the principal responsibility for funding schools and whether urban taxpayers, who faced higher tax rates than those in other municipalities, had a right to equal taxation. At the outset of its analysis, the court cited the "thorough and efficient clause" in the state constitution: "The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years" (*Robinson,* p. 716, citing New Jersey Constitution, Article VIII, Section IV, 1).

The court explained that in seeking to provide funding for public schools, the state's financing system relied heavily on local property taxes. Under this formula, the court commented that there was a wide disparity in the amount of money spent per pupil, depending on a child's district of residence, with the result that in some systems with low property wealth and high taxes, the schools were underfunded. As part of its analysis, the court acknowledged that the school funding was provided from three sources: local taxes, which provided about 67% of the total; state aid, which accounted for about 28%; and federal aid for the last 5%. As such, the court specified that the state aid did not substantially equalize the dollar amount spent per pupil.

At the same, the plaintiffs claimed that due to the financing disparity, the state offered a "thorough" education to some but not all students, as the system discriminated against property owners who were taxed at different rates for the same underlying purpose. The plaintiffs further alleged that since the language in the state constitution imposed an obligation on the state to fund public education, any tax imposed to fund education should be a "state" tax that should have been applied uniformly across the state as a whole. The court rejected this argument, responding that state functions could be delegated to the local level and funded by local taxes. If the state chose to fund education at the state level, then the court would be satisfied that property taxes would be uniformly imposed across all property in the state. Conversely, the court posited that, as was the situation in New Jersey, since the state chose to assign responsibility to the local government, all property in any given municipality should have been taxed equally.

Continuing its analysis, the state high court observed that the trial court thought that the state constitution's language required equal taxation among all school systems and that the state had the duty to raise funds by imposing levies on all taxpayers equally. The court also rejected the idea that the constitution required equal treatment of all taxpayers in all jurisdictions. Noting that other essential services, such as police and fire protection, come out of the same tax base as the one that funds education, the court judged that it was inevitable that local per-pupil expenditures would vary, as each locality would be willing or able to pay different amounts. In fact, the court added that such funding discrepancies existed in these other essential state services.

The court recognized the importance of schooling but was unwilling to categorize education as a fundamental right under the state constitution's equal protection clause. While remarking that public education is vital, the court found that other needs, such as food and lodging, were more appropriately entitled to equal protection status. To this end, the court pointed out that police and fire protection, along with water and other public health services, are essential needs that are provided by local funding and that the dollar amounts vary by jurisdiction. The court did decide that insofar as the funding system was unconstitutional because of its impact on education, it ordered the state to provide enough funding to the poorest districts in order to ensure that children received a thorough and efficient education.

A Second Round

Following the court's 1975 opinion in *Robinson,* the U.S. Supreme Court again refused to intervene in *Robinson.* Legislators in New Jersey then struggled to develop a constitutionally permissible funding system. Although the legislators did enact a new system in the Public School Education Act of 1976 (PSEA), controversy would soon return.

The successor suit to *Robinson, Abbott by Abbott v. Burke* (1990), was initially filed in 1981, as students in urban school districts claimed that the new funding system still did not satisfy the thorough and efficient clause. Following a long and complicated procedural

history, in *Abbott* (1990), the Supreme Court of New Jersey determined that the PSEA was constitutional on its face but that, as applied, it failed to meet the requirements of the thorough and efficient clause.

In its judgment, the court maintained that since the PSEA failed poorer districts, the state had to provide aid to the poorest systems, identified as "special needs" districts, in an amount that would equal their per-pupil spending for those in locations with the highest socioeconomic levels. The court observed that the "special needs" districts could not be forced to rely solely on their local tax availability and that the state was responsible for providing sufficient resources to these districts. According to the court, while the PSEA did not require equal expenditures, there was a minimum amount that all school systems should be entitled to receive. If the local tax base could not offer the needed amount, then the court expected the state to provide the rest. In this way, the court forced the state to allocate significantly more money to urban schools with the realization that they would need more resources than their tax base would, or could, provide.

The *Abbott* court noted that providing a thorough and efficient education involved much more than simply giving schools money to operate. The court concluded that since money can make a difference if it is used effectively, because it provides all children with a chance to succeed, the state was obligated to abide by its constitution in making a thorough and efficient education available to all children. Insofar as controversy lingered on, the Supreme Court of New Jersey had to clarify its order. As such, the court subsequently addressed issues surrounding the credentials of noncertified preschool teachers who would serve children in the state's poorest districts (*Abbot,* 2004a, 2004b).

Megan L. Rehberg

See also *San Antonio Independent School District v. Rodriguez;* School Finance Litigation; Thorough and Efficient Systems of Education

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San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Robinson v. Jacksonville Shipyards

At issue in *Robinson v. Jacksonville Shipyards* (1991) was whether a court could apply the "reasonable woman" standard in a Title VII case involving sexual harassment in the workplace. In finding that the employer in *Jacksonville Shipyards* allowed for the creation of a sexually hostile work environment, a federal trial court in Florida decided that the female employee's Title VII claim was actionable. Although *Jacksonville Shipyards* was not set in an educational context, it is informative for educators concerning issues in sexual harassment.

Facts of the Case

The dispute in *Jacksonville Shipyards* arose when a female employee complained to company executives and supervisors that male coworkers created a sexually hostile work environment by displaying inappropriate pictures of women and making derogatory comments about her and other women. After the plaintiff made multiple attempts to resolve the hostile environment within the company, the woman filed suit in a federal trial court alleging that officials perpetuated a sexually hostile work environment.

During the company's defense presentation, the court viewed the testimony of its two expert witnesses as not useful to the specifics of the dispute. As such, the court gave this testimony little credence. The company also tried to explain how officials attempted to reduce the hostile environment by marking off areas of the shops as "men only" and encouraging the men to post the pictures of nude or partially nude

women only in the designated areas. Further, officials indicated that they encouraged the men to ask female employees to leave areas when they were going to tell off-color jokes and/or stories.

At the same time, testimony revealed that company policy never permitted the posting of pictures of nude or partially dressed men and that even though it did not allow magazines and newspapers on the job site, employees admitted there were pornographic material strewn about the shops and offices. Moreover, officials had to concede that the woman was told that since she chose the company's work environment and the men had constitutional rights to post the pictures, she would essentially have to tolerate their behavior.

The plaintiff's two expert witnesses testified that the ongoing presence of the demeaning pictures of women created conditions for sexual stereotyping that encouraged male workers and supervisors to view the female workers in terms of their sexuality rather that as able-bodied coworkers. The witnesses pointed out that with this form of stereotyping, members of the majority group, namely, the males, minimized the concerns of the women, who were in the minority, with the result that the women were frequently perceived as the problem. Further, the testimony stated that members of the minority group frequently combated the hostile environment by denying the impact of the event and blocking it out, avoiding the workplace by taking sick leave, telling harassers to stop, engaging in joking or other banter in the workplace in order to defuse the situation, and threatening to make or actually making informal or formal complaints.

The Court's Ruling

For the Title VII claim of sexual discrimination to proceed, the court noted that the plaintiff had to prove that she was a member of a protected class, that the sexual harassment was unwelcome, that it was based on her sex, that it affected her employment, that the employer knew or should have known of it, and that she neither solicited nor incited the offending behaviors. Insofar as the court was satisfied that the plaintiff met these tests, it permitted the case to proceed.

The court conceded that in situations in which inappropriate sexual slurs and behaviors are isolated, company officials may not be able to curb all such misbehaviors. However, as in the case at bar, wherein officials were aware that the actions were frequent and severe enough that they should have intervened and that a reasonable woman would have been offended by the behavior that the plaintiff had been subjected to, the company was liable for the creation of a hostile environment. The court thus granted the plaintiff's request for injunctive relief while requiring the company to institute the sexual harassment plan that she proposed. However, since the plaintiff was unable to document the specific and/or exact number of days she missed work due to stress resulting from the hostile environment, the judge was unable to calculate a financial award due her and so awarded her $1 in nominal damages.

Brenda R. Kallio

See also Hostile Work Environment; *Meritor Savings Bank v. Vinson;* Sexual Harassment; Title VII

Legal Citations

Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986).
Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486 (M.D. Fla. 1991).

Rogers v. Paul

In *Rogers v. Paul* (1965), the U.S. Supreme Court essentially overturned the gradual "one grade per year" desegregation plan that it had permitted in an earlier case from Arkansas, *Cooper v. Aaron* (1958). In *Rogers,* the Court rejected a school board's clear attempt to exclude students from a broader curriculum based solely on race. In looking at the passage of time since *Brown v. Board of Education of Topeka* (1954), the Court also demonstrated its impatience with the school board's unacceptably slow movement to converting the system to unitary status.

Facts of the Case

At issue in *Rogers* was the constitutionality of a "grade-per-year" desegregation plan. The plan that a

local board in Arkansas adopted in 1957 called for desegregating its school system one grade per year. Yet the 10th through 12th grades were still segregated. Moreover, African American students in the segregated schools were not allowed to take courses that were available only at the high school for White students.

After the African American students and their parents filed a class action suit against the board, they unsuccessfully challenged the fact that the plan did not grant them access to equal educational opportunities. The Eighth Circuit affirmed that the plan was properly set in place. On further review in Rogers, a unanimous Supreme Court, in a brief per curiam opinion, vacated and remanded in favor of the plaintiffs.

The Court's Ruling

In its analysis, the Supreme Court held that the assignment of students to the African American high school on the basis of their race was constitutionally impermissible pursuant to the precedent that it set in *Brown v. Board of Education of Topeka* (1954). To this end, the Court was of the opinion that the African American students were entitled to relief in the form of being able to transfer out of their high schools immediately so they could avail themselves of the more extensive curriculum at the high school for Whites.

At the same time, the Supreme Court stressed that delays in desegregating the school system were no longer tolerable. The Court noted that more than 10 years had passed since its order calling for the desegregation of public schools. The Court also found that petitioners had standing to challenge the constitutionality of the allocation of faculty on a racial basis, as a separate issue, due to the impact that this could have on the potential denial of equal educational opportunities. However, insofar as this issue was not at bar, the Court vacated and remanded for further consideration on this point.

Deborah Curry

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *Cooper v. Aaron;* Dual and Unitary Systems

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Rogers v. Paul, 382 U.S. 198 (1965).

Rose v. Council for Better Education

Rose v. Council for Better Education (1989) was a major school-funding case based on adequacy arguments inspired by the language of state constitutions. In *Rose,* the Supreme Court of Kentucky interpreted the commonwealth's constitutional provision as mandating its general assembly to "provide an efficient system of common schools throughout the state." The court held that the general assembly fell far short of its duty by failing to enact laws to provide an "efficient" education. In a sweeping opinion, *Rose* struck down not just the commonwealth's education finance system, but the entire educational bureaucracy in Kentucky. In other words, the court essentially invalidated the entire system and ordered the legislature to start over. The result, the Kentucky Educational Reform Act, has been a sweeping overhaul of public education in Kentucky.

Finance Litigation

To place *Rose* in context, school-finance litigation is categorized by the different legal theories that drive the arguments. The first wave of school-finance litigation, beginning in the late 1960s, relied on the Equal Protection Clause of the federal, and then state, constitutions. Basically, plaintiffs challenged the disparities in per-pupil expenditures and argued that by

relying on local property taxes, states created funding systems for public education in which the differences in educational opportunities were vast, unfair, and unlawful on account of disparities in district wealth. The plaintiffs in these cases claimed that education was a fundamental right; as such, funding systems that classified resource allocation on the basis of individual districts' property tax base required strict judicial scrutiny. In *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court rejected a federal equal protection argument and ultimately found that education was not a fundamental right guaranteed by the U.S. Constitution.

Following *Rodriguez,* school-finance litigation focused on state constitutions. The first state-level cases, *McInnis v. Shapiro* (1968) and *Burruss v. Wilkerson* (1970), mirrored the *Rodriguez* arguments. When the courts asked for a standard measuring educational need, no such standard existed and the courts found the cases nonjusticiable. Rejecting the precedents set by *McInnis* and *Burruss,* the Supreme Court of California, in *Serrano v. Priest I* (1971), found that education was a fundamental right. As a result, the court found that California's school-finance system violated the Equal Protection Clauses of both the U.S. and California constitutions, a position that the Supreme Court repudiated, as applied to the federal constitution in *San Antonio.* On further review, in *Serrano v. Priest II* (1976, 1977), the Supreme Court of California affirmed its earlier ruling that education is a fundamental right based on the state constitution.

The ensuing second wave of school funding litigation shifted away from equal protection arguments in the federal Constitution and focused on the education clauses that exist in every state constitution, in some cases combining the two. Plaintiffs in these cases argued that education was a fundamental right determined by the education clause and in some instances unequal funding levels violated the Equal Protection Clause. Litigants were not very successful in making equity arguments. However, in Arkansas, *Dupree v. Alma School District* (1983) found that the school-finance system was unconstitutional on both grounds. The court required the Arkansas legislature to create a new funding system.

The *Rose* Case

With the evolution of standards-based education in the 1980s and more recently the No Child Left Behind Act of 2001, a third wave of litigation based on adequacy arguments developed. *Rose* is recognized as one of the first cases in the third wave. The logic of adequacy suits is as follows: States have expectations, or standards, for school districts, schools, and students; assessments are given to measure success in meeting these expectations; there are ramifications for those who do not meet the standards; and, therefore, states should provide an adequate amount of funding and resources so that the standards can be met. Interestingly, when *Rose* was argued, Kentucky did not already have a set of educational standards. Rather, in a very scathing opinion, the court interpreted the commonwealth's education clause and then required the legislature to "re-create" the entire educational system almost from the ground up.

In 2003, plaintiffs in Kentucky filed a complaint alleging that the per-pupil foundation level, created as a result of the findings in *Rose,* had not increased as quickly as inflation and the cost of education. While this case is as yet unreported and unlitigated on the merits, it may be the beginning of a fourth wave of litigation. Certainly, as the landscape of school-finance litigation has shifted from equality of funding to quality of education, legal theory has also changed from broad equal protection provisions to narrow education clauses. These changes have been accompanied by some sweeping education reforms. The question that remains is whether an emerging fourth wave of school-finance litigation is emerging and, if so, what this may mean for adequacy cases like *Rose.*

Jennifer Silverstein

See also *San Antonio Independent School District v. Rodriguez;* School Finance Litigation; *Serrano v. Priest*

Legal Citations

Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd*, 397 U.S. 44 (1970).
Dupree v. Alma School District, 651 S.W.2d 90 (Ark. 1983).
McInnis v. Shaprio, 293 F. Supp. 327 (N.D. Ill. 1968).
Rose v. Council for Better Education, 790 S.W.2d 186 (1989).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).
Serrano v. Priest I, 487 P.2d 1241 (Cal. 1971).
Serrano v. Priest II, 557 P.2d 929 (Cal. 1976), *cert. denied*, 432 U.S. 907 (1977).

Rule of Law

The phrase *rule of law* describes a legal system in which universally applicable laws are established publicly according to regularly established procedures. The rule of law in the Anglo-American common law tradition is based on the principles of constitutionality, equality before the law, and separation of powers. A system based on the rule of law is designed to prevent the arbitrary exercise of political power either for the personal benefit of the rulers or to the personal detriment of the rulers' opponents. In the Western tradition, the concept of a rule of law began with the Romans. In contrast to the Greek democracies, where the majority could rewrite the law to suit its whims, the Romans placed limits on the power of their government to change the law.

Equality before the law means that all people, including those who exercise governmental authority, are subject to the same laws. The rule of law is usually not characterized by laws that apply only to certain individuals or groups. As such, the Fourteenth Amendment to the U.S. Constitution forbids states from denying equal protection of the laws to persons within their jurisdiction; the Fifth Amendment's Equal Protection Clause applies to the federal government.

Under the Fourteenth Amendment, if government action is based on a suspect classification such as race, courts apply strict scrutiny to the law. Pursuant to strict scrutiny analysis, there is usually little or no presumption in favor of governmental actions; this often results in courts striking governmental actions as unconstitutional. The goal of such analysis is to prevent the government, popularly elected by the majority, from passing laws that disadvantage minority groups. Accordingly, the principle of equal protection serves to uphold the rule of law by ensuring that the government applies the same rules to all.

At the same time, the rule of law depends on regular, clearly established legal procedures. In criminal proceedings, for example, appropriate procedures provide assurance that the accused will be treated fairly. Much of the Bill of Rights is designed to prevent the arbitrary exercise of power against the people and thereby to preserve the rule of law. The Fourth, Fifth, Sixth, Seventh, and Eighth Amendments all concern the rights of criminal suspects and defendants as well as civil litigants. The Fourth Amendment's requirement of probable cause for issuing warrants, along with the Fifth Amendment's requirement of a grand jury indictment for serious crimes, together reflect a concern with preventing the government from arresting people and charging them with crimes without ever having to demonstrate the validity of the charges to impartial arbiters. By requiring government officials acting on behalf of the state to observe the same procedures no matter who is the subject of the actions, the due process requirements of the Fifth and Fourteenth Amendments ensure that the state acts equitably and fairly.

The Massachusetts Constitution, I Article XXX, drafted by John Adams, mandated a strict separation of powers in order to preserve "a government of laws and not of men." To this end, the American system maintained and expanded on the common-law tradition of an independent judiciary. The independence and impartiality of judges is crucial to any system in which the rule of law is observed, in order to prevent legislators or the executive branch from unduly influencing the judicial process. The danger in such situations is not only that too much power might be concentrated in the hands of a single person or group of individuals but also that the judiciary would lose its position as an independent arbiter that can prevent a popular majority from oppressing an unpopular minority. Federal judges enjoy lifetime appointments both in order to insulate them from the popular pressures faced by elected legislators and to protect them from electoral retaliation for unpopular verdicts.

In common-law systems, the rule of law is closely connected to the concepts of judicial precedent and stare decisis. Courts defer to earlier rulings in order to minimize the danger that each new judgment might be based solely on the whims of judges who hear cases. Insofar as judges in most American jurisdictions are not directly answerable to the voters for their performances, a strong tradition of judicial precedent is

necessary to constrain judges from rendering capricious decisions. Such deference further serves to minimize the possible interference from the legislative and executive branches, since judges tend to rely on other courts for guidance on the interpretation of the law rather than looking to the other branches of government. Adherence to precedent therefore prevents the arbitrary exercise of judicial power, while making legal outcomes more predictable.

The ability to foresee the outcome of legal proceedings makes it possible for citizens to act within the limits set by the law. The U.S. Constitution, for example, forbids ex post facto laws, in which crimes are defined only after their commission. Unless people have a fair idea of the rules by which their actions will be judged, they cannot voluntarily avoid breaking the law. Thus, the rule of law could be said to help encourage lawful behavior. Moreover, the rule of law reduces the inefficiency that results when resources are directed toward activities in good faith, only to have the government, through its officials, step in unexpectedly to halt those activities.

James Mawdsley

See also Bill of Rights; Civil Law; Civil Rights Movement; Common Law; Due Process; Equal Protection Analysis; Fourteenth Amendment; Precedent; Stare Decisis

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Runyon v. McCrary

Runyon v. McCrary (1976) stands out because it was the first time the U.S. Supreme Court was asked to determine whether private schools were subject to Section 1981 of the Civil Rights Act of 1866 and therefore prohibited from discriminating on the basis of race. The Court answered in the affirmative.

Facts of the Case

Section 1981 provides all persons with an equal right to enter into and enforce contracts and prohibits racial discrimination in contract formation. While Section 1981 expressly disallowed any discriminatory practices derived from public state action, the implicit question in *Runyon* was whether the authority of Congress extended to prevent racial discrimination of a private nature.

Runyon originated in the 1960s, when public school systems in southeastern United States were subjected to sweeping federal court desegregation decrees opening formerly White schools to Black children. In an effort to circumvent the Supreme Court's ruling in *Brown v. Board of Education of Topeka* (1954, 1955), a number of states closed all or portions of their public school systems and offered support for students to attend private, segregated academies. In *Griffin v. School Board of Prince Edward County* (1963), the Supreme Court ruled that the Commonwealth of Virginia's closing of the entire Prince Edward County school system violated the Equal Protection Clause of the Fourteenth Amendment, and it ordered the schools reopened. Even so, the Court's order did not, and could not, compel the return of White students to the public schools from which they had fled to avoid desegregation. It was in this time period and social context that *Runyon* arose.

In *Runyon,* African American students attempted to establish contractual relationships with two private schools but were denied educational services based on their race. Neither private school ever enrolled a Black student in any of its programs. The African American families that sought admittance for their children were informed that the schools were not integrated and were subsequently denied admittance. Through their parents, the two Black students sued the schools, alleging that their policies of excluding non-Whites violated Section 1981.

The Court's Ruling

On further review of judgments in favor of the students from a federal trial court in Virginia and the Fourth Circuit, the Supreme Court affirmed that the schools violated Section 1981. In its analysis, a unanimous Court applied Section 1981 to the facts

and found that the policies of the private schools that denied admittance to qualified Black students based solely on race violated Section 1981, despite the lack of state action typically required to enforce the Fourteenth Amendment's Equal Protection Clause.

Based on the legislative history of Section 1981, the *Runyon* Court reasoned that Section 1981 extended to purely private acts of racial discrimination. Further, the Court was of the opinion that the educational services of the private schools were widely advertised and offered to the general public in a contractual capacity in which educational benefits for qualified students could be exchanged for payment rendered to the facility. As such, the Court pointed out that the general offers of educational services constituted potential commercial contracts, and, as such, the private schools could not refuse to contract with otherwise qualified African American students. In 1991, Congress confirmed the application of Section 1981 to private schools by codifying the prohibition against intentional racial discrimination in private contracting set forth in *Runyon* in Section 1981(c).

In deciding affirmatively that Section 1981 applied to private, commercially operated schools, the Supreme Court further explained that such statutory application did not interfere with the constitutionally protected First Amendment right of free association or the Liberty Clause involving the parental right to direct the education of a child. While the Court conceded that parents have a constitutional right to select educational institutions for their children that espouse certain beliefs even if those beliefs are unconstitutional, the constitution does not protect these institutions if they are engaged in invidious discrimination. Moreover, the Court indicated that the application of Section 1981 to private schools did not circumvent the right of parents to direct the education of their children, nor did it mandate the values and standards to be taught by private schools. The Court thus concluded that the private institutions' and parental Liberty Clause arguments were unpersuasive.

Runyon represents the first foray of Section 1981 into the private sphere of racial discrimination that is divorced from state action. Prior to *Runyon,* invidious racial discrimination in contracting within the private school sector was left largely unregulated and unsanctioned. This expanded scope of antidiscriminatory regulation with respect to contract formation was one of the Court's initial methods of circumscribing private schools' exclusionary enrollment practices based on race. Although the Court has upheld the federal government's denial of tax-exempt status to private schools that discriminate in admissions (*Coit v. Green,* 1971), *Runyon* is particularly significant because it makes the segregation of private schools unlawful, prohibiting them from proffering admission to Whites while denying such opportunities to prospective non-White students.

Aimee R. Vergon

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; Equal Protection Analysis; Fourteenth Amendment; Parental Rights

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
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Rural Education

Many legal and policy issues face rural public schools. These challenges are also somewhat related to the issues facing urban schools, including poverty, increasing populations of English language learners (ELLs) and newcomers, and political isolation. However, others are specific to rural schools, including a shortage of resources, funding inequities, and changing demographics, as described in this entry.

Definition Issues

First, the term *rural,* which is monolithic neither as a taxonomical classification nor as a political economy, encompasses many political ecologies and arenas

within one classification. The issues facing rural schools in states with high percentages of private ownership of lands and with an evenly dispersed population in southeastern or midwestern states may be very different from those facing western states.

In the West, a high percentage of land is publicly owned, effectively taking it off the tax rolls. Also, there may be a higher geographical isolation for rural schools and communities in the West based on geography, hydrology, the scarcity of arable soils and water resources, and geologic barriers, such as mountain ranges, deserts, and canyons. Rural schools in communities where populations are "bedroom communities," that is, "rural" communities within reasonable driving or commuting distances of larger metropolitan areas available for employment and purchasing, may be very different from rural small communities that are principal county seats as well as employment and merchant centers for other more rural and isolated communities and dispersed populations.

Until the mid-1960s or earlier, many political scientists suggested that rural areas had disproportionately great political power and political representation because of the U.S. system of regional representation. As rural populations declined, with many people migrating to urban settings, rural districts tended to keep the same number of elected representatives. In the early 1960s, many urban legislative districts had over 1,000 times the number of residents as did equally represented rural districts.

In the recent past, then, the majority of the U.S. population lived in either rural or urban settings. However, this has changed drastically, and the majority of the U.S. population currently lives in suburban settings, neither rural nor urban. This has had a great impact on the law and policy of rural political representation as well as the funding of rural schools and, parenthetically, the policies affecting strictly urban schools and school systems.

Comparative Disadvantage

Regardless of whether it is intended, many federal and state laws and programs tend to advantage suburban/urban over rural schools. For example, the No Child Left Behind Act (NCLB) (2002) provides some key rights to students in failing schools. These rights include, at different levels of school failure or noncompliance with provisions for "adequate yearly progress," having highly qualified teachers; the right to have private tutors; and, ultimately, the right to attend another public or private school.

In many rural communities, no such tutoring or alternate school resources exist. Moreover, rural public schools and districts often do not have high enough populations of teacher candidates and students in schools to allow all teachers to be "highly qualified" under the NCLB's mandates. It is very common, often essential, that teachers in rural schools teach several different subjects, subjects in which they may not have undergraduate majors or teaching certificates. Yet insofar as such schools and systems must employ teachers who are able to teach a number of subjects and levels, rural schools will continually be noncompliant because they will lack an appropriate percentage of "highly qualified" teachers as defined by NCLB.

Finance Issues

Funding inequities plague rural schools vis-à-vis state and federal laws coupled with funding formulas and policies. Often, equalization of funding pressures that are, in and of themselves, useful for other salutary purposes may in some areas have the unintended consequence of harming rural schools. In some regions, there have been many rural school "consolidations," with the attendant closing of small rural schools to achieve greater "efficiencies" of scale. Even so, in such calculations, the impact on rural communities, their identities, and child development are not always easily measured in cost-benefit analyses. In other regions, especially in dispersed and remote western counties and areas, there are few or no schools close enough to consolidate with, and the expense of operating small schools in geographically dispersed areas may be higher than the costs associated with operating suburban schools, including transportation costs and "inefficiently" small class sizes.

Another legal and policy issue confronting rural communities and their schools is the high percentage of federal lands and otherwise reserved lands in many rural counties and school districts. This is especially

a western-state issue, because states in this region all have high percentages of federal ownership. The General Services Administration reports, for example, that Arizona is 48% federal land, Utah 57%, Alaska 69%, and Nevada 85%, with all western states having very high percentages of federal ownership. This removes such land from tax rolls. When one includes state-owned lands, situations arise such as in Arizona, in which 48% of the land is federally owned and after removing state and other public types of land ownership, only 18% of the state is privately owned, and thus potentially subject to property taxes. In addition, federal law providing for in lieu payments to school districts for federally reserved land that is not taxed for the benefit of public schools is specifically limited to land reserved before 1938, before almost all the federal parks, forests, and reservation lands were reserved.

While federal land ownership is a significant burden on states, it can be especially burdensome on individual rural school districts and counties within western states. For example, Teton Country in Wyoming is 96% federally owned, and Emery County in Utah is 80%. Even though some statutes return limited amounts of money to such counties through mechanisms such as forest reserve payments, in some western states, these payments often flow to urban and suburban schools that are contiguous to forest land, while truly isolated rural schools with less sources of funding than these urban and suburban schools have been apportioned a smaller amount within the same state.

Further, funding formulas established in dispersed western states often are set up with parameters that advantage urban schools. Even the landing taxes imposed on airliners landing in municipal airports have been sought in one western state, Utah. To the extent that all of those monies went to the urban school districts that are contiguous to the state's principal airport, rural educators sought a statute taxing airliners a percentage as a "flyover" tax. Although the statute was appropriately declared unconstitutional, it highlights another of many inequities in funding that accrue to the benefit of urban and mostly suburban schools, while harming rural schools.

Demographic Challenges

Of course, these funding challenges have coincided with lower birthrates and continuing exodus from many rural school districts. At the same time, rural counties and schools, which may already be experiencing mixed success at meeting the needs of Native American and low-income students, are experiencing a great influx of ELLs. Many rural school districts in the West and the South have gone from almost no ELLs in 1985 to 35% to 40% ELLs or more. This has been a mixed blessing. Many commentators and researchers in rural issues have noted that rural communities' schools and their educators have been generally welcoming of this population of predominantly Latino ELLs.

The influx of students has helped sustain school districts experiencing a decline in enrollments or population. However, these school districts do not always have the capacity in terms of teacher training and community organizations to meet such students' additional learning needs, while often being disadvantaged in funding compared with many suburban and urban districts. Certainly, there are many issues yet to be addressed in meeting the educational needs of rural students from diverse language, cultural, and ethnic communities, while dealing with dwindling resources and lack of sufficient advocacy on national and state levels on behalf of rural populations.

Scott Ellis Ferrin

See also Adequate Yearly Progress; Bilingual Education; English as a Second Language; Highly Qualified Teachers; Limited English Proficiency

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San Antonio Independent School District v. Rodriguez

San Antonio Independent School District v. Rodriguez (1973) stands out as the only case in which the U.S. Supreme Court addressed the issue of school finance. In *Rodriguez,* the Court upheld Texas's school funding system, which relied on local taxes, finding that it was not unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. In so doing, the Court held that education was not a fundamental right and was not afforded explicit protection under the U.S. Constitution. In addition, the Court essentially repudiated *Serrano v. Priest I* (1971) wherein the Supreme Court of California had decided that education was so protected by the federal constitution. In *Serrano II* (1975), the Supreme Court of California asserted that education was a fundamental right under the state constitution.

Facts of the Case

In *Rodriguez,* parents in several school districts filed suit against state school officials, claiming that Texas's method of funding schools was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The record revealed that the system in Texas, under which boards relied on local property taxes to supplement state funds, resulted in substantial disparities in per-pupil funding. This disparity in funding was attributed chiefly to the difference in the amount of money raised through property taxes in each district.

A federal trial court, entering a judgment in favor of the parents, was of the opinion that because the system discriminated on the basis of wealth, it was unconstitutional under the Equal Protection Clause. The court agreed with the parents' argument that because wealth was a so-called suspect class, and education was a fundamental interest, the funding system was subject to the strict scrutiny test under equal protection analysis. This test requires governmental entities to demonstrate the need for a compelling state interest in order to justify their actions. The court was not even satisfied that the state proved that it had a reasonable basis for its system.

The Court's Ruling

On further review, the Supreme Court reversed in favor of the State of Texas. In an opinion authored by Justice Powell, the Court reasoned that education was not a fundamental right, so the strict scrutiny test did not apply. Moreover, he indicated that there was no showing that the funding system discriminated against any discernable category of "poor" people. Recognizing that some families resided in districts with financial disadvantages, Powell rejected the notion that poorer districts met the criterion of being a suspect class.

In his analysis, Justice Powell explained that the system did not deny any child the opportunity to obtain an education, and there was no showing that it denied any child an adequate education. At the same time, he

pointed out that the system had a rational relationship to furthering a legitimate state purpose, namely funding public education, because the judiciary traditionally defers to state legislatures in areas of education policy and local taxation. Powell also noted that even though the financing system in Texas was imperfect, it was not the product of purposeful discrimination, and it assured a basic education for every child while encouraging local control of schools through taxation.

Justice Powell next determined that strict scrutiny was an inappropriate test in *Rodriguez.* To this end, he observed that strict scrutiny was the appropriate test when state action resulted in suspect classifications of people or hampered their ability to exercise their constitutionally protected rights. Insofar as the Court refused to identify education as a fundamental right under the U.S. Constitution, Powell held that the test was inappropriate in *Rodriguez.* In light of the particularly sensitive and delicate topics of local taxation, educational policy, fiscal planning, and federalism, Powell maintained that the Texas system should have been scrutinized with principles that were cognizant of the state's efforts in creating it while respecting the rights that are reserved to the states under the Tenth Amendment to the federal Constitution.

According to Justice Powell, the traditional standard of review required only that the funding system in Texas bore some rational relationship to a legitimate state purpose. Because he identified the dispute as a direct attack on the way Texas chose to fund its schools, he posited that interfering with its decision-making authority would have been an intrusion in an area that traditionally was left for the state legislatures. Powell remarked that the justices were neither well versed in nor familiar with the local problems of raising revenue to fund schools, nor did they have the specialized knowledge to make proper decisions about educational policy in Texas. Insofar as the state legislature and local school boards would have been better equipped and more knowledgeable to handle these problems, he decided that the authority to make financing decisions was properly left to state officials.

Rounding out his opinion, Justice Powell took a close look at the Texas system, acknowledging that it provided an adequate minimum education for children. He noted that the system provided enough funds to assure that there was one teacher for every 25 students, all necessary administrative personnel, transportation, and textbooks. While Texas provided the minimum in state funds, Powell found that none of the local school boards was content to rely solely on those funds. Even though this approach created a funding disparity, because some districts had higher property values and more revenue for use in local schools, because the state of Texas provided the necessary minimum amount to ensure that every child received a free public school education, Powell concluded that there was no violation of the Equal Protection Clause in *Rodriguez.*

Justice Stewart concurred on the basis that the funding system in Texas did not create classes of persons that would have been recognized and protected under the Equal Protection Clause. He added that even if the classes did exist, they were not the type that the Equal Protection Clause was intended to protect.

Justice Brennan, joined in dissent by Justices White and Marshall, asserted that education was a fundamental right, because it was inextricably linked to the right to vote and the free speech rights protected by the First Amendment. He therefore was of the view that any classification affecting education should have been subjected to strict scrutiny.

Justice White, along with Justice Douglas and Justice Brennan, also dissented on the ground that the parents constituted a class that should have been offered protection under the Equal Protection Clause.

Megan L. Rehberg

See also Equal Protection Analysis; Federal Role in Education; Federalism and the Tenth Amendment; Fourteenth Amendment; School Finance Litigation; Thorough and Efficient Systems of Education

Legal Citations

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San Antonio Independent School District v. Rodriguez (Excerpts)

In San Antonio Independent School District v. Rodriguez, *its only case involving school finance, the Supreme Court ruled that education is not a fundamental right under the United States Constitution.*

Supreme Court of the United States

SAN ANTONIO INDEPENDENT SCHOOL DISTRICT

v.

RODRIGUEZ

411 US 1

Argued Oct. 12, 1972.

Decided March 21, 1973.

Rehearing Denied April 23, 1973

See 411 U.S. 959.

Mr. Justice POWELL delivered the opinion of the Court.

This suit attacking the Texas system of financing public education was initiated by Mexican-American parents whose children attend the elementary and secondary schools in the Edgewood Independent School District, an urban school district in San Antonio, Texas. They brought a class action on behalf of schoolchildren throughout the State who are members of minority groups or who are poor and reside in school districts having a low property tax base. Named as defendants were the State Board of Education, the Commissioner of Education, the State Attorney General, and the Bexar County (San Antonio) Board of Trustees. The complaint was filed in the summer of 1968 and a three-judge court was impaneled in January 1969. In December 1971 the panel rendered its judgment in a per curiam opinion holding the Texas school finance system unconstitutional under the Equal Protection Clause of the Fourteenth Amendment. The State appealed, and we noted probable jurisdiction to consider the far-reaching constitutional questions presented. For the reasons stated in this opinion, we reverse the decision of the District Court.

I

The first Texas State Constitution, promulgated upon Texas' entry into the Union in 1845, provided for the establishment of a system of free schools. [The Supreme Court then reviewed this history]. . . .

Until recent times, Texas was a predominantly rural State and its population and property wealth were spread relatively evenly across the State. Sizable differences in the value of assessable property between local school districts became increasingly evident as the State became more industrialized and as rural-to-urban population shifts became more pronounced. The location of commercial and industrial property began to play a significant role in determining the amount of tax resources available to each school district. These growing disparities in population and taxable property between districts were responsible in part for increasingly notable differences in levels of local expenditure for education.

In due time it became apparent to those concerned with financing public education that contributions from the Available School Fund were not sufficient to ameliorate these disparities. Prior to 1939, the Available School Fund contributed money to every school district at a rate of $17.50 per school-age child. Although the amount was increased several times in the early 1940's, the Fund was providing only $46 per student by 1945.

Recognizing the need for increased state funding to help offset disparities in local spending and to meet Texas' changing educational requirements, the state legislature in the late 1940's undertook a thorough evaluation of public education with an eye toward major reform. In 1947, an 18-member committee, composed of educators and legislators, was appointed to explore alternative systems in other States and to propose a funding scheme that would guarantee a minimum or basic educational offering to each child and that would help overcome interdistrict disparities in taxable resources. The Committee's efforts led to the passage of the Gilmer-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation School Program. Today, this Program accounts for approximately half of the total educational expenditures in Texas.

. . . .

The design of this complex system was twofold. First, it was an attempt to assure that the Foundation Program would have an equalizing influence on expenditure levels between school districts by placing the heaviest burden on

the school districts most capable of paying. Second, the Program's architects sought to establish a Local Fund Assignment that would force every school district to contribute to the education of its children but that would not by itself exhaust any district's resources. Today every school district does impose a property tax from which it derives locally expendable funds in excess of the amount necessary to satisfy its Local Fund Assignment under the Foundation Program.

In the years since this program went into operation in 1949, expenditures for education—from state as well as local sources—have increased steadily. Between 1949 and 1967, expenditures increased approximately 500%. In the last decade alone the total public school budget rose from $750 million to $2.1 billion and these increases have been reflected in consistently rising per pupil expenditures throughout the State. . . .

The school district in which appellees reside, the Edgewood Independent School District, has been compared throughout this litigation with the Alamo Heights Independent School District. This comparison between the least and most affluent districts in the San Antonio area serves to illustrate the manner in which the dual system of finance operates and to indicate the extent to which substantial disparities exist despite the State's impressive progress in recent years. Edgewood is one of seven public school districts in the metropolitan area. Approximately 22,000 students are enrolled in its 25 elementary and secondary schools. The district is . . . situated in the core-city sector of San Antonio in a residential neighborhood that has little commercial or industrial property. The residents are predominantly of Mexican-American descent: approximately 90% of the student population is Mexican-American and over 6% is Negro. The average assessed property value per pupil is $5,960—the lowest in the metropolitan area—and the median family income ($4,686) is also the lowest. At an equalized tax rate of $1.05 per $100 of assessed property—the highest in the metropolitan area—the district contributed $26 to the education of each child for the 1967–1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed $222 per pupil for a state—local total of $248. Federal funds added another $108 for a total of $356 per pupil.

. . . .

. . . . substantial interdistrict disparities in school expenditures found by the District Court to prevail in San Antonio and in varying degrees throughout the State still exist. And it was these disparities, largely attributable to differences in the amounts of money collected through local property taxation, that led the District Court to conclude that Texas' dual system of public school financing violated the Equal Protection Clause. The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. Finding that wealth is a 'suspect' classification and that education is a 'fundamental' interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest. On this issue the court concluded that '(n)ot only are defendants unable to demonstrate compelling state interests . . . they fail even to establish a reasonable basis for these classifications.'

. . . .

. . . . We must decide, first, whether the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution, thereby requiring strict judicial scrutiny. If so, the judgment of the District Court should be affirmed. If not, the Texas scheme must still be examined to determine whether it rationally furthers some legitimate, articulated state purpose and therefore does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment.

II

The District Court's opinion does not reflect the novelty and complexity of the constitutional questions posed by appellees' challenge to Texas' system of school financing. In concluding that strict judicial scrutiny was required, that court relied on decisions dealing with the rights of indigents to equal treatment in the criminal trial and appellate processes, and on cases disapproving wealth restrictions on the right to vote. Those cases, the District Court concluded, established wealth as a suspect classification. Finding that the local property tax system discriminated on the basis of wealth, it regarded those precedents as controlling. It then reasoned, based on decisions of this Court affirming the undeniable importance of education, that there is a fundamental right to education and that, absent some compelling state justification, the Texas system could not stand.

We are unable to agree that this case, which in significant aspects is sui generis, may be so neatly fitted into the conventional mosaic of constitutional analysis under

the Equal Protection Clause. Indeed, for the several reasons that follow, we find neither the suspect—classification not the fundamental—interest analysis persuasive.

A

The wealth discrimination discovered by the District Court in this case, and by several other courts that have recently struck down school-financing laws in other States, is quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court. Rather than focusing on the unique features of the alleged discrimination, the courts in these cases have virtually assumed their findings of a suspect classification through a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth. This approach largely ignores the hard threshold questions, including whether it makes a difference for purposes of consideration under the Constitution that the class of disadvantaged 'poor' cannot be identified or defined in customary equal protection terms, and whether the relative—rather than absolute—nature of the asserted deprivation is of significant consequence. Before a State's laws and the justifications for the classifications they create are subjected to strict judicial scrutiny, we think these threshold considerations must be analyzed more closely than they were in the court below.

The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class. . . .

The precedents of this Court provide the proper starting point. The individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. . . .

. . . .

Only appellees' first possible basis for describing the class disadvantaged by the Texas school-financing system—discrimination against a class of defineably 'poor' persons—might arguably meet the criteria established in these prior cases. Even a cursory examination, however, demonstrates that neither of the two distinguishing characteristics of wealth classifications can be found here. First, in support of their charge that the system discriminates against the 'poor,' appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level. Indeed, there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts. A recent and exhaustive study of school districts in Connecticut concluded that '(i)t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts. . . .

Second, neither appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit. The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth. Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. . . .

For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms.

As suggested above, appellees and the District Court may have embraced a second or third approach, the second of which might be characterized as a theory of relative or comparative discrimination based on family income. Appellees sought to prove that a direct correlation exists between the wealth of families within each district and the expenditures therein for education. That is, along a continuum, the poorer the family the lower the dollar amount of education received by the family's children.

. . . .

This brings us, then, to the third way in which the classification scheme might be defined—district wealth discrimination. Since the only correlation indicated by the evidence is between district property wealth and expenditures, it may be argued that discrimination might be found without regard to the individual income characteristics of district residents. Assuming a perfect correlation between district property wealth and expenditures

from top to bottom, the disadvantaged class might be viewed as encompassing every child in every district except the district that has the most assessable wealth and spends the most on education. . . .

. . . .

We thus conclude that the Texas system does not operate to the peculiar disadvantage of any suspect class. But in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny, appellees have not relied solely on this contention. They also assert that the State's system impermissibly interferes with the exercise of a 'fundamental' right and that accordingly the prior decisions of this Court require the application of the strict standard of judicial review. It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years.

B

In *Brown v. Board of Education,* a unanimous Court recognized that 'education is perhaps the most important function of state and local governments.' . . .

. . . .

Nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that 'the grave significance of education both to the individual and to our society' cannot be doubted. But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause. . . .

'The Court today does not 'pick out particular human activities, characterize them as 'fundamental,' and give them added protection. . . .' To the contrary, the Court simply recognizes, as it must, an established constitutional right, and gives to that right no less protection than the Constitution itself demands.'

. . . .

Education, of course, is not among the rights afforded explicit protection under our Federal Constitution. Nor do we find any basis for saying it is implicitly so protected. As we have said, the undisputed importance of education will not alone cause this Court to depart from the usual standard for reviewing a State's social and economic legislation. It is appellees' contention, however, that education is distinguishable from other services and benefits provided by the State because it bears a peculiarly close relationship to other rights and liberties accorded protection under the Constitution. Specifically, they insist that education is itself a fundamental personal right because it is essential to the effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote. In asserting a nexus between speech and education, appellees urge that the right to speak is meaningless unless the speaker is capable of articulating his thoughts intelligently and persuasively. The 'marketplace of ideas' is an empty forum for those lacking basic communicative tools. Likewise, they argue that the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge.

. . . .

Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short. Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.

. . . .

We have carefully considered each of the arguments supportive of the District Court's finding that education is a fundamental right or liberty and have found those arguments unpersuasive. In one further respect we find this a particularly inappropriate case in which to subject state action to strict judicial scrutiny. The present case, in another basic sense, is significantly different from any of the cases in which the Court has applied strict scrutiny to state or federal legislation touching upon constitutionally protected rights. Each of our prior cases involved legislation which 'deprived,' 'infringed,' or 'interfered' with the free exercise of some such fundamental personal right or liberty. A critical distinction between those cases and the one now before us lies in what Texas is endeavoring to do with respect to education. . . .

IV

In light of the considerable attention that has focused on the District Court opinion in this case and on its California predecessor [in *Serrano v. Priest*], a cautionary postscript seems appropriate. It cannot be questioned that the constitutional judgment reached by the District Court and approved by our dissenting Brothers today would occasion in Texas and elsewhere an unprecedented upheaval in public education. Some commentators have concluded that, whatever the contours of the alternative financing programs that might be devised and approved, the result could not avoid being a beneficial one. But, just as there is nothing simple about the constitutional issues involved in these cases, there is nothing simple or certain about predicting the consequences of massive change in the financing and control of public education. Those who have devoted the most thoughtful attention to the practical ramifications of these cases have found no clear or dependable answers and their scholarship reflects no such unqualified confidence in the desirability of completely uprooting the existing system.

The complexity of these problems is demonstrated by the lack of consensus with respect to whether it may be said with any assurance that the poor, the racial minorities, or the children in over-burdened core-city school districts would be benefited by abrogation of traditional modes of financing education. Unless there is to be a substantial increase in state expenditures on education across the board—an event the likelihood of which is open to considerable question—these groups stand to realize gains in terms of increased per-pupil expenditures only if they reside in districts that presently spend at relatively low levels, i.e., in those districts that would benefit from the redistribution of existing resources. Yet, recent studies have indicated that the poorest families are not invariably clustered in the most impecunious school districts. Nor does it now appear that there is any more than a random chance that racial minorities are concentrated in property-poor districts. . . .

These practical considerations, of course, play no role in the adjudication of the constitutional issues presented here. But they serve to highlight the wisdom of the traditional limitations on this Court's function. The consideration and initiation of fundamental reforms with respect to state taxation and education are matters reserved for the legislative processes of the various States, and we do no violence to the values of federalism and separation of powers by staying our hand. We hardly need add that this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. The need is apparent for reform in tax systems which may well have relied too long and too heavily on the local property tax. And certainly innovative thinking as to public education, its methods, and its funding is necessary to assure both a higher level of quality and greater uniformity of opportunity. These matters merit the continued attention of the scholars who already have contributed much by their challenges. But the ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them.

Reversed.

Citation: *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

Santa Fe Independent School District v. Doe

In *Santa Fe Independent School District v. Doe* (2000), its most recent case on the topic of school prayer as this encyclopedia heads to press, the U.S. Supreme Court held that the policy of a school board in a Texas district that allowed students to deliver a nonsectarian, nonproselytizing "invocation and/or message" (i.e., prayer) before varsity high school football games violated the Establishment Clause of the First Amendment. In this landmark case regarding the legality of school prayer, the board contended that control of the pregame message was left to students who also chose the speaker and the content of the message by a majority vote. (Initially, the student who led the prayer, also noted in the policy as an "invocation," was the chaplain of the student council.) However, the Court found that the policy in effect coerced students who chose to attend a high school football game into listening to a school-sponsored religious message. While the board argued that the message that was permitted by the district's policy allowed "private speech," the Court ruled that

> the delivery of such a message—over the school's public address system, by a speaker representing the

> student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as "private" speech. (p. 310)

The policy at issue specifically permitted a pregame prayer, student-led and student-initiated, prior to high school football games. In a decidedly narrow ruling, the Supreme Court maintained that such a policy violates the Establishment Clause, noting that unlike a graduation ceremony, football games were not occasions that needed to be "solemnized" by prayer, even prayer described as merely a pregame message led by a student who was selected by a majority of the student body.

In its analysis, the Supreme Court specifically rejected the board's claim that the pregame messages were actually private student speech protected by the First Amendment's Free Speech and Free Exercise clauses. According to the Court, not only did the school board allow the prayer to take place, officials had created a policy outlining how this prayer at a school-sponsored event, on school property, was to take place. In fact, the Court determined that the policy actually encouraged and invited a religious prayer and that students interpreted the policy in just such a manner. Thus, the Court was of the opinion that the policy would only lead to student messages that were, rather than private speech, actually religious speech directly sponsored and endorsed by a governmental agency.

The board also argued that because the football games were completely voluntary, there was no issue of mandatory attendance or coercion of students to attend and be subjected to the prayer. The Supreme Court observed that many students are obligated to attend football games, even to earn credit in classes such as athletics, band, and other extracurricular activities. Still, the Court indicated that students who did choose to attend the football games, regardless of whether they were mandatory, would have been subject to board-sponsored prayer.

In applying the *Lemon* test to this policy, the Supreme Court noted that the district's policy did not have a secular legislative purpose; in fact, the only purpose the Court found for this policy was to endorse student-led prayer. Although the decision was split 6-to-3, the Court concluded that even when the policy was amended to allow only nonsectarian, nonproselytizing prayer, it still violated the Establishment Clause of the First Amendment.

Stacy L. Edmonson

See also First Amendment; *Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Public Schools

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Scalia, Antonin (1936–)

President Ronald Reagan nominated Antonin Scalia to serve on the U.S. Supreme Court in 1986. After his appointment was affirmed unanimously in the U.S. Senate, he officially took his oath on September 26, 1986. At his Senate Judiciary Committee confirmation hearing, he stated that his only agenda was to be a good judge.

Early Years

Antonin Scalia was born on March 11, 1936, in Trenton, New Jersey, the sole child of S. Eugene and Catherine Scalia. His father came to the United States from Sicily and was a professor of Romance languages. His mother, who was also of Italian heritage, was a teacher. Justice Scalia was the first justice of Italian American heritage and is a purveyor of the American dream.

Scalia attended a military prep school, St. Francis Xavier, and Georgetown University, where he graduated first in his class in 1957. He went to Harvard Law School, serving as notes editor of the *Harvard Law*

Review and graduating magna cum laude in 1960. While at Harvard, Scalia met and married Maureen McCarthy, an English major at Radcliffe College; they have nine children.

After graduating from law school, Scalia worked at a law firm and taught at the University of Virginia Law School. He began his career in government service as general counsel for the U.S. Office of Telecommunications Policy during the administration of President Nixon and served in President Ford's Department of Justice as assistant attorney general in charge of the Office of Legal Counsel. Additionally, he worked as a resident scholar at the American Enterprise Institute while also teaching at the Georgetown University Law Center and the University of Chicago Law School.

In 1982, President Reagan appointed Scalia to the U.S. Court of Appeals for the District of Columbia Circuit.

Supreme Court Record

In his time on the Supreme Court, Scalia has been defined through his debates and opinions as a textualist, or one who begins with the legal text of the Constitution, and an originalist as one who seeks the original meaning of a text in his interpretations and understanding of the role of the Supreme Court. He has often argued that specific parts of statutes did not fit the intent of the federal Constitution. To this end, Scalia has a talent for putting complex arguments about fundamental principles in easy-to-understand terms. His opinions and concurrences, along with his often strident dissents, span topics including free speech, separation of powers, race, abortion, the death penalty, religious freedom, and gender equity.

Scalia has declared his "original meaning" or textual stance consistently, indicating that it is a judge's duty to apply the textual language of the Constitution or a statute when it is clear and to apply the appropriate legal precedents when it is not. Given this position, he believes that insofar as laws say what they mean and mean what they say, judges should focus on their texts. Moreover, Scalia has maintained that judges should determine whether a text provides support for the individual rights or governmental authority in question. If the text provides the support, then he would argue that a claim is valid. Conversely, Scalia is of the view that if a text does not support a claim, then it should be struck down as invalid.

Justice Scalia has added that the American people, not the justices, can alter the U.S. Constitution through the amendment process to meet the needs of a changing society. He has continually emphasized that justices need to interpret the Constitution as it is written and enforce general and clear rules. From Scalia's perspective, the American people will receive consistent and equal treatment if courts apply this principle and will not be subjected to the whims of preference or changes in popular opinions. In over 600 rulings, Scalia's majority, concurring, and dissenting opinions reflect this belief, a system that entails looking at what a text says while examining how it might fit into social or practical contexts.

Prior to Justice Scalia's appointment to the Court, the justices would often begin with the text, but then move to its legislative history. Today, the justices consult legislative history less frequently. While Scalia's constitutional opinions are full of text and tradition, his positions have not always prevailed, especially in areas dealing with religion such as prayer at public school graduation ceremonies (*Lee v. Weisman,* 1992) or the posting of the Ten Commandments in public places (*American Civil Liberties Union v. McCreary County, Kentucky,* 2005).

Because Justice Scalia is in good health and already has more than 20 years of service on the Supreme Court, his tenure may well span at least three decades as a justice.

Deborah E. Stine

See also *Lee v. Weisman;* Rehnquist Court; Roberts Court; U.S. Supreme Court Cases in Education

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Schaffer ex rel. Schaffer v. Weast

In *Schaffer ex rel. Schaffer v. Weast* (2005), the U.S. Supreme Court declared that the party challenging an individualized education program (IEP) bears the burden of proof at an administrative due process hearing under the Individuals with Disabilities Education Act (IDEA). Because it is generally the parents of students with disabilities who bring IEP challenges, *Schaffer* effectively placed the burden of proof on parents in most situations. This entry summarizes the case and the court ruling.

Facts of the Case

The original dispute in *Schaffer* concerned the appropriate program for a student with learning disabilities, language disabilities, and other health impairments who attended a private school. In spite of small classes, the student was not successful, and his parents contacted the public school district seeking special education services. The school board determined that the student was eligible for services and proposed an IEP, but the parents rejected the proposed IEP and requested a due process hearing. At the same time, the parents enrolled their son in a private school for students with disabilities.

Following a hearing, an administrative law judge (ALJ) concluded that the school board offered the student a free appropriate public education (FAPE). In reaching that decision, the ALJ determined that the parents bore the burden of proof in establishing that the proposed IEP was inadequate. The parents appealed, and the federal district court in Maryland remanded to the ALJ, holding that the burden of proof should be placed on the board in any administrative hearing regarding an initial IEP (*Brian S. v. Vance,* 2000).

On remand, the ALJ reversed, concluding that the proposed IEP would not have provided the student with an appropriate education. In the meantime, the school board appealed the district court's ruling to the Fourth Circuit, which vacated the trial court's order and remanded with directions to consider the case on its merits (*Schaffer v. Vance,* 2001). On remand, the trial court again held that the school board bore the burden of proof at the administrative level. The court also decided that the board failed to offer the child a FAPE (*Schaffer v. Vance,* 2002).

Following another appeal, the Fourth Circuit reversed and placed the burden of proof back on the parents (*Weast v. Schaffer,* 2004). The court maintained that a school board should not have the burden of proof in an IEP challenge just because it has the statutory obligation to propose an appropriate educational program for a child. Further, the court did not see that the school board had an unfair information or resource advantage that would compel the court to reassign the burden of proof to the school board when the parents initiate the proceedings. Basically, the Fourth Circuit could not find any reason to depart from the general rule that a party initiating a proceeding bears the burden of proof.

The Court's Ruling

In a 6-to-2 decision, with newly appointed Chief Justice Roberts abstaining, the Supreme Court affirmed. Writing for the majority, Justice O'Connor, in her last education-related case on the Court, agreed with the Fourth Circuit that the ordinary default rule is that plaintiffs bear the risk of failing to prove their claims. Noting that assigning the burden of persuasion to school boards might encourage educators to put more resources into preparing IEPs and presenting evidence, she wrote that the IDEA is silent about whether marginal dollars should be allocated to litigation and administrative expenditures or to educational services.

Further, O'Connor reasoned that the IDEA relies heavily on the expertise of school officials to meet its goals. School officials have a natural advantage in

information and expertise, but O'Connor thought that Congress addressed this when it required school boards to safeguard the procedural rights of parents and to share information with them. Thus, in her view, the IDEA ensures parents access to an expert who can evaluate all the materials that the school must make available and who can give an independent opinion. O'Connor added that parents are not left to challenge school boards without realistic opportunities to access the necessary evidence or without an expert with the firepower to match the opposition.

Justice Ginsburg filed a dissenting opinion. Basically, Justice Ginsburg pointed out that policy considerations, convenience, and fairness called for assigning the burden of proof to the school board in this case, because the IDEA is atypical in that it casts an affirmative beneficiary-specific obligation on providers of public education. Noting that school boards are charged with the responsibility to offer an IEP to each disabled child, Ginsburg was of the opinion that the proponent of the IEP is properly called upon to demonstrate its adequacy.

Allan G. Osborne, Jr.

See also Disabled Persons, Rights of; Due Process Hearing, Free Appropriate Public Education; Individualized Education Program (IEP)

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School-Based Decision Making

The record of American public education is characterized by sporadic alterations between centralization and decentralization of influence and control. In times of greater centralized authority, large managerial structures such as state and local boards of education maintain control over educational decision making and management. When the trend swings toward decentralization, much of this power shifts to smaller managerial units such as smaller schools and an array of school councils.

During the last 20 years or so, educational systems in the United States have been evolving from largely centralized to more decentralized structures. In fact, virtually all jurisdictions have laws in place that either mandate or permit decentralization, whether at the state (or commonwealth) level as in Kentucky or on a district level as in Chicago. While this trend goes by many names, it is often referred to as school-based decision making (SBDM), site-based management, or participatory decision making. This entry looks at the practice and its history.

Historical Background

There are about 16,000 school districts in the United States, down from over 100,000 at the start of the 1900s. Most of the early districts, which consisted of one school in rural areas, were small, locally operated organizations that spawned favoritism, nepotism, and deception. These characteristics led to the call for reform, consolidation, and centrally controlled schools. This trend continued through the 1960s, when critics began to call on boards to be responsive to the needs of local communities.

The pendulum began to swing the other way, and considerable decentralization did occur in levels of authority. For instance, starting in the 1960s, in many locations, building-level administrators and faculty were granted increased autonomy and responsibility as site councils developed. At this time, decision making at school sites increased, and roles began to change.

During the 1970s and 1980s, there was something of a power shift back to the centralized model as states

and the federal governments attempted to bring about top-down educational reform through legislation. The problem, now widely recognized, was that highly centralized educational organizations simply do not engender the desired outcomes, because they can easily become bogged down with trivia. The result was, and is, inertia, pessimism, inefficiency, cynicism, and long delays for making decisions of any kind, even on the smallest of matters. An equally significant concern was the repeated failure of centralized bureaucratic organizations to inspire the prerequisite attitudes and behaviors in school personnel for bringing about educational improvements.

Looking at the Practice

Early attempts to decentralize control over public schools in locations such as New York City in the 1960s were aimed at moving authority from large, central units to smaller, site-based boards. This innovation was an attempt to replace one form of bureaucracy with another, moving decision making closer to the level where decisions would be implemented. However, proponents believe that SBDM is considerably more that a new name for an old and recurring phenomenon. Supporters of this approach maintain that unlike previous approaches to decentralizing education, SBDM invokes fundamental changes. As one author points out, past forms of governance transferred control from large to small units, while SBDM changes entire district organizations by restructuring most roles in school systems.

The implementation of SBDM is typically accompanied by organizational and managerial questions. Among the key issues are defining what it means to be site based, how roles change for school personnel, and what the obstacles are to implementing and sustaining this approach, as well as considering whether research supports the move to this model of school governance.

The current rationale for decentralized schooling, and particularly SBDM, has developed both in recognition of the foregoing issues and in response to research findings about more promising arrangements for improving educational outcomes in students. This research concludes that because schools are the primary units of change, those who work directly with children should have the most informed and credible opinions as to what educational arrangements are most beneficial to their students. This approach acknowledges that because significant and lasting improvements take considerable time, educators at the local level, often acting in conjunction with parents and community members, are in the best position to sustain improvement efforts over time.

At the same time, an approach that supports decentralization notes that school administrators are key figures in school improvement. It also acknowledges that significant change is brought about by staff and community participation in project planning and implementation. Further, SBDM supports the professionalization of teaching, which can lead to more desirable student outcomes while keeping the focus of schooling where it belongs—on academic achievement.

What Happens in Schools

Many changes occur when school systems elect to implement SBDM in some or all of their schools. According to the growing body of implementation research, the major impact of setting SBDM in place is that the roles of all educational stakeholders—superintendents, other central office personnel, board members, principals, teachers, and students—are profoundly affected by the shift. Additionally, SBDM and joint decision-making strategies directly challenge the multifaceted and well-entrenched patterns of instructional and individual behavior that remain untouched by most reforms

It is almost impossible to make radical changes in the roles of school-level personnel without modifying traditional district administrative roles. Many writers have presented specific findings about these changes. Experience in districts that have adopted SBDM demonstrates that strong support from superintendents is absolutely necessary for its proper implementation; virtually all who study SBDM concur with this perspective. To this end, superintendents should be the ones to communicate to their communities what SBDM is and why it is desirable in order to foster shared understanding and support. Along with change for superintendents, under SBDM, the role of central office personnel shifts from a primary focus on giving directives and monitoring

compliance to serving as resources for and facilitators of school-level change efforts.

Under site-based management, the role of the principal is most subject to change. This transformation is sometimes expressed as changing the principal's role from that of building manager to that of educational leader. Instead of simply enforcing policies made elsewhere, SBDM principals work collegially with personnel, including parents, by sharing power collaboratively. In SBDM schools, principals typically move closer to the educational process, serving as instructional leaders who climb higher in the organization's chain of command due to the increased authority and accountability that shifts into their hands.

Prior to the advent of SBDM, teachers have often been cut off from participating in decision making and meaningful contact with one another. Another benefit of SBDM is that it tends to augment teacher participation in educational decision making, often to a considerable extent, typically giving teachers a renewed sense of dedication.

Parents and community representatives have generally been unaware of and detached from educational decision making and school operations. In an attempt to gain their participation, many SBDM statutes and policies, especially in Kentucky and Chicago, not only make use of increased parent/community input but also provide training to help these individuals become more capable participants in the process. Students have traditionally been isolated from operational and policy decisions. Under SBDM, students, particularly older ones, often have influence in these areas by giving advice and input.

A final group that has not yet been identified in the SBDM process is school boards. Although some board members feared that SBDM would usurp their power, they still have the duty to provide general direction for their districts by establishing goals and policy statements, allocating resources, and monitoring progress. Clear messages of support from boards for SBDM can lend credibility and foster positive community attitudes toward the process. In fact, the role of boards does not change as dramatically as that of some other stakeholders, but their support remains vital in implementing SBDM.

Challenges

Some of the literature on SBDM focuses on difficulties that schools and boards have had with the process. Some of these difficulties involve implementation, others arise in connection with the operation of SBDM structures, and yet others concern the failure of many initiatives to bring about the academic results desired by educators and other stakeholders. One difficulty that emerges is that many schools pilot-testing SBDM tend to undertake too many projects and procedural changes during their first year or two of operation rather than focus on the primary concern for fostering student achievement through curricular innovation. The research on SBDM makes it abundantly clear that its full institutionalization can take a long time, as long as five years or more.

SBDM councils, the bodies concerned with planning and decision making in most statutes, often have extensive responsibilities, including making recommendations for replacing personnel who leave schools. Typical problems that SDBM groups face in starting up include lack of knowledge of school operations, of group process skills, and of the law, as well as a lack of clarity about their roles. Another obstacle that frequently hampers SBDM efforts is lack of adequate financial resources. This may take the form of insufficient released time for planning and/or insufficient resources to implement plans once they are made. SBDM groups also have a tendency to fail to focus on instructional programs and student outcomes.

Research clearly establishes that teachers' desire to participate in decision making centers on their schools' technical core, its curriculum, and its instructional program. Unfortunately, absent clear legislative mandates in SBDM statutes, school boards are often unwilling to delegate real decision-making authority to SBDM groups in these areas. Such an approach may not sit well with principals, but it is almost universally frustrating to teachers. For one thing, teachers resent being excluded from decision making in areas about which they know a great deal. Just as distressing, teachers often discover that they are expected to use time and energy that they would ordinarily have spent on activities related to their teaching responsibilities for decision making in areas they would just as

soon leave to administrators. In addition, the research reveals that increased board flexibility and selective waiving of these constraints is associated with more successful SBDM efforts.

The frequent failure of SBDM efforts to address schools' programs of instruction is related to another and perhaps more critical challenge. This difficulty involves the tendency of those implementing SBDM to forget that it is not an end in itself, but rather a means to improving student performance through bringing about positive changes in the quality of schooling.

The ultimate goal of SBDM is to improve student learning. Even so, the data are thin relative to finding direct links between student performance and the implementation of SBDM in schools. In some settings, student scores on state and national tests have improved slightly, while in others, they have declined slightly. However, in most SBDM schools, it has made little difference.

States have considerable power to help SBDM arrangements to succeed through providing their practitioners with real support. These states have done so by encouraging or mandating school boards to utilize SBDM as a means for improving student performance and overall educational conditions. Moreover, state officials can assist by making it clear to superintendents and central office staff that schools require considerable authority and flexibility in order to be able to engender real improvements under SBDM. Successful states have also provided professional development opportunities, research-based information, and on-site assistance to help in the implementation of SBDM.

C. Daniel Raisch

See also Charter Schools; School Boards; School Choice

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School Board of Nassau County v. Arline

School Board of Nassau County v. Arline (1987) centered on the difficult dilemma that occurs when the rights of individuals with disabilities must be balanced against the authority of officials in school systems to take action to protect the health and well-being of others. At issue in *Arline* was whether Section 504 of the Rehabilitation Act of 1973 applied to persons with communicable diseases and if so, what should be done in evaluating whether such individuals could be reasonably accommodated. According to Section 504, "No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." In *Arline,* the U.S. Supreme Court held that Section 504 applied to a teacher who had tuberculosis and wished to remain at her job.

Facts of the Case

Gene Arline, who taught elementary school in Nassau County, Florida, had recurring lapses of tuberculosis. After a third bout with the disease, school board officials terminated her employment; the teacher filed suit, claiming that because her dismissal constituted discrimination on the basis of a "handicap," it was prohibited under Section 504. Moreover, the teacher claimed that she was "otherwise qualified" for her job but excluded because of her disability.

When a federal trial court in Florida ruled that the teacher did not have a disability as defined by Section 504, it entered a judgment in favor of the school board. However, after the Eleventh Circuit reversed in favor of the teacher, the board appealed.

The Court's Ruling

On further review, a seven-member majority of the Supreme Court affirmed in favor of the teacher. As an initial matter, in writing for the Court, Justice Brennan was of the opinion that persons with contagious diseases that substantially affected a major life activity such as work enjoyed protection as persons with disabilities under Section 504. Therefore, he rejected the school board's assertion that its decision based on contagiousness proved that its action was not made on the basis of a disability.

Justice Brennan next adopted a four-part test taken from the amicus curiae brief filed by the American Medical Association to evaluate whether persons with contagious diseases could be considered "otherwise qualified" under Section 504. The test requires the consideration of

> (a) the nature of the risk (how the disease is transmitted), (b) the duration of the risk (how long is the carrier infectious), (c) the severity of the risk (what is the potential harm to third parties), and (d) the probabilities the disease will be transmitted and will cause varying degrees of harm. (p. 288, citing brief at p. 19)

Finding that the lower courts had neither made findings of fact on these issues nor had they engaged in an analysis related to each factor, Justice Brennan remanded the dispute for further consideration consistent with the test articulated in his order.

Chief Justice Rehnquist's dissent was joined by Justice Scalia. These justices essentially agreed with the school board that persons who were contagious were not disabled within the meaning of Section 504.

The *Arline* test has subsequently been used to consider whether accommodations could be made for persons with other contagious diseases, including Acquired Immune Deficiency Syndrome (AIDS), and for children who were HIV-positive as in another case from Florida, *Martinez v. School Board of Hillsborough County* (1988).

Julie F. Mead

See also Americans with Disabilities Act; Disabled Persons, Rights of; Rehabilitation Act of 1973, Section 504; *Southeastern Community College v. Davis*

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School Board Policy

School board policy provides a legal and administrative framework governing a board's procedures, decisions, and actions. Policy at the school district level addresses both direct and indirect functions of schooling. Policies adopted by local school boards ordinarily control student academic achievement levels, curricula, instruction, and grading as well as student enrollment, attendance, discipline, and disciplinary removal procedures. Matters involving board election procedures, board meeting protocols, and board decision-making processes are also codified in board policies. In addition, policies control board fiscal activities such as payroll, purchasing, facilities, and transportation as well as personnel matters relating to contracts, employee evaluation, and dismissal. This entry describes some relevant court rulings and current issues.

Insofar as the U.S. Constitution makes no mention of public education as a right, it is historically regarded as a matter of state and local control. Education is typically a provision embedded within state constitutions, from which power is delegated to state legislatures and other state educational bodies. With the exception of Hawaii, which consists of a single district, a considerable degree of school governance is accorded by the state legislature to local educational officials. Further, state statutes defer most issues governing responsibilities, which to varying degrees involve executive, legislative, and judicial tasks, to local educational units, which in turn formulate a

broad range of policies to suit the needs of their respective districts. At the same time, it must be noted that while school boards serve and act locally, they are considered state agencies. As such, school board policy making is circumscribed by state statutes.

Court Rulings

Case law is instructive with regard to the policy-making power of school boards. Case law suggests that school boards encounter particular difficulties when executing implied or discretionary policy-making powers or those powers not delineated by state law. In *McGilvra v. Seattle School District No. 1* (1921), the Supreme Court of Washington ruled that a school board's financial support and maintenance of a medical care facility for students was unlawful, because it exceeded the limitations of state law. Unlike playgrounds and gymnasiums, the court expressed that "rendering medical, surgical, and dental services" was "foreign to the powers to be exercised by a school district or its officers . . ." (p. 14).

In like fashion, the Supreme Court of Pennsylvania, in *Barth v. Philadelphia School District* (1958), decided that because school boards were not "constitutional bodies" (p. 561), they were not entitled to "the wide basic powers, functions and duties of Municipal Government" (p. 564). In this dispute, a local board was party to an agreement with the city of Philadelphia in financially supporting a program to curb juvenile delinquency. The court invalidated the program on the basis that it related marginally if at all to the statutory support of essential educational functions.

More recent cases reflect a more accommodating judicial stance toward implied policy-making power, part of which may be due to changes in social conditions and government. For example, in *Clark v. Jefferson County Board of Education* (1982), the Supreme Court of Alabama upheld a school board's power to support the operation of day care centers. Stressing the importance of the community education aspect, the school district was persuasive in demonstrating that such an effort was "in the best interest of the public schools in Alabama" (p. 27).

Past and present, the discretionary powers of school boards in policy matters continue to be challenged in areas such as curriculum and materials (e.g., *Board of Education, Island Trees Union Free School District No. 26 v. Pico,* 1982; *Mozert v. Hawkins County Public Schools,* 1987), bilingual education (e.g., *Lau v. Nichols,* 1974), graduation requirements (e.g., *Debra P. v. Turlington,* 1984), and student attendance, assignment, and classification (*Plyler v. Doe,* 1982; *Parents Involved in Community Schools v. Seattle School District No. 1,* 2007), to name a few.

Current Issues

There is also much debate as to whether those serving on school boards have sufficient policy-making ability. With heightened productivity expectations, stakes for school boards have increased. Mayoral takeovers or the threats thereof and greater federal and state inspection of local governance, such as with regard to curricula, underscore the need for effective leadership at the board level. Even so, it appears that policy-making capacities of board members are complex and multifaceted.

Yet, some depict school boards as entities lacking sufficient "bureaucratic intelligence" to micromanage policy development in technical form. To this end, maintaining legitimacy as a governing body is of vital interest to board members who place secondary importance on the interests of the community. Further, school boards rationally and irrationally govern in ways that shield them from criticism and disruption.

The arrival of the No Child Left Behind Act (2002) has forced local school boards to focus greater attention on standards, teacher quality, and performance data, among other items. Moreover, school boards are called on to utilize funds more efficiently. It seems that without question, accountability and fiscal efficiency are two of the most critical issues facing board members today. All the same, little is known about the effect that overconcentration on these issues by school boards bears on their attention to other policy domains, particularly student speech and expression. While demands intensify for board members to acquire an increasingly technical expertise of educational issues such as examining test data, little is known about the extent to which school boards intervene in academic and legal policy development.

To be sure, public interest in school boards has gradually faded over time. Even though school boards remain revered symbols in local politics, they have generally failed to capture a high level of public interest and attention. Some believe that the apathy is partly due to the adversarial, nondeliberative democratic nature of school boards. Others suggest that the geographical placement and the size of the school district predict the level of board participation and responsiveness. Research also suggests that typical urban school governance is less community oriented, less responsive, and more bureaucratic in terms of control over curriculum, personnel, and finance than its rural counterpart. Greater interest on the whole might be attained through tinkering with elements such as consolidating school board elections with larger general elections. This might generate more participation in elections for public school boards, even as governance remains largely unmonitored by the public despite the considerable power that local boards wield.

Mario S. Torres, Jr.

See also Authority Theory; Bureaucracy; Federalism and the Tenth Amendment; School Boards

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Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).
Plyler v. Doe, 458 U.S. 1131 (1982).

School Boards

The almost 16,000 school boards in the United States, which trace their origins to colonial America, are an integral part of a complex system of school governance. State legislatures created local school boards to carry out the state function of providing public education by executing and administering statutes and policies. School boards, then, are state agencies. Therefore, even though board members are elected locally, they are, in fact, state officials. Further, school board functions and authority are delineated in state statutes, as described in this entry.

What They Do

As educational agencies, school boards have three functions: legislative, executive, and quasi-judicial. The legislative function includes the authority to make rules and regulations for the effective operation of school systems. School boards may also levy taxes for the funding of the educational enterprises over which they have authority.

School board executive functions fall into two categories. The first type of power that boards exercise is discretionary, the larger portion of their administrative authority. Discretionary functions are actions that entail a board's judgment, such as hiring personnel, entering into contracts with vendors, or deciding whether to offer course electives or extracurricular activities for students. Boards also exercise ministerial functions, tasks that are carried out by administrators and do not require judgment. School boards may delegate ministerial but not discretionary functions.

The quasi-judicial function of school boards deals with the authority to make decisions that involve individuals. These include disciplinary hearings for both students and employees. Determinations in these decisions are binding. School boards must ensure that subjects of hearings receive fairness and due process.

Membership and Meetings

School board members are public officers, indicating that they have a delegation of sovereign power of the state. Put another way, board members have powers and duties conferred by their state legislatures which they must carry out independently and without the control of superior powers. Most school board members are elected, although a small number of boards,

often in large cities, are actually appointed. Whether elected or appointed, school board membership is a public office, and each member takes an oath of office.

School boards can act only as a body. This means that the only formal power that school boards or individual members have is to cast their votes on items at formal board meetings. Members have no authority to act individually, separate from their entire boards. Even so, individual board members have the informal ability to influence the actions of the board as well as school staff.

All official board transactions and business, including voting, must take place during regular school board meetings or at special meetings convened for a certain purpose. Any actions or decisions that occur outside of formal meetings are invalid. Moreover, a basic rule is that such meetings must take place within the geographical boundaries of the district that members represent. Additionally, unless specified in legislation, individual school boards choose the procedure by which to conduct their meetings. While courts have been lenient concerning meeting procedures, boards must comply with open meetings and open or public record laws.

As a means of making them more open and accessible to the public, school board meetings must comply with state "sunshine laws." The criteria for evaluating whether meetings satisfy these laws include the following:

- whether the matters under discussion were crucial to policy decisions
- whether there was a quorum of the board present
- whether those in opposition were absent
- whether the intentions of those present were to obscure the action taken
- the nature and planning of the meeting
- the length of the meeting
- the opportunity and venue for private discussion, and
- the effect of private or closed meetings on the decisions that the boards made.

With variations from one jurisdiction to another, boards are allowed to meet in executive sessions to discuss issues of personnel or court proceedings.

In general, the business of school boards is a matter of public record. However, what actually constitutes a meeting is often controversial. For example, it is unclear whether a social gathering where a quorum of board members is present is business that is subject to open meetings as a matter of public record. For all boards—not just school boards—courts must weigh the extent of the public interest involved when deciding the public nature of meetings and records of meetings. The criteria used to make such a determination include whether the board performed governmental functions at the meeting, the level of governmental funding used to support the meeting, the extent and involvement of governmental regulation in the meeting, and whether the board that was meeting was related to the government.

Effectiveness

There are a wide range of opinions concerning the efficacy of local school boards as educational policy-making bodies. Many critics of boards argue that they have outlived their usefulness. Other detractors claim that because boards tend to be dominated by White middle-class and mostly male members, they do not adequately represent the stakeholders. Still other critics maintain that boards perpetuate inequality in educational funding. Many educators assert that because such issues as globalization and school choice, along with the multifaceted issues facing urban schools particularly, have rendered education too complex, policy should not be set by lay people at the local level. Additionally, critics argue that given the increased federal role in education, especially under the Individuals with Disabilities Education Act and the No Child Left Behind Act, local school boards have become obsolete.

On the other hand, proponents of local school boards argue that they are an essential component in public school governance. Some of these advocates believe that boards are needed to implement federal and state policies. Additionally, supporters view boards as being vital for the representation of the local context to state level policy makers. Others assert that, insofar as education is a public good, local boards are necessary and important for the representation of entire communities. These supporters express the view that because the purpose of public education is to prepare citizens, entire communities have an interest in their operations.

Proponents add that without school boards, many members of local communities would not have accessible means of expressing their concerns. Consequently, supporters fear that school governance would be reduced to issues of parental consumer rights. This, school board advocates argue, would undermine the purpose of public education in a democratic society.

In sum, while local school boards have a long-standing tradition in the educational system, the debate on whether they continue to serve a useful purpose is far from being resolved.

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See also Open Meetings Laws; Open Records Laws

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School Choice

School choice refers to programs wherein parents select the schools that their children will attend at public expense, regardless of where they choose to reside. Although some scholars trace its roots to the 1770s and Adam Smith, Thomas Paine, and John Stuart, most name Milton Friedman as the father of modern school choice. This entry looks at how school choice was used to foster desegregation and how it was refashioned in a context of quality education; it also briefly discusses related court decisions.

Choice and Desegregation

In his book, *Capitalism and Freedom* (1962), Friedman asserted that public education should not be defined so much by the operation of a system of schools as by a method of public funding that would allow parents to obtain the education that they deem suitable for their children.

He proposed that parents be given vouchers for each child's education, which could be redeemed at any public or nonpublic school. According to Friedman, competition would then drive the provision of education, as good schools would thrive while poor schools would eventually close for lack of clientele. He maintained that such a system would be both more efficient and more effective than the traditional system of public education. However, this proposal never really captured widespread public attention or support until much later.

During the 1970s, proponents of desegregation began to utilize school choice initiatives as a means of promoting voluntary integration within public school systems. Educators developed so-called magnet schools, which used innovative and distinctive programming in order to attract students to enroll in schools outside of their traditional, often racially homogeneous, attendance areas. For example, schools were developed that focused on the arts, mathematics and science, vocational training, or particular philosophies or methodologies of teaching. Under such plans, parents petitioned school officials in the hope of having their children admitted to magnet programs. Magnet schools have been supported by federal grants and required by federal trial court desegregation orders.

States and school boards also encouraged integration by crafting open enrollment programs. In some instances, boards created intradistrict transfer plans that, with or without employing magnet schools, allowed parents to choose from among their schools, using this approach rather than residence to decide where children would attend school. Likewise, states created interdistrict voluntary integration programs around large urban areas that provided financial incentives to suburban schools to accept transfer students from urban districts and vice versa.

Choice and Educational Quality

The late 1980s witnessed the rebirth of Friedman's voucher proposal and the reapplication of free market principles to public education. This time, two of the most vocal and perhaps influential heralds were John Chubb and Terry Moe from the Brookings Institute of Washington, D.C. The reemergence of school choice

as a viable approach to public school reform also signaled a shift in the rationale for its support. Prior to this time, racial and ethnic equity had been the driving force behind the choice plans in operation. However, this incarnation of choice focused heavily on considerations of excellence. The 1983 report by the National Commission on Excellence in Education, *A Nation at Risk,* posited that the current system of public education was critically failing and in need of immediate infusions of reform and restructuring if American students were to achieve their potential and the United States was to maintain (or regain) its status as the world's economic, political, technological, and intellectual leader.

In response to this call for school reform, a number of forms of school choice evolved along with magnet and open enrollment plans. First, some states expanded interdistrict open enrollment programs to allow transfers between public school districts statewide. Currently, at least 41 states have adopted some sort of interdistrict open enrollment policy. Second, at least 40 states have created charter school programs.

Charter schools are public schools created by virtue of a charter or contract with authorizing agencies, usually school boards, although authorizers vary from state to state. Charter schools are relieved from compliance with some state regulation in exchange for agreeing to be bound by performance contracts. While charter schools are creations of state statutes and are largely governed by state law, federal grant funds exist to support the development of innovative charter schools.

Finally, some states, such as Wisconsin, Ohio, Florida, and Utah, have created voucher programs that allow students to attend nonpublic schools with full or partial public financial support. For example, in both Milwaukee and Cleveland, low-income students may elect to attend participating nonpublic schools in addition to public schools.

In addition to state and local efforts, a federal effort was made when Congress included a school choice provision in the No Child Left Behind Act (NCLB) (2002). Under NCLB, all schools must demonstrate that they are making adequate yearly progress (AYP) toward having all of their students demonstrate proficiency on state assessments of reading, mathematics, and science achievement. If schools fail to make AYP for 2 consecutive years, parents must be informed of the option of transferring their children to other schools that meet their AYP goals. As Congress works to reauthorize NCLB, these school choice provisions are likely to be debated once more. In other words, Congress will have to decide whether to retain, expand, modify, or eliminate the requirement for school choice currently set forth in NCLB.

Choice in the Courts

Ever since its inception, school choice has generated strong disagreement about its wisdom and effectiveness as an educational policy. In addition to extensive policy debate on the advantages and disadvantages to school choice as a whole or in one of its forms, considerable litigation has ensued to challenge various iterations of choice. Numerous issues have been litigated and range from challenges under education clauses of state constitutions to core principles of the U.S. Constitution. While the space allotted here does not allow for a full explication of all the issues raised, two lines of cases are most prominent.

First, opponents have challenged voucher programs that allow religiously affiliated nonpublic schools to participate as violating the Establishment Clause of the First Amendment to the Constitution. That litigation culminated in the Supreme Court's 5-to-4 decision in *Zelman v. Simmons-Harris* (2002). In *Zelman,* the Court ruled that the program from Cleveland did not violate the Establishment Clause, because it was enacted to further a legitimate secular purpose, the recipients of the vouchers were not defined by religious criteria, and parents had a genuine choice from among a variety of publicly funded options, both secular and religious, at which to spend their vouchers.

Most recently, the Supreme Court considered the propriety of two voluntary integration programs that considered students' race during the admissions process. Challengers alleged that conditioning admission to schools in the Seattle and Louisville intradistrict choice programs violated the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court agreed, striking down both plans in *Parents*

Involved in Community Schools v. Seattle School District No. 1 (*PICS,* 2007). While *PICS* was decided by a plurality, five justices agreed that the Seattle and Louisville choice programs under scrutiny were not narrowly tailored to a compelling state interest. Of the five justices voting to overturn the plans, only Justice Kennedy pointed out that consideration of racial diversity in public elementary and secondary schools could be compelling. The four other members who ruled that the plans were unconstitutional reasoned that race could only properly be considered if necessary to remedy past discriminatory behavior. The effect of this precedent on currently operating forms of school choice across the country is just beginning to be explored.

While *Zelman* and *PICS* settled the questions presented by the cases, they did not resolve all legal issues associated with school choice. Further, neither did the Supreme Court's pronouncements quell the policy debates surrounding school choice. Accordingly, both legal and policy disagreements around school choice are likely to continue. Given its current prevalence, it is likely that school choice, whether interdistrict open enrollment, intradistrict open enrollment, magnet schools, charter schools, or vouchers, will remain part of the public educational landscape for years to come.

Julie F. Mead

See also Charter Schools; Equal Protection Analysis; Fourteenth Amendment; No Child Left Behind Act; *Parents Involved in Community Schools v. Seattle School District No. 1;* State Aid and the Establishment Clause; Vouchers; *Zelman v. Simmons-Harris*

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School Committee of the Town of Burlington v. Department of Education

School Committee of the Town of Burlington v. Department of Education (1985) involved a dispute over the rights of parents under the Education for All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act (IDEA). At issue was whether parents could be reimbursed for unilaterally placing their child in private school after they disagreed with the individualized education program (IEP) that school officials designed for their son.

Facts of the Case

The IDEA provides procedural safeguards to ensure that qualified students with disabilities receive a free appropriate public education (FAPE) in the least restrictive environment. Among these procedures are the parents' right to participate in the creation of IEPs for their children and to challenge proposed IEPs if they disagree with any of their content. In addition, the IDEA gives courts the authority to grant whatever relief they determine is appropriate.

The child in *Burlington* was a student with disabilities who attended a public school. Insofar as the child was not attending a school that could adequately meet his needs, his parents requested a new IEP for him, but they did not agree with the new IEP that school officials proposed. As such, they sought review consistent with the IDEA's provisions.

In the meantime, the parents enrolled their son in a commonwealth-approved private school for special education students at their own expense. Following a series of hearings, a hearing officer was of the view that the private school was the most appropriate placement for the child. Consequently, the Bureau of Special Education Appeals (BSEA) directed town

officials to pay the child's tuition at the school and to reimburse his parents for the expenses that they had already incurred.

When town officials ignored the BSEA's order, commonwealth officials threatened to freeze all of their special education funds unless they complied with the directive that they pay for the child's education. During this time, the child remained at his private school. Eventually, town officials agreed to pay for one school year but not a subsequent one. After a four-day trial, the federal trial court ordered the parents to reimburse the town for placement and transportation expenses for the last two years of their son's placement. Not surprisingly, the parents appealed.

In the appeals process, the First Circuit remanded twice, eventually holding that the parents' reliance on the BSEA order allowed them to be reimbursed for the tuition that they paid for their son's education. The Supreme Court then agreed to hear an appeal.

The Court's Ruling

Writing for a unanimous Supreme Court, Justice Rehnquist explored whether the language of the IDEA, which granted the judiciary the authority to award the relief that judges deemed appropriate, included reimbursement for tuition at private schools if they thought that this would be a proper placement. Interpreting the IDEA as authorizing such reimbursement, and finding that "relief" was not specified further, Rehnquist noted that the courts had broad discretionary power. While the language in the act focused primarily on providing education for students with disabilities, Rehnquist pointed out that the IDEA provided for placements in private schools at public expense if necessary. In so doing, he determined that if a private school can be considered a proper placement, then in order for relief to be appropriate, school officials would have to create IEPs to permit children to attend the private schools and reimburse their parents retroactively. While town officials claimed that reimbursement should have been seen as damages, Rehnquist disagreed. Rather, he indicated that reimbursing parents was only paying what the town would, or should, have spent in the first place had officials initially developed a proper IEP.

Town officials also argued that the parents waived their right to be reimbursed because they chose to move their son to a private school unilaterally. The town officials adopted this stance based on language in the IDEA that requires children to remain in their then current educational placements while IEP contests are pending. In rejecting the town's position, Justice Rehnquist observed that the parents had not changed their son's placement, because before the parents moved him to the private school, commonwealth educational officials and they had agreed that he should attend a new school. If anything, Rehnquist specified that the parents reviewed their son's IEP, disagreed with it, and chose to enroll him in the private school. As a result, Rehnquist considered the private school to be his placement during the IEP appeals proceedings.

Justice Rehnquist also examined the BSEA's decision that called for the child being placed in the private school. To this end, he recognized that the IDEA allows changes of placements if officials in the state (commonwealth, here) or local educational agencies agree with such modifications. Insofar as he considered the BSEA's order to be an agreement with regard to the child's placement, Justice Rehnquist was satisfied that the parents had not violated the IDEA.

Rounding out his opinion, Justice Rehnquist reasoned that the parental change of their son's educational setting did not constitute a waiver of reimbursement. As such, he examined the IDEA's purpose, which was to grant students with disabilities a FAPE. In an effort to avoid construing the act in such a way that forced parents to choose between an inappropriate education and a free one, Rehnquist concluded that the parents should have been reimbursed, because the Supreme Court ultimately decided that the private school was the child's appropriate placement. However, Rehnquist clarified that if parents unilaterally choose to place their children in private schools that are not required or appropriate based on their IEPs, they do so at their own financial risk if courts later disagree that this would have been their appropriate placements. Put another way, if parents unilaterally place their children in schools that courts find inappropriate, then they will not be reimbursed for their expenses.

Eight years later, in *Florence County School District Four v. Carter* (1993), the Court was of the opinion that parents could be reimbursed for tuition expenses for their children even if the schools that they selected were not state approved, as long as they were otherwise appropriate.

Megan L. Rehberg

See also Disabled Persons, Rights of; Free Appropriate Public Education; Individualized Education Program (IEP); Least Restrictive Environment; Tuition Reimbursement

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School Finance Litigation

The availability of funds to support schools varies from district to district in most states, and the amount of money has a clear link with the quality of education provided. Often, districts with modest finances are also home to low-income students from underrepresented minorities. Thus, school finance has become associated with issues of equity, and it is often a target of parties seeking more equitable education for children. This entry looks at the background and some important legal cases in this area.

Background

Education is not a fundamental right under the U.S. Constitution. Instead, because, pursuant to the Tenth Amendment, it is governed by state law, every state constitution has a provision mandating, at a minimum, that the state provide a system of free public schools. Thus, in America, free public education is a constitutional value. Although free public education for all is a constitutional value, America's public schools remain unequal and often fail to provide students with the education they need. Moreover, because the failure of public schools is more frequent and better documented in cities than in suburbs or rural areas, the consequences are felt most among minority students, who are more likely to be urban dwellers. Many, perhaps most, of these inequalities are the direct result of significant financial disparities among the public schools. While local school boards receive funds from both federal and state sources, all local districts, except those in Hawai'i (which is a single district) and Michigan raise much of the money necessary for operations through a percentage tax, with the rate set by the local residents, on the value of the real property in the district. Due to differences in rates and in the value of real property, this system results in vast disparities. As a result, some districts have trouble providing even the basics, while others are able to offer educational luxuries. While the states' legislatures and executives have adopted various mechanisms to correct this financial inequality, the disparities remain.

Given the obvious conflict between the constitutional value of free public education for all and the funding disparities created by the states' school finance systems, it is not surprising that the courts have been asked to intervene and vindicate the constitutional value of free public education for all by declaring that the current system of financing the schools is unconstitutional. Indeed, over the last four decades, the supreme court of virtually every state has wrestled with the question of whether the state's school financing system is constitutional.

School finance suits have taken two forms. First, there are "equity suits," where the plaintiffs assert that all children are entitled to have the same amount of money spent on their education and/or that children are entitled to equal educational opportunities. In effect, the plaintiffs believe that more money means a better education, and have little or no tolerance for any differences among districts in expenditures and/or opportunities. In an equity suit, the plaintiffs assert that education is a fundamental right and that any disparities in funding violate that right. The equity approach tended to be the dominant legal theory during the 1970s and 1980s.

Second, there are "quality suits" in which the plaintiffs argue that all children are entitled to an education of at least a certain quality, and that more money is

necessary to bring the worst school districts up to the minimum level mandated by the state constitution. The emphasis is on differences in the quality of education delivered rather than on the resources available to the districts. The systems are struck down by the courts not because some boards have more money than others do, but because the quality of education in some schools, not necessarily the poorest in financial terms, is inadequate. In quality suits, the plaintiffs assert that the state constitution establishes a particular standard of quality and that the schools named in their suits do not measure up to that standard. The plaintiffs assume that the reason for this failure is inadequate funds. While many cases have equity suit arguments, the quality suit is the dominant strategy of the 1990s and early 21st century.

Historical Sequence

The history of school finance litigation consists of three waves. During the first wave, which lasted from the late 1960s until Supreme Court's decision in *San Antonio Independent School District v. Rodriguez,* this litigation relied on the federal Equal Protection Clause. Essentially, the plaintiffs asserted that all children were entitled to have the same amount of money spent on their education and/or that children were entitled to equal educational opportunities; that is, they brought equity suits. In effect, the plaintiffs believed that more money meant a better education, and they had little or no tolerance for any differences among students in expenditures and/or opportunities. In order to prevail under this equity theory, the plaintiffs had to persuade the court that education was a fundamental right, or that wealth was a suspect class, or that the finance system was irrational.

Similarly, during the second wave, which lasted from the New Jersey Supreme Court's 1973 ruling in *Robinson v. Cahill* until early 1989, the emphasis continued to be on equity suits. However, because *Rodriguez* had foreclosed the use of the federal constitution, the plaintiffs were forced to rely on state constitutional provisions. Although the plaintiffs were able to prevail in Arkansas, California, Connecticut, New Jersey, Washington, West Virginia, and Wyoming, the overwhelming majority of the cases resulted in victories for the state. In contrast, the third wave, which began with plaintiffs' victories in suits in Montana, Kentucky, and Texas in 1989 and continues to the present, has been fundamentally different. Unlike the first and second waves, the third wave emphasizes quality of education rather than equality of funds, uses the narrow education clauses rather than the broad equal protection provisions, and seeks sweeping reform and/or continued court supervision of school districts. This represents the future of school finance reform litigation.

William E. Thro

See also *Robinson v. Cahill; Rose v. Council for Better Education; San Antonio Independent School District v. Rodriguez; Serrano v. Priest;* Thorough and Efficient Systems of Education

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Scopes Monkey Trial

Called the "world's most famous court trial" at the time, the case of *State of Tennessee v. John Thomas Scopes* (1925) concerned a young biology teacher who taught that man had descended from a lower order of animals rather than having been divinely created as described in the Bible.

The Scopes trial occurred as a result of legislation advocated by John Washington Butler, a Primitive Baptist and former farmer and schoolteacher who had learned that evolution was being taught in the public schools of Tennessee. As a member of the Tennessee legislature, Butler succeeded in passing a law that made it unlawful to teach evolution in the public schools. The Butler Act, as it came to be called, was also being promoted by William Jennings Bryan, former U.S. secretary of state and a three-time candidate for president, as an antidote to Darwin's theory of evolution, a notion that he regarded as heresy.

The Butler Act was immediately challenged by the American Civil Liberties Union (ACLU), which was searching for a test case. The selection of Dayton, Tennessee, as the site for the testing of the anti-evolution law occurred as a result of opposition to the Butler Act by a small group of Dayton men who enlisted the help of the local science teacher, John Thomas Scopes. F. E. Robinson, owner of the local drug store and chairman of the school board, got things going when he called the newspaper in Chattanooga to report the arrest of a teacher who had taught evolution.

William Jennings Bryan volunteered to represent Tennessee in its prosecution of young Scopes. This brought Clarence Darrow and Dudley Field Malone, a New York barrister, into the fray as volunteers for the defense. At first, the ACLU did not want Darrow on its team, believing that the 68-year-old former attorney was too controversial and not technically as skilled a lawyer as they believed the case required. However, young Scopes insisted that the Darrow/ Malone team was just the tandem he believed was necessary in the ugly legal brawl he knew would ensue in his hometown. The Scopes defense team was anchored by Darrow and Malone and joined by Arthur Garfield Hays, another New York attorney; W. O. Thompson, Darrow's law partner from Chicago; and John Randolph Neal, a former Tennessee judge and dean of the law school at the University of Tennessee.

From the beginning, the Scopes "monkey" trial was more than a simple test of an anti-evolution law. Rather, as Darrow later said near the end of the trial, it was contested for the purpose of preventing bigots and ignoramuses from controlling education in the United States. It was bitterly fought before a partisan crowd of what H. L. Mencken of the *Baltimore Sun* described as "yokels," a derogatory term for unsophisticated country folk who made up the town and the jury, one member of which was illiterate.

The Scopes defense team set up a dense battery of prominent scientists regarding the efficacy of the theory of evolution. However, the prosecution succeeded in overcoming this plan by showing that the trial was not about the theory of evolution, but rather was a simple question of whether Scopes had violated the Butler Act. After Judge John T. Raulston ruled that expert testimony on evolution was inadmissible, many considered the trial to be over and began to leave town. What then occurred propelled the Scopes trial into infamy. The defense team called William Jennings Bryan to the stand as an expert on the Bible. While his prosecutorial colleagues strenuously objected, Bryan succumbed to the lure of being a defender of the faith before the cross-examination skills of his legal nemesis Clarence Darrow, whose agnosticism was widely known. What then ensued was a clash of legal titans in a set piece battle that has subsequently become the verbiage of Broadway plays and Hollywood celluloid. Darrow walked, weaved, and sucker-punched Bryan through the Biblical story of Jonah and the whale, the fable of Joshua making

the sun stand still, the unnamed wife of Cain, and into the length of a day in the act of creation set forth in Genesis. In an acerbic courtroom fight in which both exchanged clenched fists at one another, Darrow showed plainly that in the face of textual ambiguity, a reader of the Bible had to interpret what was written, because a literal interpretation was not consistent with what was generally accepted as scientific fact, even by Christian literalists such as Bryan. While Bryan was not shown to be a complete idiot and was initially skillful in his rejoinders to Darrow, he was publicly humiliated and exposed as naïve and irrational.

Bryan knew he had made a major miscue. Even when Judge Raulston threw out his entire testimony, he was not satisfied, because he wanted the world to know that he had worked to protect the word of God against the greatest atheist or agnostic in the United States. He never got his chance, however, as Darrow pushed for the jury to find young Scopes guilty so that the case could be appealed to the Tennessee Supreme Court. Under Tennessee law, such a request prevented the defense from offering a closing statement and thus deprived Bryan of the opportunity to present a final appeal. Darrow's public relations coup was then complete. Scopes was brought before the jury, which convicted him of violating the Butler Act. Judge Raulston imposed a fine of $100. After the trial, Bryan traveled about Tennessee trying to find a suitable forum to redeem himself, but after having a heavy noon-day meal, he died in his sleep.

The ACLU appealed the decision of the lower court, and once again, there was acrimony over the continuing presence of Clarence Darrow as the case went to the Tennessee Supreme Court. This time the argument was engineered to avoid favoring Darrow, who was not a good lawyer in appellate cases. But Darrow doggedly stuck to his guns and argued the case with Arthur Garfield Hays in Nashville. The high court reversed the Scopes decision on a technicality: Scopes's fine should have been determined by the jury rather than by Judge Raulston. It was not until 1967 that the Butler Act was repealed in Tennessee. A year later, an anti-evolution law in Arkansas was declared unconstitutional by the U.S. Supreme Court.

The legacy of the Scopes monkey trial lies largely today in the public imagination and in the court of public opinion. It was the first time that science and faith came face to face in the courtroom and were personified by two protagonists who were larger than life. The irony is that John Thomas Scopes never testified on his own behalf. Darrow was afraid that the jury would discover that Scopes had never taught biology. Once the trial began, Scopes himself was a bystander to the larger issues being argued.

Fenwick W. English

See also Darrow, Clarence S.; Religious Activities in Public Schools

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Section 504

See Rehabilitation Act of 1973, Section 504

Segregation, De Facto

De facto racial segregation is the result of the actions of private individuals or societal forces rather than governmental action, law, or policy. De facto segregation can be distinguished from de jure segregation, a condition that is caused by governmental actions or law. De facto segregation is typically the result of housing patterns, population movements, and economic conditions that are often reinforced by governmental policies that are not aimed at creating segregation but have a segregative effect. For example, most American metropolitan areas have large single central-city school districts that serve primarily minority students; these systems are usually surrounded by

suburban school districts that serve mostly White students. This entry looks at the history of de facto segregation and discusses key Supreme Court rulings.

Background

Documentation reveals that schools in many parts of the North were substantially segregated in the years leading up to 1954 and in the decades following *Brown v. Board of Education of Topeka* (1954). To be sure, most of this segregation was de facto, rather than de jure, and was aided by the small size of many school districts. The small size of many of these districts had the effect of guaranteeing that residential segregation would be translated into school segregation as long as boards could not be required to move students across jurisdictional lines.

In some states outside of the South, segregation carried the imprimatur of official policy. Perhaps the best, or more properly worst, example among the cases identified in this entry was Kansas, home to *Brown.* However, more frequently, high degrees of segregation, falling short of complete separation of the races, were maintained in more than a few Northern school districts, owing to housing patterns. Fueled by racial discrimination among homeowners, real estate brokers, and banks, residential de facto segregation was bolstered by government action and inaction.

In its most active mode, governmentally enforced residential segregation existed through legislation, such as the ordinance in Stockton, California, that required all Chinese to live south of Main Street. One of the most prominent tools for maintaining residential segregation, a California innovation of the 1890s that was used widely until shortly after World War II, was the restrictive covenant, the insertion into deeds of the promise not to sell a property to Blacks or members of other specified groups. More extreme was the practice of some suburban communities to exclude Blacks altogether. Combined with the selective location of public housing projects and the largely unchecked discrimination in the housing market, many large and midsize urban areas of the North became highly segregated under de facto conditions. Detroit's inner city epitomized de facto segregation; as late as 1970, this city had 14 suburban communities with populations of 36,000 or more, none of which had more than 50 Black residents.

Court Rulings

The U.S. Supreme Court first used the term *de facto segregation* in *Swann v. Charlotte-Mecklenburg Board of Education* (1971). Three years later, the Court addressed its first case of de facto segregation in *Keyes v. School District No. 1, Denver, Colorado* (1973), a case that addressed the rights of students of Mexican ancestry. In *Keyes,* the Court held that even though the schools were not segregated by law or the state constitution, the board's actions led to the creation of a core of inner-city schools for minority students that were inferior to those educating children in predominately White schools in the rest of the city. *Keyes* is often discussed as a case of de jure segregation, even though it primarily focused on de facto segregation. Based on its finding that the board's action created a case of intentional discrimination, the Court concluded that school officials had to prove that they had not deliberately created schools that were segregated.

The Supreme Court's distinction in *Keyes* between de facto and de jure segregation has been questioned at the top of the nation's legal system. Justice Lewis Powell concurred with Justice William Douglas in *Keyes* (1973), noting that the difference between de facto and de jure segregation is a distinction without a difference. Douglas argued that many governmental actions, such as restrictive covenants and the actions of urban development agencies, led to so-called de facto segregation. The Court's allowing the legal distinction between de jure and de facto segregation to stand has severely limited the ability of minority students to sue for more integrated public schools under the Fourteenth Amendment of the federal Constitution.

A year later, in *Milliken v. Bradley I* (1974), the Supreme Court was of the opinion that the judiciary could not demand an interdistrict remedy to segregation that did not result from explicit governmental actions even though its effect was de jure. Two years later, in *Washington v. Davis* (1976), the Court went a

step further, albeit not set in a school context because it involved the selection of police officers, deciding that de jure segregation was unconstitutional only if it was the result of a racially discriminatory governmental purpose. Further, in *Crawford v. Board of Education of the City of Los Angeles* (1982), the Court upheld an amendment to the state constitution of California that prohibited state officials from mandating busing to eliminate de facto segregation.

In sum, it can be argued that given enough resources, one could prove that because de jure segregation existed in many urban school systems and no longer does, the courts have had a measure of success dealing with this problem. However, when segregation has been labeled as de facto, because it involves the amorphous concept of governmental action or inaction coupled with larger societal trends, the cost of litigating such disputes means that the courts and educational officials continue to wrestle with ways of eliminating de facto segregation in schools.

Paul Green

See also *Brown v. Board of Education of Topeka; Crawford v. Board of Education of the City of Los Angeles;* Dual and Unitary Systems; *Keyes v. School District No. 1, Denver, Colorado;* Segregation, De Jure; *Swann v. Charlotte-Mecklenburg Board of Education*

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Segregation, De Jure

De jure segregation is racial segregation that is caused by governmental actions or law. De jure school segregation can be distinguished from de facto school segregation on the basis that the latter results from the private actions of individuals or societal forces rather than the state. This entry looks at the legal history of de jure segregation.

Court-Supported Segregation

In *Plessy v. Ferguson* (1896), its first case directly on this point, the U.S. Supreme Court upheld de jure segregation as long as facilities for Whites and Blacks were "separate but equal." Three years later, the Court extended de jure segregation that was not equal in *Cumming v. County Board of Education of Richmond County* (1899), wherein the justices allowed a school board to close a Black high school while maintaining high schools for Whites. The Court explicitly applied "separate but equal" to K–12 education in *Gong Lum v. Rice* (1927) when it concluded that school officials could deny a child of Chinese extraction access to a school for Whites. De jure segregation was the rule in the South during the Jim Crow era, not only in schools but in all areas of life.

The Supreme Court began to change its course with regard to de jure segregation in *Missouri ex rel. Gaines v. Canada* (1938). In *Gaines,* the Court ruled that because graduate and professional schools for Blacks could not be both separate and equal, both Blacks and Whites had to be admitted to the same programs. Even so, de jure segregation continued in elementary and secondary schools in the South and six border states as merely one part of a vast and elaborate superstructure that was the segregated South. Subsequently, the success that the NAACP and its Legal Defense Fund had in *Sweatt v. Painter* (1950) and *McLaurin v. Oklahoma State Regents for Higher Education* (1950), wherein the justices struck down inter- and intrainstitution segregation, respectively, in higher education, led Thurgood Marshall and others in the organizations he worked with to believe that the Court would uphold the rights of Blacks to attend desegregated K–12 public schools.

The Impact of *Brown*

In 1954, the Supreme Court's landmark judgment in *Brown v. Board of Education of Topeka,* in striking down segregation in public schools based on race, declared "that in the field of public education the doctrine of 'separate but equal' has no place. Separate educational facilities are inherently unequal" (p. 495). A year later, in a follow-up case, *Brown II,* the justices directed lower federal courts to proceed in dismantling segregated, or dual, school systems "with all deliberate speed" (p. 301).

Yet, a decade after *Brown,* only a small fraction of schools in border states and the South had complied with the Court's order, signaling that the battle to end segregated schools would rage on for years. As evidence of ongoing disputes with regard to school segregation, the Department of Justice's fiscal year 2008 performance budget for its Civil Rights Division shows that about 308 school systems continue to operate under desegregation orders nationwide (p. 22).

In light of the struggle to implement desegregation remedies, whether in de jure or de facto settings, some, including Supreme Court Justice Lewis Powell, questioned the distinction between de jure and de facto school segregation. In light of Justice Powell's concern, one view is that given enough resources, plaintiffs or the government can prove that de jure segregation exists in almost any school. A second view is that insofar as the function of schooling in American society requires all groups to be taught together under the common school theory, segregation based on race for whatever reason, whatever the cause, is unconstitutional. Further, the distinction between de jure segregation, which was practiced almost exclusively in the South, and de facto segregation, which was found in the North, has led to different standards in the two regions of the nation, an untenable and unwise outcome.

Contemporary Segregation

David Armor, in *Forced Justice,* maintained that de jure segregation must meet two criteria. First, he was of the opinion that de jure segregation must have both the intent to discriminate and an effect that leads to significant segregation; an example is the segregation enforced by the Jim Crow laws that existed in the American South. Second, he asserted that because the standards by which segregative intent are determined are unclear, they should be clarified. For example, he pointed out that lower courts had adopted a foreseeable effects standard, according to which school boards that adopted courses of action that were obviously going to increase segregation should have been liable for intentional segregation. Such a standard reduces the distinction between de jure and de facto segregation.

Today, identifying the vestiges of de jure segregation is becoming an increasingly difficult task, as the Supreme Court recognized in such cases as *Milliken v. Bradley II* (1977) and *Dowell v. Board of Education of Oklahoma City Public Schools* (1991). This difficulty arises because school boards have, by now, for the most part, eliminated the racial disparities that were most readily traceable to de jure segregation, such as the assignment of students to separate schools based on race. Although racial disparities certainly still exist, the courts have acknowledged that not all instances of racial disparity result from segregation, because "segregation is the conscious, deliberate act of separating people by race" (*Hampton v. Jefferson County Board of Education,* 2000, p. 371). The courts have refused to interpret apartness as unconstitutional.

It cannot be doubted that school boards have eliminated most of the overt racial disparities that were most readily traceable to de jure segregation. Still, this issue can become complicated when elementary or secondary schools use race as a factor in admitting students to particularly desirable programs. Absent either the compelling governmental interest in remedying past de jure segregation or an assignment system narrowly tailored to achieving such a remedy, a plurality of the Supreme Court, in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), ruled that such race-conscious systems, in both Seattle, Washington, and Louisville, Kentucky, were unconstitutional.

In other words, evaluating whether disparities such as scores on standardized tests are vestiges of de jure segregation is more difficult, because the relationship between present disparities and those that existed

under the prior system of segregation is less clear. While the cause of a present racial disparity might be a prior system of de jure segregation, it might also be social or economic factors over which school board officials have no control, thereby making it all the more difficult to ensure equal educational opportunities for all children.

Paul Green

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; *Cumming v. Board of Education of Richmond County;* Dual and Unitary Systems; *Gong Lum v. Rice; McLaurin v. Oklahoma State Regents for Higher Education; Milliken v. Bradley; Parents Involved in Community Schools v. Seattle School District No. 1; Plessy v. Ferguson; Roberts v. City of Boston; Sweatt v. Painter*

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Serrano v. Priest

The 1971 case of *Serrano v. Priest*—known commonly as *Serrano I*—marked the first major decision in a state supreme court that struck down a state educational funding system as unconstitutional. In *Serrano I,* the Supreme Court of California ruled that the state's school funding system violated the equal protection clause of the Fourteenth Amendment to the U.S. Constitution. In a footnote, the court mentioned that the state's funding practices also violated the California state constitution's equal protection clause.

In *Serrano I,* the Supreme Court of California acknowledged that the state's public school general fund financing structure resulted in large variations in per-pupil expenditures and depended largely on a school district's property tax base. The court explained that these kinds of tax-base disparities resulted in inequalities in actual educational expenditures per pupil, because districts with higher property values could generate more funding with lower tax rates. The court added that the state aid mechanisms in place at the time were inadequate to offset the large disparities. A year later, in 1972, the California legislature enacted Senate Bill 90, which established a formula to begin leveling school district incomes based on the average daily attendance revenue limits, the amount of funds that public schools receive to pay for the operations.

The Supreme Court of California based *Serrano I* on two main constitutional findings: First, education in the public schools is a fundamental interest or right; and second, a school district's wealth, namely, its real-property tax base, is a suspect classification. In making this second determination, the court was of the opinion that wealth was a suspect classification, declaring that the school "funding scheme invidiously discriminated against the poor because it made the quality of a child's education a function of the wealth

of his parents and neighbors" (p. 1244). The court invoked strict-scrutiny review and rejected the state's compelling governmental interest argument for tying per-pupil education expenditures to the assessed value of a district's realty and that the current system was necessary to maintain local control.

However, the court's interpretation of wealth as a suspect classification under the federal Constitution did not hold for long. Two years later, the U.S. Supreme Court's opinion in *San Antonio Independent School District v. Rodriguez* (1973), its only case ever on school finance, reasoned that the Equal Protection Clause of the U.S. Constitution does not extend to schools. *Rodriguez* effectively precluded litigants from using the federal Equal Protection Clause as a vehicle for school finance reform.

In the 1976 case of *Serrano v. Priest* (known as *Serrano II*), the Supreme Court of California returned to its earlier, brief mention of the state constitution's Equal Protection Clause. The court essentially rendered the same judgment as it had five years earlier, but its sole authority now was the California constitution. According to *Serrano II,* the finance reform legislation passed in response to *Serrano I* was insufficient. The court clearly established education as a fundamental right under the state constitution. The court maintained that the state's property tax–based school-finance system violated the state's Equal Protection Clause, because it did not withstand the strict scrutiny that is given to the denial of a fundamental right. The court indicated that property tax rates and per-pupil expenditures should be equalized, charging the legislature with the task of leveling revenue such that, by 1980, the difference in revenue limits per pupil would be less than $100. This figure, called the "*Serrano* band," included a built-in inflation factor that increased the size of the band to $300 by the year 2000.

Rather than level school funding up to the amount spent in high-wealth districts, though, the legislature ultimately equalized school funding down to the level spent by the low-wealth districts. Proposition 13, passed by state voters in 1978, limited property tax rates to 1% of the cash value of real property subject to taxation, and it had the effect of severely limiting the growth in spending for public schools. In 1986, *Serrano V* responded to concerns about this limited spending growth. Yet, an appellate court scrutinized the equality of the funding structure, concluding that the legislature had not violated the state constitution's Equal Protection Clause. Although the initial opinion was superseded and transferred for further review, there have been no additional judgments in *Serrano.* In sum, *Serrano I* and its progeny stand out as the beginning of an era that led to about one-half of the states reforming their systems of funding public education.

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See also Equal Protection Analysis; *San Antonio Independent School District v. Rodriguez;* School Finance Litigation; Thorough and Efficient Systems of Education

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Sexual Harassment

School-based sexual harassment can be defined as a form of sex discrimination that involves unwelcome or unwanted conduct of a sexual or sexist nature that directly interferes with the rights of victims to receive equal educational opportunities. Discrimination based on sexual harassment occurs in a variety of ways, including sexual propositions, lewd comments or jokes, unwanted use of pornographic materials, or inappropriate touching. This entry provides an overview of school-based sexual harassment, focusing in turn on some of its more common expressions and related case law.

Definitions

School-based sexual harassment can take place between students, between teachers and students, or between other educational staff persons and students. Sex discrimination in the public school environment

is expressly prohibited by the Equal Protection Clause of the Fourteenth Amendment, Title VII of the Equal Rights Act of 1964, and by Title IX of the Education Amendments of 1972 as well as state- and local-level human rights acts. Students are protected by Title IX, while employees are covered by Title VII. Sexual harassment can be classified under a variety of different legal claims, including gender harassment, unwanted sexual attention, or sexual coercion.

School-based sexual harassment is a serious and growing problem and is found in classrooms throughout the country. For instance, a 1993 national survey conducted by the American Association of University Women (AAUW), titled "Hostile Hallways: The AAUW Survey on Sexual Harassment in America's Schools," reported that 83% of the girls and 60% of the boys surveyed reported experiencing unwanted sexual attention in the school environment. Reported instances of school-based sexual harassment or abuse appear to be on the rise.

Historically, sexual harassment and abuse charges against school boards and their employees were often dismissed. However, the impact of recent research and scholarship demonstrating sexual harassment's detrimental impact on the educational environment through increased student absenteeism, lower achievement, increased dropout rates for victims of sexual harassment, and other negative results has drawn the attention of the courts to the discriminatory impact of school-based sexual harassment. According to statistics, the majority of reported school-based sexual harassment cases occur among students, often referred to as peer-to-peer sexual harassment. In a report by the National Coalition for Women and Girls in Education, 90% of the students who reported sexual harassment were harassed by other students. Researchers assert that the most common reason for sexual harassment of students by other students is related to the need to assert power.

The courts typically refer to the U.S. Equal Employment Opportunity Commission (EEOC) for legal guidance relating to sexual harassment issues originating in the workplace. Beginning in 1988, the EEOC has published a document annually, *Policy Guidance on Current Issues of Sexual Harassment,* outlining behavior that legally qualifies as sexual harassment. Specifically, the EEOC guidelines indicate that sexual harassment is a form of sexual discrimination that is illegal under Title VII of the 1964 Civil Rights Act. Title VII provides that employees have the right to work in an environment free from discrimination based on intimidation, insult, or ridicule. Pursuant to EEOC guidelines, two distinct forms of sexual harassment have evolved: quid pro quo and hostile work environment.

The first category of sexual harassment is referred to as a quid pro quo claim. Quid pro quo is a Latin maxim that translates to mean "this for that." A quid pro quo sexual harassment claim in the educational environment takes place when a person in an authority position, such as a teacher, demands sexual favors in exchange for a certain benefit, such as grades. The most common quid pro quo sexual harassment claim in school-based settings occurs when teachers threaten to lower students' grades or refuse to write letters of recommendation if students fail to accept sexual advances or requests. An incident of quid pro quo sexual harassment need only occur once to legally qualify as a valid sexual harassment claim. The deprivation of educationally related benefits, namely interpreting the teaching process, allow a victim of quid pro quo sexual harassment an opportunity to ask a court for monetary relief.

Hostile work environment is often described as the most prevalent as well as misunderstood sexual harassment claim. Hostile work environment sexual harassment claims are defined as unwelcome sexual behavior that creates intimidating or offensive environments. The concept of hostile work environment is confusing, because what some employees might see as harmless jokes or teasing, victims consider blatantly offensive sexual harassment.

An important legal distinction between quid pro quo and hostile work environment sexual harassment claims is that victims of hostile work environment sexual harassment do not need to suffer tangible economic losses, such as reductions in wages or tangible benefits, in order to satisfy a successful sexual harassment claim. However, unlike quid pro quo sexual harassment claims that only require a single event to

constitute a violation, hostile work environment claims require consistent and multiple patterns of behavior to constitute a violation. For a hostile work environment sexual harassment claim to be successful, the behavior must be considered "sufficiently pervasive and severe."

Insofar as the remainder of this essay addresses sexual harassment involving students, the discussion focuses on Title IX.

The Legal Significance of Title IX

Title IX of the Education Amendments of 1972 is a federal law that expressly prohibits discrimination based on sex. According to the language of Title IX, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Prior to 1992, victims of successful sexual harassment claims could not receive monetary damages as a legal remedy from the courts. Instead, victims who successfully filed sexual harassment claims could only request that federal funding be removed from the organizations where individuals accused of sexual harassment were employed.

In a landmark and unanimous decision, the U.S. Supreme Court in *Franklin v. Gwinnett County Public Schools* (1992) expanded the legal scope of Title IX to include sexual harassment specifically in school settings. *Franklin* is legally significant, because it brought the nation's attention to the extensive problem of sexual harassment in schools. *Franklin* also established the right of student victims of sexual harassment to sue for compensatory, or monetary, damages under Title IX. As a direct result of the legal precedent established in *Franklin,* a major legal factor now considered in determining whether school officials are liable for sexual harassment under Title IX is whether educators have actual knowledge of alleged sexual harassment.

The facts surrounding *Franklin* involved a female high school student and a male teacher who were engaged in coercive sexual intercourse three times on school grounds. When the 15-year old female student initially reported the sexual activity to school administrators, the student was discouraged from informing others of the incident, including her parents, police, or her boyfriend. Officials told the student that the male teacher involved in the incident would be removed from the school. He agreed to resign, and the school agreed to drop all legal charges against him. In reversing previous legal judgments in favor of the local school board, the Supreme Court decided in favor of the student and provided compensatory damages.

Including *Franklin,* the Supreme Court has resolved three sexual harassment cases involving students in elementary through secondary school settings. Unquestionably, this level of judicial activity by the nation's highest court reveals that the issue of sexual harassment in schools is a matter of national concern. In addition to *Franklin,* the Court decided two additional and significant school-based sexual harassment cases in *Gebser v. Lago Vista Independent School District* (1998) and *Davis v. Monroe County Board of Education* (1999).

A 2004 study conducted by the U.S. Department of Education indicated that approximately 10% of public school students who reported being sexually harassed revealed that the sexual harassment was initiated by a teacher or another school staff member. The Court in *Gebser* developed the present legal standard for a legally actionable claim of sexual harassment of a student by a teacher under Title IX. In *Gebser,* the Supreme Court was of the opinion that student victims of sexual harassment may not recover monetary damages unless school officials who have the authority to institute corrective measures have actual knowledge of and are deliberately indifferent to teachers' misconduct. In *Gebser,* a mother and her daughter sued a local school board after the student was involved in a sexual relationship with a male teacher at her school. A police officer had discovered the student and teacher having sexual intercourse in a car. The ninth-grade student, who was involved in a sexual relationship with her teacher for over a year, never told her mother or a school official. When the local school board found out, unlike the board in *Franklin,* the board promptly dismissed the teacher, and he was

ultimately criminally prosecuted for having sex with a minor. The Court concluded that local school officials were not liable under Title IX for the acts of the teacher against the student.

In 1999, in *Davis,* the Supreme Court reasoned that schools that are recipients of federal financial assistance could be liable for peer or student-to-student sexual harassment if the sexual harassment was sufficiently severe and school officials treated the allegations of harassment with deliberate indifference. Additionally, the Court referred to instances where, if school officials had actual knowledge of sexual harassment that was "severe, pervasive, and objectively offensive," they could be held liable.

Davis involved a fifth-grade female student who was subjected to continuous sexual harassment by a male classmate. The female's parents filed suit under Title IX. More specifically, during the duration of the school year, the male engaged in sexually inappropriate behavior toward the female student, including verbal requests for sexual favors and numerous attempts to touch the female student's breasts and genital area. At the end of the school year, the female student's father found that his daughter had written suicide notes based on the sexual harassment she was subjected to by the male. Even though the male's behavior had been reported to the teacher by the student's parents, the teacher failed to assign the student a different desk away form the boy.

In *Davis,* the Supreme Court pointed out that students do have private rights of action to initiate Title IX legal actions asserting peer sexual harassment against public school boards that are recipients of federal funds. *Davis* developed a two-part legal test to evaluate whether sexual harassment existed. The first part of the test asks whether school boards or their officials acted with deliberate indifference to known acts of sexual harassment. The second part of the test considers whether the sexual harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to educational opportunity or benefit. Following *Davis,* students and school officials are better informed regarding the legal boundaries concerning the rights and responsibilities of school-based sexual harassment. Even so, litigation continues at a brisk pace over this contentious topic.

Harassment Based on Sexual Orientation

More recently, legal developments in the area of school-based sexual harassment have taken place to prevent the sexual abuse and harassment of students based solely on their sexual orientation. Statistics reveal that lesbian, gay, bisexual, and transgendered students, commonly referred to as LGBT students, are sexually harassed and bullied significantly more than other members of the overall student population in U.S. middle and secondary schools. Moreover, national surveys reveal that LGBT students are at a statistically greater risk of dropping out of school or considering suicide due to sexual harassment than are other students. For example, the 2001 National School Climate Survey reported that approximately 83% of LGBT students reported that they were sexually harassed at school due to their sexual orientation, and 70% of LGBT students reported feeling unsafe at school. Unclear school- and district-level antidiscrimination policies, school officials' relative inaction toward student sexual harassment incidents based on sexual orientation, and inadequate or nonexistent training of school staff pertaining to issues unique to LGBT students are among the primary reasons schools are often perceived as unsafe environments for students who are sexually harassed based on their sexual orientation.

Two federal-level court decisions, *Nabozny v. Podlesny* (1996) and *Flores v. Morgan Hill Unified School District* (2003) have affirmatively found that school officials have a legal obligation under both the Fourteenth Amendment's Equal Protection Clause and Title IX to protect students from discrimination and sexual harassment based on their sexual orientation. In *Nabozny,* the Seventh Circuit ruled that a public high school student, who was repeatedly physically and verbally harassed throughout middle and high school because he was gay, could sue his school board for violating his right to equal protection. *Nabozny* was a groundbreaking case, because it represented the first time an American court rendered both a public school board and individual school employees monetarily liable for failing to protect a student who was gay from discrimination.

In *Flores,* the Ninth Circuit, in denying a school board's motion for summary judgment that essentially would have dismissed the claim, maintained that officials who failed to take formal action based on the consistent discrimination and sexual harassment of six former middle and high school students violated the Equal Protection Clause of the Fourteenth Amendment. As a result of *Flores,* the school board agreed that teachers, school officials, and staff would receive annual training in the recognition and prevention of sexual harassment based on sexual orientation.

A major legal implication of both *Nabozny* and *Flores* is that local school officials must take proactive steps to prevent sexual harassment of and discrimination against students based on a their sexual orientation. The failure of school officials to do so could potentially result not only in violating students' equal protection and Title IX rights but also in having to pay costly monetary damages.

Harassment in Cyberspace

The sexual harassment of students is no longer confined solely to classrooms. For example, while the Internet has been embraced, especially by young people, as a socialization tool, it is increasingly being used to sexually harass and denigrate students. For example, a 2005 survey of 1,500 teenagers using the Internet reported that 32% of male respondents and 36% of female respondents had experienced cyberbullying to some degree. Cyberbullying has been defined as the use of communication technologies, such as e-mail, cell phone and pager text messages, instant messaging, and defamatory personal Web sites to facilitate deliberate, repeated, and hostile behavior by an individual or group toward another.

A recent case in the federal trial court in Idaho, *Drews v. Joint School District* (2006), illustrates the potential for sexual harassment harm associated with cyberbullying and cyberharassment. Although the court did not have to address the merits of the underlying claim, because the dispute arose in connection with the use (and abuse) of the Internet, it can be seen as a precautionary tale when dealing with the emerging issue of cyberharassment.

The dispute in *Drews* involved a high school student with peer relationship issues. After her mother took a joke snapshot of the student kissing a female friend, other "friends" posted the photo on the Internet and spread rumors that she was a lesbian. Students called the student names, avoided her, and would not undress for basketball games when she was in the locker room. The student purportedly quit the basketball team and opted to be homeschooled for her science class. Insofar as the student and her parents alleged that school officials acted with deliberate indifference to her being harassed, they filed suit, alleging violations of her Title IX rights, her civil rights, and her privacy rights under the Family Educational Rights and Privacy Act (FERPA), as well as other state and constitutional claims. When the board moved for reconsideration before the court, a different set of facts emerged. It turns out that the student did not quit the basketball team because of the peer harassment and that she actually preferred her homeschooled science class to her former in-school instruction. After the facts were revealed, the court granted the board's motion for summary judgment and dismissed the remaining Title IX claims, because the student failed to sustain her burden of proof that she was subject to sexual harassment.

Insofar as cyberbullying occurs in a multitude of electronic forums, including e-mail, Web sites, online forums, chat rooms, blogs, instant messaging, and voice or text sent to cell phones, it is extremely difficult for school officials to monitor and control this behavior or the sexual harassment of other students through Internet-based communications. Unlike traditional sexual harassment and bullying, where the offenders are known, those using the Internet to sexually harass other students are often anonymous. Additionally, those who sexually harass others online can instigate harmful attacks 24 hours a day at any location with Internet access.

Recommendations for Policies

While the Supreme Court has deemed that school officials are liable under Title IX for failing to protect students that are sexually harassed, there are some proactive policy measures that schools can adopt to avoid liability. These policies should include the

following items. First, local school boards must develop comprehensive and clearly written antidiscrimination policies expressly prohibiting sexual harassment and apply those policies to all involved stakeholders in the schools, including students, teachers, school staff, and parents. Second, board sexual harassment policies must be aligned with other relevant policies, including codes of conduct, personnel guidelines, and student handbooks. Third, school-based sexual harassment polices should include all forms of sexual harassment. For example, sexual harassment policies must not only prohibit "traditional" sexual harassment but must also explicitly prohibit sexual harassment based on sexual orientation. Fourth, school-based sexual harassment policies must explicitly include conditions regarding how to specifically address and resolve sexual harassment claims in a timely manner. Fifth, school-based sexual harassment policies must be reviewed annually to ensure legal compliance with the latest developments in federal and state law.

Kevin P. Brady

See also *Davis v. Monroe County Board of Education;* Equal Protection Analysis; *Franklin v. Gwinnett County Public Schools; Gebser v. Lago Vista Independent School District;* Hostile Work Environment; *Nabozny v. Podlesny;* Sexual Harassment, Peer-to-Peer; Sexual Harassment, Quid Pro Quo; Sexual Harassment, Same-Sex; Sexual Harassment of Students by Teachers; Sexual Orientation

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Sexual Harassment, Peer-to-Peer

Complaints from students regarding sexual harassment from peers are not only common but are on the increase. What was once treated as innocent teasing or behavior that was typically described as "boys will be boys" is now often viewed as offensive, provocative conduct unacceptable at school. These acts of harassment occur on school grounds, at extracurricular events, and on school buses. The increase in reported peer-to-peer sexual harassment may be due to a combination of the increased awareness of sexuality by students, societal acceptance of reporting sexually inappropriate behavior, and an increase in sexually aggressive acts by students.

Much of the peer-to-peer sexual harassment involves bullying types of behavior. Females are often the victims of sexual bullying in the forms of inappropriate or suggestive comments, graphic graffiti in school halls or bathroom walls, and overt acts of touching or groping. Moreover, there appears to be a rapid increase of same-sex sexual harassment. Insofar as society has become more tolerant and accepting of students who are openly gay or lesbian, school officials have witnessed increases in bullying, hate, and sexually harassing behaviors directed at these students. There is evidence that, left unchecked, sexually harassing behaviors, regardless of the sexual orientations or genders of the students involved, will continue.

Sexually harassing behavior has also invaded elementary schools. Students as young as five years old have engaged in verbal and physical abuse of a sexual nature. Although newsworthy sex-related incidents, such as an innocent kiss leading to extreme discipline, have gained wide media attention, far too common aggressive sexual acts by preteens have been disregarded as childish naiveté.

In light of judicial developments, school boards may be held liable for peer-to-peer sexual harassment pursuant to Title IX of the Educational Amendments of 1972. In *Davis v. Monroe County Board of Education* (1999), a female student complained about sexually harassing behavior from a fellow male student. The parents, on behalf of their fifth-grade daughter, sued the school board under Title IX for failure to stop the classmate's sexually harassing behavior. After a federal trial court in Georgia and the Eleventh Circuit rejected the claims, the Supreme Court reversed in favor of the student and her parents and remanded for further consideration in light of analysis. In its only case involving peer-to-peer sexual harassment, the Court ruled that while school boards that receive federal financial assistance may not be liable for the conduct of the students, they may be accountable when school officials fail to prevent inappropriate student conduct. More specifically, the Court determined that school boards

> are properly held liable in damages only when they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school. (p. 650)

At the same time, the Court added that a board can be liable for damages when officials have "substantial control over both the harasser and the context in which the known harassment occurs" (p. 646).

The Office for Civil Rights (OCR) provides guidance to school systems to help prevent acts of sexual harassment and to address incidents of harassment. First, the OCR (2001) guidelines direct school boards to develop policies addressing sexual harassment. Polices should include a definition of sexual harassment, an explanation of the penalties for engaging in harassing conduct, an outline of the grievance procedures, contact information for those who receive complaints, and an expressed commitment to keep complaints confidential. Further, school officials are advised to be prompt in the investigation of complaints of sexual harassment and to avoid ignoring the plight of the alleged victim. In order to assist with the complaint process, school officials are urged to develop their own guidelines for the identification and reporting of sexually harassing behavior and to train all employees on how to identify harassing behavior and intervene on behalf of the victim using clear guidelines for reporting such behavior.

Mark Littleton

See also Bullying; *Davis v. Monroe County Board of Education;* Hostile Work Environment; Sexual Harassment, Quid Pro Quo; Sexual Harassment, Same-Sex; Title IX and Sexual Harassment

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Sexual Harassment, Quid Pro Quo

When harassment involves the exchange of sexual favors in exchange for desired benefits, it is typically referred to as "quid pro quo," literally, "this for that"

sexual harassment. Quid pro quo harassment implies a power relationship between harassers and victims. Usually, quid pro quo harassment involves employees and supervisors, but the term may also be applied to students in educational settings who are involved with teachers or other staff members such as coaches. As an example in a school setting, it could be that a teacher, acting as harasser, awards a grade to a student on the provision that the victim grant sexual favors. Nonetheless, educational decisions based on the acquiescence to sexual demands may have alternate twists. For example, teachers may offer to withhold reports of poor grades to students' parents for the exchange of sexual favors.

Unlike hostile environment sexual harassment, quid pro quo harassment is more easily recognizable. Additionally, a single incident of quid pro quo harassment may well be sufficient to establish a sexual harassment claim, because individuals need not submit to demands for sexual favors in order for there to be violations. This entry looks at the law as it applies in educational settings.

Enforcement

Under Title VII of the Civil Rights Act of 1964, private and public institutions with 15 or more employees are liable for acts of supervisors and employees who sexually harass workers. Title VII is enforced by the Equal Employment Opportunity Commission (EEOC). Title IX of the Education Amendments of 1972 is an educational statute that prohibits disparate treatment of students in educational institutions on the basis of sex. The U.S. Supreme Court has yet to address a case of quid pro quo sexual harassment head-on in an educational setting.

While employee-to-employee sexual harassment is covered by Title VII, Title IX addresses employee-to-employee, employee-to-student, and student-to-student sexual harassment. Pursuant to Title IX, private and public institutions receiving federal funds may be liable for the sexual harassment of students or employees. Title IX is enforced by the Office for Civil Rights in the U.S. Department of Education.

Employer Liability

Unlike hostile environment sexual harassment, the courts tend to apply strict liability to supervisors of individuals who engaged in quid pro quo harassment. When supervisory employees in educational settings have primary or absolute authority to hire, promote, or terminate other staff members and they use their power to secure sexual favors, the courts are likely to find school boards strictly liable. In instances where supervisory employees have limited authority to hire, promote, or terminate the employment of their victim, then the courts are less likely to render boards strictly liable.

Prevention is the best tool to eliminate claims of sexual harassment. To this end, school boards and officials can take steps to reduce or prevent the occurrence of sexually harassing behavior by establishing, promulgating, and regularly updating their sexual harassment policies. Employees should be notified of the policies and trained on the content and intent of the policies. Appropriately devised policies include a commitment to eradicate and prevent sexual harassment, a definition of hostile environment sexual harassment, an explanation of penalties for sexually harassing conduct, an outline of the grievance procedures, contact persons for consultation, and an expressed commitment to keep all complaints and personnel actions confidential.

Additionally, once school officials are made aware of sexually harassing behavior by subordinates, it is incumbent on them to act and not to be deliberately indifferent to the plight of victims. Officials are likely to be identified as deliberately indifferent if they possess the authority to address the harassing behavior, have actual knowledge of the wrongdoing, and consciously disregard the behavior.

Providing educational training is crucial to identifying signs of sexual harassment. First, training should occur on sexual harassment complaint procedures. Part of this preparation should include information on how to file formal complaints, with whom charges should be filed, timelines for filing, and how to respond appropriately to such charges. Second, because most problems of sexual harassment do not follow formal complaint processes, all employees should be taught to identify potentially harassing behaviors. Regarding

employee behavior that might lead to harassment charges, some behavior is fairly obvious, such as making sexually suggestive comments, giving inappropriate personal gifts, and sending intimate letters or cards. However, some behavior that is not so obvious includes flirting, lingering too long in a hug, engaging in playful exchanges, and leering ("elevator eyes"—staring at an individual with the eyes moving up and down the body). Clearly, dealing with issues of quid pro quo sexual harassment will help to improve conditions in schools for all, students and staff.

Mark Littleton

See also Equal Employment Opportunity Commission; Sexual Harassment; Sexual Harassment, Peer-to-Peer; Sexual Harassment, Same-Sex; Sexual Harassment of Students by Teachers; Title VII; Title IX and Sexual Harassment

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Sexual Harassment, Same-Sex

Sexual harassment is unwelcome conduct of a sexual nature, which is prohibited both by Title VII of the Civil Rights Act of 1964 as it applies to employees and Title IX of the Educational Amendments of 1972 when dealing with students. The genesis of sexual harassment legislation was to forbid employers from hiring and promoting employees on the basis of their gender and to prohibit the conditioning of employment in return for sexual favors.

The Law and Its Enforcement

According to Title VII of the Civil Rights Act of 1964, public school boards and nonpublic schools with more than 15 employees that receive federal financial assistance may be liable for sexual harassment claims. Title VII is enforced by the Equal Employment Opportunity Commission. Title VII addresses harassment only when the perpetrator and the victim are employees. On the other hand, Title IX of the Educational Amendments of 1972 covers employee-to-employee, employee-to-student, and student-to-student harassment. Under Title IX, public and nonpublic institutions receiving federal funds may be liable for sexual harassment of students and employees. The Office for Civil Rights in the U.S. Department of Education enforces Title IX claims.

The early sexual harassment litigation focused on male-female interactions in employment and educational settings. Yet, the U.S. Supreme Court expanded the parameters of prohibited sexual harassment in *Oncale v. Sundowner Offshore Services* (1998). In *Oncale,* the Court ruled that Title VII prohibits sexual harassment when the perpetrator and the victim are of the same sex. Subsequently, while the Supreme Court of Alabama (*H. M. v. Jefferson County Board of Education,* 1998) and Eighth Circuit (*Kinman v. Omaha Public School District,* 1999) agreed that Title IX prohibits the sexual harassment of students by teachers of the same sex, in neither instance had the plaintiffs presented actionable claims. Further, although not reaching the merits of the underlying claim, the Ninth Circuit pointed out that students had a clearly established right not to be harassed by peers based on their actual or perceived sexual orientations (*Flores v. Morgan Hill Unified School District,* 2003).

Same-sex sexual harassment manifests itself in various forms. Often, the harassment is in the form of bullying based on the victims' physical features or sexual orientation. For example, male students who possess delicate features or feminine characteristics may be verbally teased or physically assaulted by same-sex classmates because these characteristics do not portray the example of a "typical" male. Likewise, female students who possess more masculine features may be vilified by their more "typical" female contemporaries.

Students may be bullied because of their sexual orientation. Gay male students may be verbally teased, even ostracized, by their male heterosexual classmates;

on occasion, gay students choose to attempt or commit suicide to escape the emotional trauma. Often, the verbal abuse also leads to physical abuse. Reported abuse of openly lesbian students is less common than is abuse of their male peers.

Incidents of actual reported sexual assault by same-sex students are relatively rare. The few reports may be due to the lack of actual acts of sexual assault or the lack of reported behavior because of the embarrassment on the part of the victim. Same-sex sexual abuse is more common when perpetrators are school employees preying on students.

Avoiding Liability

As noted above, same-sex sexual harassment between students is often associated with bullying. Frequently, students are bullied because of their actual or perceived gay and lesbian sexual orientations. To this end, school boards and educational officials would be wise to establish appropriate preventative measures to avoid bullying behavior. As reflected by the Seventh Circuit's analysis in *Nabozny v. Podlesny* (1996), students who are subjected to harassment by peers due to their sexual orientation may receive significant protection via the Equal Protection Clause of the Fourteenth Amendment.

In addition to preventative measures, school boards should establish, and regularly revise, formal complaint procedures to address instances of bullying and harassing behaviors. At the same time, boards should inform teachers, staff, and students about appropriate behavior with regard to others so as to avoid sexual harassment. Insofar as sexually motivated harassment is frequently unreported, employees should be taught to identify harassing behavior. Same-sex harassment, particularly bullying behavior of students based on their sexual orientation, often begins with lewd gesturing and suggestive name calling, and unless educators intervene, it can quickly lead to physical violence.

Mark Littleton

See also Bullying; Equal Employment Opportunity Commission; Fourteenth Amendment; Hostile Work Environment; Sexual Harassment of Students by Teachers; Title VII; Title IX and Sexual Harassment

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Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998).

Sexual Harassment of Students by Teachers

There is yet no definitive study indicating how prevalent teacher-on-student sexual harassment is. Even so, experts in the field estimate that a minimum of 10% of the student population experiences some form of inappropriate sexual activity with an educator at some time during their public education. Yet, due to the shame and guilt often experienced by students, these same experts suggest that the incidence of sexual misconduct is greater than what is actually reported. This entry briefly discusses legal cases and laws related to such harassment and preventive guidelines for educators.

There is no stereotypical perpetrator of sexual misconduct. Research indicates that teachers are the most common offenders, with others being coaches, administrators, and other school employees. Coaches, as well as others who spend extensive amounts of time with students in extracurricular settings, often develop close relationships with students. These relationships, combined with opportunity, enable the boundaries between educators and students to become blurred, leading to

inappropriate sexual relationships. Offenders tend to be, but are not exclusively, males who have been deemed to be trustworthy, popular, and model educators. The perpetrators are seldom predators, meaning that they do not enter the profession to prey on the students. In retrospect, the perpetrators usually experience deep feelings of guilt and shame in light of their conduct.

Legal Cases

In *Franklin v. Gwinnett County Public Schools* (1993), a male high school teacher coerced a female student into sexual intercourse. In a landmark decision, the Supreme Court unanimously reasoned that Title IX of the Educational Amendments of 1972 was an appropriate vehicle for a student to pursue damages related to a sexual harassment claim. The Court specified that having a statute such as Title IX in place, yet not offering any remedy, would have left victims without redress. Subsequently, in *Gebser v. Lago Vista Independent School District* (1998), the Supreme Court essentially rejected the notion that a school board can be essentially strictly liable for the inappropriate sexual relationship that a teacher had with a student. The Court determined that an award of damages would have been inappropriate, because no school official with the authority to address the discrimination had knowledge of the act. As such, the Court was of the opinion that because there could not have been deliberate indifference to the Title IX violation, the board was not at fault.

Two federal statutes address incidents of sexual harassment. The first, Title VII of the Civil Rights Act of 1964, is an employment statute that prohibits discrimination on the basis of race, color, national origin, religion, and sex. Under Title VII, private and public institutions with 15 or more employees are liable for acts of supervisors and employees who sexually harass, and Title VII is enforced by the Equal Employment Opportunity Commission.

The second law, Title IX of the Education Amendments of 1972, is an educational statute that prohibits disparate treatment of individuals in educational institutions on the basis of sex. Under Title IX, private and public institutions receiving federal funds may be liable for the inappropriate actions of students and/or school personnel. Title IX is enforced by the Office for Civil Rights in the U.S. Department of Education.

Educator Guidelines

Identifying sexual misconduct is not an easy task, but there are some indicators that inappropriate behavior may be occurring. One indicator is overly affectionate behavior such as hugging or touching. Related indicating behavior is telling jokes of a sexual nature or using suggestive terms in conversation. Telephone visitation and conversations of an intimate nature between the educator and student are additional indicators of inappropriate relationships.

Unnecessary visitations beyond the school day are another sign. Those educators who extend their work days to assist students are often hard-working dedicated individuals seeking to make a difference in the lives of students. Yet, perpetrators frequently use this contact as a means of grooming the student for future sexual activity. Likewise, student-initiated contact may be an attempt to violate appropriate educator–student boundaries.

Finally, complaints and innuendos of an inappropriate relationship between an educator and student are indicative of sexual misconduct. These "rumors" should be taken seriously and be properly investigated. In some instances, consensual sexual activity occurs between an educator and a student who is of consensual age. The age of consent varies greatly from state to state, ranging from 15 to 18. Nevertheless, most states have laws or ethics codes that prohibit inappropriate sexual conduct between an educator and student regardless of the student's age.

In order to combat teacher-on-student sexual harassment, school officials should establish clear written policies that delineate and prohibit inappropriate relationships. Additionally, school personnel should be diligent in the scrutiny of prospective employees and should train employees on how to avoid inappropriate relationships and identify signs of misconduct. Finally, school board policymakers should identify individuals to serve as investigators of allegations and rumors. Although a sense of teacher guilt is imbedded in these recommendations, experts caution policymakers to

avoid establishing a climate of suspicion. In such a climate, innocent teachers may believe that false accusations and vendettas against demanding teachers would become commonplace, although studies indicate that such accusations are rare.

Mark Littleton

See also *Franklin v. Gwinnett County Public Schools; Gebser v. Lago Vista Independent School District;* Hostile Work Environment; Sexual Harassment; Sexual Harassment, Quid Pro Quo; Sexual Harassment, Same-Sex

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Sexuality Education

Sexuality education is the curricular area that addresses human sexual development, identity, and orientation as well as sexual behavior across the life span. Historically, public school systems began offering sexuality education classes in the early 20th century, in Chicago. However, these early classes were generally limited to issues of personal health and what was called, at that time, "social hygiene." Explicit sexuality education did not become commonplace in the public school curriculum until the 1970s, even though many comparable programs were housed under the more neutral sounding titles of "health education" or "family life education."

By the late 1970s, a growing resistance mobilized against such programs. In addition to harboring hostility toward the civil rights movement and other social liberation movements, opponents focused on public school policies that they believed promoted godlessness and immorality. Given the opposition's deep unease with public discussions of sexuality in general and adolescent sexuality in particular, rescinding sexuality education classes became a favorite target for their activism. During the 1980s and 1990s, opposition activists launched a series of court challenges to these programs, but they found little success (see *Brown v. Hot, Sexy & Safer Productions,* 1995). Further, to date, no decisions from the U.S. Supreme Court directly address this point. Consequently, activists refocused their efforts in reshaping extant policies and procedures at all levels of governance, whether local, state, or federal.

Ironically, the HIV/AIDS pandemic indirectly assisted opponents of comprehensive sexuality education. Across the United States, public school districts without sexuality education programs, or those employing perfunctory curricula, embraced sexuality education as part of the larger public health response to HIV/AIDS. As a result, activists realized that they would not be able to remove sexuality education entirely from public school curricula. To this end, opponents of comprehensive sexuality education refocused their efforts by promoting "abstinence-only" sexuality education or curricula that focused on encouraging adolescents to refrain from sexual activity until marriage. While the efficacy of these programs has long been questionable at best, with a political change in the U.S. Congress in 1994, abstinence-only sexuality education found friendly, and national, political support. By 1996, then-President Clinton signed into law the first federally funded abstinence-only sexuality education program.

Currently, while the federal government continues to fund abstinence-only education, even if it is now doing so at reduced levels, there is wide public support for comprehensive sexuality education, not abstinence-only. Additionally, questions remain about

whether the content of many of the federally funded abstinence programs is factually accurate. Moreover, the evaluation research regarding this federal program indicates that students who have participated fail to refrain from initiating sexual activity prior to heterosexual marriage and may be more likely to engage in high-risk sexual behavior, in particular, regardless of their sexual orientations or genders.

Citing the overwhelming public health evidence, local school boards can make strong legal arguments in support of comprehensive sexuality programs, particularly by invoking "compelling state interest" in reducing sexually transmitted diseases as well as unintended pregnancy. Additionally, there is evidence that some of the established abstinence-only programs may run afoul of the Establishment Clause in the First Amendment to the U.S. Constitution by invoking religious justifications for stressing sexual abstinence until heterosexual marriage. However, in some locales, the political risks for local board members and administrators of embracing comprehensive sexuality education would probably outweigh these legal considerations.

Catherine A. Lugg

See also Sexual Orientation

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Sexual Orientation

Sexual orientation is the proclivity or capacity for romantic love. All human beings have a basic sexual orientation, which can range from homosexual (individuals fall in love with people who are their same biological sex) to bisexual (individuals can fall in love with individuals of various biological sexes) to heterosexual (individuals fall in love with people who are of what is historically considered "the opposite sex"). According to the psychological research literature, individuals' sexual orientations are well established by the age of five and are highly resistant, if not impossible, to change. Individuals who have a nonheterosexual sexual orientation are currently understood to be lesbian, gay, or bisexual; collectively, the acronym is LGB.

Variations in human sexual orientation have existed across history and cultures. Even so, beginning in the late 19th century, officials in the United States criminalized sexual behavior that was nonheterosexual. By the 1920s, all states had made same-sex consensual sexual behavior a felony. This situation did not end until the 2003 U.S. Supreme Court's decision in *Lawrence v. Texas,* which ruled that all laws banning consensual sodomy, whether by cross-sex or same-sex couples, were unconstitutional.

Complicating this picture is that gender, or how individuals express their understandings of what it means to be male or female, has historically been used as a proxy for sexual orientation. Simply stated, if persons did not "do" their gender correctly, particularly effeminate men, the cultural assumption was that they were "queer" or homosexual, regardless of their actual orientation. Consequently, gender transgressors could be, were, and in some instances, still are fired from their jobs as well as harassed by their peers and law enforcement officials.

For educators working in public schools, the conflation of sexual orientation and gender meant that both male and female educators have had to adhere to rigid gender roles or face the loss of their positions. Additionally, because sexual orientation was equated with intrinsic criminality, states maintained bans on

lesbian, gay, and bisexual school personnel. Heterosexual marriage was expected for male educators throughout the bulk of the 20th century. At the same time, many school boards actually banned married women from serving as teachers under the sexist logic that women could not satisfy both their husbands and their educational responsibilities. However, after World War II, a combination of greater awareness regarding human sexuality, rampant homophobia, particularly in the field of educational administration, and a dire need for public school teachers in light of the ongoing baby boom opened the doors wide to married female teachers. By the 1970s, female educators were expected to marry just like their male peers.

Since the 1970s, sexual orientation has served as a flashpoint in the politics of education. There have been numerous political battles at the local, state, and federal level as both a growing LGB civil rights movement and Protestant Right political activists have clashed over many aspects affecting public schooling policy.

Currently, the status of sexual orientation vis-à-vis American public schooling is dominated by policy incoherence. On the one hand, 20 states and Washington, D.C., outlaw discrimination based on sexual orientation, and another 6 jurisdictions have statewide policies that ban harassment and/or discrimination based on sexual orientation in public schools. On the other hand, 15 states provide no protection whatsoever regarding sexual orientation and public schooling. In addition, 8 states have "no promo homo" laws on the books. These laws prohibit the "promotion of homosexuality" by public school officials. Broadly construed and probably unconstitutional, no promo homo laws serve to stigmatize and silence individuals who have either a homosexual or bisexual sexual orientation. Until federal legislation is enacted, this policy incoherence involving sexual orientation and public schooling is likely to continue.

Catherine A. Lugg

See also Gay, Lesbian and Straight Education Network (GLSEN); Gay, Lesbian, Bisexual, and Transgendered Persons, Rights of; Sexual Harassment, Same-Sex

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Shelton v. Tucker

In *Shelton v. Tucker* (1960), the issue before the U.S. Supreme Court was whether a state statute requiring all public school educators to disclose every organization to which they belonged over a five-year period was unconstitutional. In its 5-to-4 ruling, the Court held that the broad requirements of the statute were unconstitutional, because it went beyond the scope of legitimate and substantial inquiries of teacher fitness and competency.

Facts of the Case

Shelton revolved around an Arkansas statute that required all public school teachers, administrators, and college faculty to make annual reports of their organizational affiliations for the preceding five years. Initially, plaintiffs filed two separate actions challenging the statute. One case went through the federal courts, while the other worked its way through state courts in Arkansas.

In the federal case, Shelton, a 25-year veteran teacher in the Little Rock public school system, did not file his affidavit that listed his organizational affiliations. As a result, the board chose not to renew his employment contract, and he filed suit. At trial, the evidence demonstrated that Shelton was a member of the National Association for the Advancement of Colored People and not a member of any subversive organization. The lower federal courts upheld the statute and declared it constitutional.

Similarly, at the state court level, a faculty member at the University of Arkansas and a public school teacher at Little Rock also declined to file the affidavits of organizational associations, and their contracts were not renewed. At trial, these plaintiffs also indicated that

they did not have any affiliations with subversive organizations. As the case continued through the appellate process, the Arkansas Supreme Court upheld the statute and declared it constitutional. As the plaintiffs in both cases pursued further appeals, the litigation was eventually brought to the attention of the U.S. Supreme Court, which consolidated them as one case.

The Court's Ruling

In *Shelton,* the Supreme Court balanced the governmental interest in evaluating the fitness and competence of educators by means of knowing their organizational affiliations with the right of individuals to exercise their constitutional liberties. Providing a general rule of law, the Court declared that when the government has a legitimate and substantial interest, it may act to achieve those purposes. However, in achieving those purposes, the Court explained that the government cannot infringe on fundamental individual rights with the exercise of broad authority when narrowly tailored provisions could achieve their goals.

Applying established legal rules to *Shelton,* the Supreme Court recognized a fundamental problem with the Arkansas statute insofar as its scope was apparently limitless. In other words, the Court found that the statute was too broad, that it constrained liberties, and that it could be more narrowly written so as to not restrict more freedoms than necessary. The Court noted that many of the organizational affiliations that educators might report would have no connection to matters related to teacher fitness and competence. Moreover, the Court indicated that public disclosure of the reported affiliations might lead to pressures from groups outside the public schools to discharge a teacher if the teacher were affiliated with an unpopular organization.

Taking these reasons as a whole into consideration, the Court struck down the Arkansas statute. According to the Court, the statute violated the federal Constitution, because it was not narrowly tailored to achieve its goals; instead, the statute had an "unlimited and indiscriminate sweep" that resulted in infringement of individual rights.

Shelton does not remove school administrators' professional autonomy in the selection process of potential staff and in the evaluation process for existing staff. Yet, it does demonstrate the need to balance governmental interests in legitimate inquiry with individual interests in associational affiliations. As the Supreme Court essentially reasoned in *Keyishian v. Board of Regents* (1967), and as many other judicial opinions subsequently emphasized, the protection of constitutional freedoms is nowhere more vital than within our schools.

Jeffrey C. Sun

See also First Amendment; *Keyishian v. Board of Regents;* Teacher Rights

Further Readings

Note: Less drastic means and the First Amendment. (1969). *Yale Law Journal, 78*(3), 464–474.

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Single-Sex Schools

Single-sex schools are gender-specific schools. While the existence of single-sex education in nonpublic schools, whether nonsectarian or religiously affiliated, especially in Roman Catholic schools, has always been legally permissible, the legality of publicly supported single-sex schools continues to be challenged actively and questioned in the courts. While the overall number of public single-sex schools in the United States is relatively small, it is growing, especially in the wake of the passage of the No Child Left Behind Act (NCLB) (2002). This entry discusses the related legal issues.

Background

According to the National Association for the Advancement of Single Sex Public Education (NASSPE), there are currently over 200 single-sex, public, K–12 schools operating in the United States. Thirty-three states presently have at least one public single-sex school, with Ohio and New York having the most with a total of 10 each. Founded in 1844, the

oldest single-sex public school, Western High School, located in Baltimore, Maryland, is still in existence. A more recent and widely publicized public school endorsing gender separation in the schooling process, Young Women's Leadership School, was created in 1996 by former journalist Ann Rubenstein Tisch in New York City.

Advocates of public single-sex schools contend that there exists a sizable amount of scientific research that demonstrates that female students are extremely underrepresented in the subject areas of math and science. According to these advocates, single-sex schools would address current gender bias in mathematics and science while promoting female student achievement and entry into mathematics and science career paths. Other advocates have called for the creation of all-male academies in an attempt to limit school violence. On the other hand, opponents to public single-sex schools respond that the creation of such schools promotes sex-based segregation analogous to the race-based segregation that was outlawed in *Brown v. Board of Education of Topeka* (1954).

The central legal question surrounding single-sex schools is whether public school boards can create publicly supported, gender-specific schools as a means to improve student achievement. Since the passage of the NCLB, the controversy of the legality of public, single-sex schools has escalated. In 2004, the U.S. Department of Education released guidelines that would potentially endorse publicly supported single-sex schools if students attended them voluntarily. In its efforts to close the achievement gap by placing an increased emphasis on accountability, flexibility, and choice, the NCLB currently allows federal money to be used for innovative educational initiatives, including single-sex schools as a means of improving student achievement.

The two primary federal sources of legal authority that cover the issue of single-sex schools are the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution and Title IX of the Education Amendments of 1972. Both the Equal Protection Clause and Title IX expressly prohibit discrimination on the basis of gender.

Supreme Court Statements

The only case to reach the U.S. Supreme Court directly on the issue of public, single-sex, K–12 schools was *Vorchheimer v. School District of Philadelphia* (1977). In *Vorchheimer,* a female high school honors student sued her school board under the Equal Protection Clause based on its refusal to admit her to a prestigious all-boys public high school. After a federal trial court ordered the student's admission, the Third Circuit reversed in the board's favor. The court was of the opinion that while the all-boys and all-girls high schools were separate, they were essentially equal in terms of educational quality. In a highly contentious, 4-to-4 split decision, with Chief Justice William Rehnquist not participating in the resolution of the case, the Supreme Court chose not to issue a written opinion.

Yet, insofar as the Court was deadlocked, its inability to reach a clear outcome meant that the earlier order denying the female admission to the all-boys public school remained in place. Conversely, in the context of higher education, in *United States v. Virginia* (1996), the Court ruled that the inability of officials at the Virginia Military Academy to justify the institution's policy of denying admission to women meant that it violated the Equal Protection Clause.

Until such time as the Supreme Court explicitly answers the question of whether public single-sex schools are legal, judicial controversies questioning their place in the current American public school landscape will undoubtedly continue. At the same time, the Equal Protection Clause and Title IX contain legal language suggesting that single-sex schools are constitutionally suspect and unlawful. Even so, the recent standards-based reform movement and its focus on enhancing student achievement along with accountability for educators has provided single-sex schools new opportunities to test their success at improving student achievement levels, especially for middle- and high-school-aged girls in the mathematics and science curriculum. The recent passage of the NCLB in conjunction with specific guidelines promulgated by the U.S. Department of Education allowing the possibility of

voluntary, single-sex classrooms has fueled the climate for public school systems nationwide to experiment with single-sex schooling.

Kevin P. Brady

See also Catholic Schools; Equal Protection Analysis; No Child Left Behind Act; Nonpublic Schools; *United States v. Virginia*

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Singleton v. Jackson Municipal Separate School District

Singleton v. Jackson Municipal Separate School District (1981) stands out as the culmination of a long-running dispute over setting an appropriate guide for integrating a school system. In this final iteration of the case, a federal trial court ruled that insofar as the school board met the criteria for achieving unitary status with regard to students, because it had been in compliance with its desegregation order since 1971, it was entitled to a release from its desegregation decree.

Facts of the Case

The dispute in *Singleton* began in 1963, when 10 school-aged children filed suit against their school board, asserting they had been irreparably injured by its failure to maintain unitary or desegregated schools. The plaintiffs alleged that the board ignored precedent from the U.S. Supreme Court directing school boards to create unitary school systems immediately (*Alexander v. Holmes County Board of Education,* 1969). The plaintiffs claimed that the board also ignored the six criteria that the Supreme Court declared should be used to determine whether school systems had achieved unitary status in *Green v. County School Board of New Kent County* (1968). These factors address the composition of a student body, faculty, staff, transportation, extracurricular activities, and facilities.

The trial court later found that the school board achieved unitary status with respect to five of the six established *Green* factors: faculty, staff, transportation, extracurricular activities, and facilities. Insofar as the remaining area of concern dealt with the desegregation of the student body, the board sent the court a new plan. The court accepted the plan for desegregating the secondary schools but not the elementary schools. In June of 1971, the court accepted a plan for desegregation of the elementary schools, and since that time, all parties agreed that the system had been desegregated. In 1981, when the board petitioned to have its desegregation order terminated, several persons opposed its request in order to assure continued protection for minority students.

The Court's Ruling

In resolving the dispute, the trial court noted the school board achieved unitary status in 1971 under the six *Green* factors. In the most significant aspect on one of the earlier rounds of litigation, and the proposition for which the Fifth Circuit's 1969 judgment in *Singleton* is remembered, the court was satisfied that the board demonstrated that it had desegregated its teaching

faculty. At that time, the Fifth Circuit acknowledged that the board succeeded, to the fullest extent possible, in ensuring that students were taught by both Black and White teachers and that the ratio of Black to White teachers was appropriate. Additionally, the trial court reiterated the Fifth Circuit's holding that board officials proved that there was a racial balance in the distribution of administrative authority and that no one had mounted a successful challenge to the board's racial hiring practices in over a decade.

Turning to transportation and extracurricular requirements, the court pointed out that the Office of Civil Rights (OCR) had issued an order stating that the school board's policy of providing free transportation to all students who lived more than nine-tenths of a mile from their assigned schools was nondiscriminatory. The court also commented on the OCR's investigation of allegations of discrimination in the board's extracurricular programs, maintaining that there were no racial barriers for students who wished to participate.

The court next determined that the school board's facilities were desegregated and that its facility use policy, which required persons requesting use of facilities to agree, in writing, not to engage in or permit discriminatory activities, was nondiscriminatory. The court further observed that the board's commitment to desegregation was exemplified by its construction of four, new, fully integrated schools over the past 10 years.

Rounding out its judgment, the court added that while "desegregation plans are more optimistic than the actual result" (p. 909), the school board had met the standards for student assignments and accomplished its desegregation goals. At the same time, the court indicated that due to "White flight" and other demographic shifts, the board, on several occasions, found it necessary to alter its attendance zones. Insofar as the board adopted a policy of creating representative teams to make rezoning decisions, the court was satisfied that there were no claims of discrimination regarding school assignments and redistricting. To the extent that the board was able to demonstrate it met and continued to meet each of the six *Green* factors, the court concluded that it was no longer required to operate pursuant to a desegregation order.

Brenda R. Kallio

See also Dual and Unitary Systems; *Green v. County School Board of New Kent County;* White Flight

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Skinner v. Railway Labor Executives' Association

In *Skinner v. Railway Labor Executives' Association* (1989), the U.S. Supreme Court upheld the constitutionality of a drug-testing program for railroad employees in positions that had an impact on safety. Pursuant to *Skinner,* along with its companion case, *National Treasury Employees Union v. Von Raab* (1989), public employers may, under some circumstances, be able to require their employees to submit to suspicionless drug and alcohol testing. Although *Skinner* was not set in an educational context, it raises interesting questions about testing of school employees.

Facts of the Case

During the 1980s, the United States began fighting the "war on drugs." Consequently, all governmental agencies were charged with developing better safety standards and implementing new regulations to help in this battle in the workplace. In this context, the Federal Railroad Administration (FRA) in 1985 adopted regulations that subjected employees in safety sensitive positions to blood and urine tests either for "reasonable cause" or after they were participants in a variety of specified major train accidents that involved deaths or damages of more than $50,000 to railway property. The purpose of the testing program was to prevent further or future accidents that might have occurred due to empoyees' consumption of drugs or alcohol. Employees who refused to submit to testing were

rendered unfit to work for 9 months but were entitled to hearings about their refusals to cooperate.

In response to the FRA's promulgation of the testing regulations, a group of employees challenged the drug and alcohol testing program. After a federal trial court in California upheld the program's constitutionality, the Ninth Circuit reversed in favor of the employees. At the heart of its analysis, the court deemed that the program violated the Fourth Amendment, because it tested for drugs and alcohol regardless of whether there was suspicion that employees engaged in the use of illegal drugs. On further review, the Supreme Court reversed in favor of the government.

The Court's Ruling

At the outset of its opinion, the Supreme Court acknowledged that the disputed program constituted a "search" within the meaning of the Fourth Amendment, insofar as the testing of railway employees was compelled as a result of a governmental initiative. Therefore, the Court was of the opinion that it was necessary to address the question of "reasonableness" in conducting the search. In other words, the Court sought to review the balance between the intrusiveness of any drug test against the legitimate governmental interest of promoting safety. In so doing, the Court relied on the concept of "special needs" outside normal law enforcement channels in finding that the testing program was designed to be used in situations wherein the probable cause and warrant requirements simply were not practicable. The Court further explained that while the Fourth Amendment's warrant requirement was designed to protect individuals' expectations of privacy, the regulations only required testing under clearly defined circumstances.

The Supreme Court reasoned that requiring railway officials to obtain warrants would have done little to advance the government's compelling interest in ensuring railway safety. In justifying its rationale, the Court pointed out that the employees knew not only that they were working in a highly regulated industry but also that the regulations were an effective means of deterring those who worked in safety sensitive positions from using drugs or alcohol. The Court decided that requiring the government, through the railway's managers, to rely on individualized suspicion that employees engaged in drug or alcohol use would seriously impede them in carrying out their duty to obtain important information. The Court thus concluded that the government's compelling need to test employees under the circumstances described in the regulations outweighed any justifiable expectations of privacy that crews might have had to avoid testing.

Marilyn J. Bartlett

See also Drug Testing of Teachers; *National Treasury Employees Union v. Von Raab; O'Connor v. Ortega*

Legal Citations

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
O'Connor v. Ortega, 480 U.S. 709 (1987).
Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989).

Sloan v. Lemon

Sloan v. Lemon (1973) was the last of three related church–state cases that the U.S. Supreme Court considered between 1971 and 1973. At issue in *Sloan* was whether the Commonwealth of Pennsylvania could reimburse parents for the tuition that they paid to send their children to religiously affiliated nonpublic schools. Based on its earlier judgment in *Lemon v. Kurtzman* (*Lemon I*) in 1971, in *Sloan,* the Court held that the statute permitting reimbursement was unconstitutional under the Establishment Clause of the First Amendment, because it impermissibly advanced religion. Knowledge of the facts in *Lemon I* is essential in understanding the Court's subsequent decision in *Sloan.*

In *Lemon I,* the Supreme Court first articulated its now-famous *Lemon* test, a three-pronged standard for use by the courts in adjudicating cases involving the issue of church–state separation. Under the *Lemon* test, a law or policy must have a secular purpose, must neither advance nor inhibit religion (i.e., it must be neutral), and must not foster excessive government entanglement with religion.

In *Lemon I,* the Court considered whether laws from Rhode Island and Pennsylvania authorizing state aid to nonpublic schools were constitutional. Both laws focused on improving secular education within nonpublic, primarily church-related elementary and secondary schools. The Rhode Island law provided state supplements for salaries of those teaching secular courses, while the Pennsylvania statute authorized state funding for various secular instructional costs. The Court declared both laws unconstitutional on the basis that they fostered excessive entanglement between government and religion because of the state bureaucracy that would have been necessary to ensure that public funds were used only to support secular instruction. *Lemon I* invalidated a number of contracts between religious schools and state governments that had been consummated in good faith prior to the final ruling.

Two years later, in *Lemon v. Kurtzman II* (1973) (*Lemon II*), the Supreme Court permitted the government to reimburse church-related schools for costs of secular instruction incurred prior to invalidation of the two state laws. The Court reached this outcome because it was satisfied that the plaintiffs had not sought interim injunctive relief, the related services had already been provided, denial of payment would have had serious financial consequences on private schools that relied on the state's formal agreement, and there was no possibility of continuing entanglement, because the contractual relationship legally could not continue beyond the final payments that the Court authorized for the 1970–1971 school year.

The Supreme Court handed down its opinion in *Lemon I* on June 28, 1971. On August 27, 1971, the Pennsylvania General Assembly, seeking to avoid the entanglement issue that doomed its previous aid statute, passed a new law authorizing direct reimbursements to parents for tuition expenses incurred in sending their children to sectarian and other nonpublic schools. The new statute specifically precluded any governmental control over policy determination, personnel, curriculum, or any other administrative function in the nonpublic schools. Further, the law imposed no restrictions or limitations on how the reimbursements could be used by qualifying parents. The intent, of course, was to distance public authority and oversight as far as possible from the operation of religious and other nonpublic schools. Clearly, the General Assembly's intent was to disentangle church and state in accordance with the third prong mandate in the *Lemon* test. The plaintiffs challenged the new law immediately.

After considering the facts in *Sloan,* the Supreme Court concluded that Pennsylvania officials impermissibly singled out a class of citizens for special economic benefit and "whether that benefit [was] viewed as a simple tuition subsidy, as an incentive to parents to send their children to sectarian schools, or as a reward for having done so" (p. 832), the ultimate result was to preserve and support religious institutions. Ironically, while trying to avoid the church–state entanglement prohibited by the third prong of the *Lemon* test, the General Assembly passed a law that was interpreted as clearly advancing the cause of religion, a direct violation of the second prong of the test. In the end, the Court held that the statute was also unconstitutional under the Establishment Clause, not because it fostered entanglement, but because it had the impermissible effect of advancing religion. The Court concluded that the law was not severable so as to permit continuing tuition assistance to parents who send their children to private nonsectarian schools.

Robert C. Cloud

See also State Aid and the Establishment Clause; *Lemon v. Kurtzman; Walz v. Tax Commission of the City of New York*

Legal Citations

Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973).
Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).
Lemon v. Kurtzman I, 403 U.S. 602 (1971).
Lemon v. Kurtzman II, 411 U.S. 192 (1973)
Sloan v. Lemon, 413 U.S. 825 (1973).
Walz v. Tax Commission of the City of New York, 397 U.S. 664 (1970).

Smith v. City of Jackson, Mississippi

Insofar as *Smith v. City of Jackson, Mississippi* (2005) involved a dispute over age discrimination in public

employment, it should be of interest to educators. At issue in *Smith* was the nature of the relationship between the legal concept of "disparate impact" and the Age Discrimination in Employment Act of 1967 (ADEA). The Court's decision in *Smith* was such a narrow interpretation of the ADEA that it has placed the future of the law's viability in jeopardy as a tool to protect employees. *Smith's* importance rests in the fact that it calls on public employers, including school boards and other educational institutions, to offer valid explanations for practices that hint at having a disparate impact on older employees. *Smith* enabled the Court not only to consider whether documents can sustain claims but also to examine the extent to which disparate impact allegations depend on the proof requirements.

Facts of the Case

The dispute in *Smith* began in 1999 when a police department enacted a pay plan for its officers. On its face, the plan appeared logical by placing the officers on pay steps based on rank, time in service, and current salary. In an attempt to help keep its younger officers, the city paid them proportionally higher step raises than their older colleagues. As a result, 30 officers who were over the age of 40 filed suit under the ADEA, alleging disparate treatment and disparate impact.

A federal trial court in Mississippi granted the city's motion for summary judgment in pointing out that the officers failed to establish that officials acted with intent to discriminate. On appeal, the Fifth Circuit affirmed that a disparate impact claim is not cognizable under the ADEA. The U.S. Supreme Court agreed to hear a further challenge to resolve whether disparate impact could be made cognizable under the ADEA.

The Court's Ruling

On further review, the Supreme Court affirmed in favor of the city. As an initial matter, it is important to note the difference between disparate treatment and disparate impact, two legal theories of recovery in discrimination law. *Disparate treatment* pertains to actions taken by governmental agencies against individuals who are members of constitutionally protected groups or classes. In *Smith,* for example, the protected group was police officers over the age of 40. In addition, plaintiffs must be able to prove that defendants acted with intent to discriminate. On the other hand, *disparate impact* refers to policies that look fair on their face and have no apparent discriminatory intent but are discriminatory in actual practice. In *Smith,* the policy appeared to be fine, insofar as it was designed to give the younger police officers extra boosts in their pay to the detriment of the older police officers whose pay was sufficiently high. Yet, in practice, the older officers lost a tremendous amount of money. Disparate treatment claims may be filed under Title VII and the ADEA. Disparate impact claims are covered by Title VII, but until *Smith,* the Court did not recognize this claim under the ADEA.

In a plurality order, the Supreme Court was of the opinion that while disparate impact causes of action are cognizable under the ADEA, the plaintiffs failed to demonstrate their claim. In its analysis, the Court found that even though the older officers were able to show that they were being paid considerably less than their younger colleagues, they could not point to any employment procedures that would have explained the disparities. In addition, the Court reasoned that what appeared to be the disparate impact caused by the new payment plan could have been based on reasons other than age, such as seniority and position. To this end, the Court acknowledged that because city officials were trying to raise the level of wages of the younger police officers in order to remain competitive with the surrounding cities in an attempt to not lose the officers, the payment plan was justifiable.

Smith stands out as noteworthy, because it established what public employees need to prove in order to prevail in disputes involving claims of disparate impact under the ADEA. While the actual resolution of the legal question in *Smith* was as important as its outcome, equally significant is that it may make employers accountable for their actions and policies regarding creative pay systems.

Marilyn J. Bartlett

See also Age Discrimination in Employment Act; Teacher Rights

Further Readings

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Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).
Smith v. City of Jackson, Mississippi, 544 U.S. 228 (2005).
Wards Cove Packing Co. v. Antonio, 490 U.S. 642 (1989).

Smith v. Robinson

The U.S. Supreme Court's judgment in *Smith v. Robinson* (1984) stands out as noteworthy because it spurred Congress to amend the Education for All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act (IDEA) substantively two years later. Under the legislative change, parents who successfully litigate their claims against their school boards can recover reasonable attorney fees.

Facts of the Case

Smith was the final chapter in a lengthy dispute between parents and school officials regarding the obligations of a school board under the IDEA. After the parents prevailed in their challenge in a federal trial court in Rhode Island, they requested that their school board reimburse them for attorney fees. The parents argued that they should have been able to recover those expenditures, because they would not have had to expend them had school officials met their obligation to their child in the first place. The federal trial court granted the parents' request for attorney fees, but the First Circuit reversed in favor of the school board.

The Court's Ruling

On further review, the U.S. Supreme Court affirmed in favor of the school board. While accepting that the EAHCA had no explicit language to guide the matter, the plaintiffs urged the Court to read an implied right to recovery for parents who prevailed in challenges against local school officials. The Court was sympathetic to the parents' plight in *Smith* but adopted a narrow reading of the statute. Simply put, because the Court could not uncover a discussion in the text or legislative history of the EAHCA dealing with the availability of attorney fees as a remedy in the face of a finding that educators denied students their rights under the EAHCA, it refused to craft one judicially. Instead, the Court reasoned that only Congress could create the fee-shifting provision that the parents sought.

Acting in response to *Smith,* two years later, Congress modified the law with the passage of the Handicapped Children's Protection Act (HCPA). The sole purpose of the HCPA was to revise the EAHCA/IDEA to add a fee-shifting provision that explicitly allows parents to recover reasonable attorney fees from local school officials if they prevail in challenges under the statute. The amendments direct courts to ensure that fees are calculated according to local costs and allow judges the discretion to reduce recovery if parents protract proceedings by unreasonably refusing to accept good-faith settlement agreements. In essence, while parents must first prevail in order to recover fees, these provisions guarantee that if they are correct, they will not have to bear the financial burden of advocating for the rights of their children.

The provisions that the HCPA added remain in the current version of the IDEA. More recently, the Court was asked to consider their scope in *Arlington Central School District Board of Education v. Murphy* (2006). At issue was whether IDEA's fee-shifting provision allowed parents to recover the costs of experts if they prevailed in challenges brought under IDEA. Just as in *Smith,* the Court refused to find an implied right to recovery in the absence of explicit language to that effect. Whether Congress will follow the lead that it set in *Smith* and again amend the IDEA to revise the fee-shifting provision remains to be seen.

Julie F. Mead

See also *Arlington Central School District Board of Education v. Murphy;* Attorney Fees; Parental Rights

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Legal Citations

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Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Smith v. Robinson, 468 U.S. 992 (1984).

Social Sciences and the Law

Muller v. Oregon (1906) is widely considered the earliest instance in which the Supreme Court used social science research to support its conclusions. In upholding the constitutionality of legislation that limited the number of hours women could work, the Court drew extensively from Louis Brandeis's brief, which reviewed social science and medical research to argue that long working hours had a negative effect on women's health. The Court's use of the arguments in the Brandeis brief marked an important turning point between 19th century and 20th century legal thought.

The dominant understanding of the law during the 19th century was that the law was a set of formal, neutral, and apolitical rules to be applied deductively to the issues in particular cases. Often described as legal formalism, this view was challenged in the early 20th century by legal realists who argued that law was a social activity and, as a result, social science evidence should be used to make law in instances when existing legal rules were inadequate for resolving legal questions.

Perhaps the most famous—or for some, infamous—use of social science research in judicial decision making is footnote 11 of the Supreme Court's opinion in *Brown v. Board of Education of Topeka* (1954). To support the contention that segregation was harmful to Black students, Chief Justice Earl Warren provided references to social science studies, which he described as "modern authority."

The NAACP's strategy of using social science research to build its case against school segregation developed slowly and was influenced in part by the case of *Mendez v. Westminster* (1946). In *Mendez,* a group of Mexican American parents won their suit, which contested the segregation policies of four Southern California school districts that required their children to attend different schools than White students attended. The Ninth Circuit upheld the trial court's ruling in *Westminster v. Mendez* (1947) after the school boards appealed. *Mendez* was significant for two reasons. First, it was widely interpreted as a sign that the doctrine of segregation was becoming less socially and legally tenable. Second, it was the first case in which social science evidence was used to challenge school segregation. Two expert witnesses for the plaintiffs argued that segregation was a form of discrimination that taught Spanish-speaking Mexican American students they were inferior to their White English-speaking peers. When the school districts appealed the lower court's decision, a number of prominent civil rights organizations filed amicus briefs in support of the Mexican American students and their families, including the NAACP and the American Jewish Congress (AJC). Both the NAACP and the AJC's briefs directly challenged the constitutionality of segregation using evidence from social science research to support their legal arguments.

After the Ninth Circuit Court's decision in 1947, the NAACP started to articulate a strategy for directly challenging the constitutionality of segregation. As the NAACP lawyers developed this tactic, with the assistance of other civil rights organizations, they started to marshal an extensive body of social scientific evidence against segregation. For example, as the case of *Sweatt v. Painter* (1950) was argued in the Texas courts in 1947, Thurgood Marshall used the testimony of anthropologist Robert Redfield to make the case that segregation has "irrevocably detrimental effects," even in the case of absolute equality of conditions between the "separate" school and the majority school.

The NAACP expanded its use of social science evidence against segregation in *Brown* and its companion cases as they were argued in the lower courts. Kenneth and Mamie Clark's doll experiments are the most famous of the studies that the NAACP used to challenge segregation. However, the Clarks were two among many expert witnesses appearing on behalf of the plaintiffs; 36 social scientists and educators provided testimony in support of the NAACP's legal arguments. This testimony was incorporated into the documentation provided to the Supreme Court as they considered the cases and debated in oral arguments. In addition, Kenneth Clark and fellow psychologists

Isidor Chen and Stuart W. Cook developed a summary of the social scientific evidence against segregation. Titled "The Effects of Segregation and the Consequences of Desegregation: A Social Science Statement" and signed by 32 prominent social scientists and physicians, the document synthesized the contemporaneous social science research on the social and psychological effects of segregation and the possible impact of desegregation. This document was filed as an appendix to the NAACP's brief in *Briggs v. Elliot.* Only five social scientists offered testimony on behalf of the defendant districts.

In the decades that followed, the Supreme Court's use of social science research in *Brown* was widely criticized. Some scholars argued that the Court should have reached the conclusion that segregation was unconstitutional solely on legal grounds. Others questioned the reliability of the social science evidence cited by the Court. Nonetheless, social science research continues to be an important influence on the legal arguments in desegregation, school financing, and affirmative action cases. For example, writing for the majority in *Grutter v. Bollinger* (2003), Justice Sandra Day O'Connor reaffirmed the use of diversity in school admissions, noting that the University of Michigan Law School's claim that enrolling a diverse student body serves important educational purposes was supported by "numerous expert studies and reports."

Jeanne M. Powers

See also Affirmative Action; *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; School Finance Litigation

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Sweatt v. Painter, 339 U.S. 629 (1950).
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Souter, David H. (1939–)

When President George H. W. Bush nominated David H. Souter for a seat on the U.S. Supreme Court, Souter's views on "hot button" issues were so unknown that the media labeled him the "stealth candidate." Unlike prior nominees such as Robert Bork, Souter had not made public pronouncements or written articles advancing controversial positions. Although he had been a lower court judge for years, Souter's opinions gave few clues as to how he would rule once he was sitting on the bench.

During his tenure on the Supreme Court, Souter has often defied prediction and continued to be a crucial swing vote. In his early days, Souter sided with Chief Justice Rehnquist in over 80% of cases. However, in recent years he has more closely aligned himself with Justices Stephen Breyer and Ruth Bader Ginsburg, voting with them over 60% of the time. On education law issues, Souter's voting record has generally been moderate to liberal, especially on issues concerning separation of church and state.

Early Years

David H. Souter was born on September 17, 1939, in Melrose, Massachusetts. As a child, he frequently visited his grandparents' farm in Weare, New Hampshire, a small town near the state capital at Concord. Souter's parents moved to Weare when he was 11, and he still resides there today when the Court is not in session.

Souter's teachers commented that he was an excellent student at an early age. While many people consider Souter to be quiet and unassuming, at Concord High School his classmates voted him "most sophisticated" as well as "most likely to succeed." Souter attended Harvard University, where he again excelled

in his studies. He was elected to Phi Beta Kappa and graduated magna cum laude.

After graduating from Harvard, Souter won a Rhodes scholarship to attend Magdalen College at Oxford University, where he was awarded bachelor's and master's degrees in jurisprudence. On completing his studies at Oxford, he enrolled in Harvard Law School, where he did well but did not make law review. Much of his time was devoted to tutoring undergraduate students at a freshman dormitory. Souter later related how his experience advising students, although taking time away from his studies, broadened his perspective about the relationship between law and human social problems.

Following his graduation from law school, Souter returned to Concord, where he worked for the prominent local firm he had clerked for during the summer. Apparently, Souter grew restless with private practice and sought a career in public service law. He was first employed as an assistant attorney general in the criminal division of the state attorney general's office. It was there that Souter met future Senator Warren Rudman, who was to become both a close friend and mentor. For five years, he served as Rudman's deputy attorney general. Rudman admired both Souter's character and his legal ability, and upon leaving office, he recommended that Souter be named as his replacement. As New Hampshire's attorney general, Souter opposed the legislature's attempts to legalize casino gambling, prosecuted protesters at the Seabrook nuclear power plant, and defended the state's denial of Jehovah's Witnesses' requests to cover up the state motto—"Live Free or Die"—on their license plates.

On the Bench

Souter was next appointed as a judge in a position that required him to "ride the circuit" and hear a variety of cases throughout the state. As a trial court judge, he developed a reputation for fairness but also for being tough on crime. In 1983, Governor (and future White House Chief of Staff) John Sununu appointed Souter to a seat on the New Hampshire Supreme Court. On the bench, Souter demonstrated traits of independence and scholarly analysis that would come to the forefront when he was elevated to the U.S. Supreme Court. On the bench, he continued to show support for law enforcement.

New England values of civic duty and respect for tradition have influenced Souter's judicial decision making. His sense of civic responsibility has led him to serve as trustee on the Concord Hospital Board and for the New Hampshire Historical Society. Souter's respect for tradition is manifested in his reluctance as a judge to overturn precedent based solely on doctrinal disagreement with prior decisions.

With the backing of Rudman and Sununu, President Bush appointed Souter to the First Circuit, and the Senate unanimously approved his nomination. Not long thereafter, when Justice William Brennan retired from the Supreme Court, President Bush nominated Souter as his replacement. Close press scrutiny of Souter's background revealed only that he was a bachelor with a somewhat reclusive lifestyle. Souter's testimony impressed the Senate Judiciary Committee, and he easily won confirmation.

Supreme Court Record

To the consternation of conservatives, over the years, Justice Souter has moved to the left on many issues, especially in the field of education law, where he now frequently takes liberal positions on questions of separation of church and state and of minority and student civil rights. When Justice O'Connor was on the Court, Souter often was a key fifth vote for the majority in narrowly decided cases. With her replacement by Justice Samuel Alito, Souter may now likely find himself a dissenter in three- or four-member minorities.

On Religious Schools

Adherence to stare decisis was a factor in Souter's dissent in *Agostini v. Felton* (1997), wherein the Court permitted the on-site delivery of Title I remedial services for children who attended religiously affiliated nonpublic schools. He argued that the status of the law had not changed sufficiently to justify overruling the previous rejection of similar programs in the cases of *Aguilar v. Felton* (1985) and *School District of Grand Rapids v. Ball* (1985). Dissenting in *Zelman v. Simmons-Harris* (2002), Souter wondered how the Court could uphold Cleveland's voucher program in light of *Everson v. Board of Education of Ewing Township* (1947).

In First Amendment Establishment Clause cases, Souter has been a staunch supporter of separation of church and state as he has taken a "separationist" position. Souter dissented in all cases providing government assistance to religious schools. Even so, he joined the Court in *Lamb's Chapel v. Center Moriches Union Free School District* (1993), which found that denying a church's request to show a movie about family values from a religious perspective was "viewpoint" discrimination in violation of the First Amendment. Conversely, he dissented in *Good News Club v. Milford Central School* (2001), wherein the Court ruled that denying a Christian children's organization the use of public school classrooms for weekly meetings violated freedom of speech. Moreover, Souter authored the Court's opinion in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), determining that the state of New York could not create a separate school district for a village of Hasidic Jews so that they could send their special education students to a nearby school that would have honored their religious practices.

Other Religion Issues

In the most recent Supreme Court decisions involving displays of religious symbols on public property, *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky* (2005) and *Van Orden v. Perry* (2005), Souter maintained that public displays of the Ten Commandments violated the Establishment Clause. He authored the Court's judgment in *McCreary,* striking down the Kentucky display. Souter dissented in *Van Orden,* which allowed a display on the grounds of the Texas state capitol because it was merely one of numerous other historical landmarks and monuments depicted.

In Free Exercise Clause cases, Souter voted to uphold the rights of religious minorities. In his concurring opinion in *Church of the Lukumi Babalu Aye v. City of Hialeah* (1993), he thought that a local ordinance that prohibited animal sacrifice was unconstitutional, and he urged the Supreme Court to return to the more lenient *Sherbert v. Verner* (1963) test. In *City of Boerne v. Flores* (1997), he dissented with the Court's decision to overturn the Religious Freedom Restoration Act.

Student Issues

His generally supportive attitude with regard to the state on criminal matters aside, Souter opposed allowing school officials to submit student-athletes to suspicionless drug testing in *Vernonia School District 47J v. Acton* (1995) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002).

In the only case involving student free speech during his time on the Court, Justice Souter sided with the student. He dissented in *Morse v. Frederick* (2007), which upheld a principal's right to discipline a student for displaying a sign that read "BONG HiTS [*sic*] 4 JESUS."

Justice Souter has supported the rights of racial minorities and the use of affirmative action programs. He dissented in *Adarand Constructors v. Pena* (1995), which struck down a program awarding preference to minority-based businesses in the construction industry. In the two University of Michigan cases, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), Souter voted to uphold race-conscious admission policies for both undergraduate and law school students. He also dissented in the more recent case of *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), wherein the Court invalidated race-conscious admissions plans for public schools.

Michael Yates

See also *Agostini v. Felton; Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls; Board of Education of Kiryas Joel School District v. Grumet; Everson v. Board of Education of Ewing Township; Good News Club v. Milford Central School; Gratz v. Bollinger; Grutter v. Bollinger; Lamb's Chapel v. Center Moriches Union Free School District; Morse v. Frederic; Parents Involved in Community Schools v. Seattle School District No. 1;* Rehnquist Court; Roberts Court; *Vernonia School District 47J v. Acton; Zelman v. Simmons-Harris*

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Southeastern Community College v. Davis

Just six years after the enactment of the provision, the U.S. Supreme Court was called on to interpret the nondiscrimination guarantee provision of Section 504 of the Rehabilitation Act of 1973 in *Southeastern Community College v. Davis* (1979). Section 504 prohibits recipients of federal financial assistance from discriminating on the basis of disability in any of their programs. According to the act,

> No otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. (29 U.S.C. § 794(a))

The Court found that insofar as Southeastern Community College in North Carolina was operated by the state and accepted federal monies, it was bound by the requirements of Section 504 and its regulations.

Facts of the Case

The dispute arose when Francis B. Davis sought to enroll in the nursing program offered by Southeastern Community College. When school officials determined Davis had a severe hearing loss, they denied her request for admission. Officials reasoned that Davis's hearing loss made it impossible for her to complete the clinical portion of the program in a manner that was safe for patients. Moreover, insofar as Davis was unable to satisfy this requirement, officials were convinced that she could not reasonably have been adequately prepared to function in a professional nursing capacity. College officials considered modifications that might have allowed her to participate, but decided that making those accommodations would have altered the program to the extent that it would no longer have been beneficial to Davis.

Davis sued the college, alleging that officials only needed to have made reasonable accommodations for her hearing loss in order to avoid discriminating against her under Section 504. A federal trial court entered a judgment in favor of the college, but the Fourth Circuit reversed in favor of Davis.

The Court's Ruling

On further review, Justice Powell wrote the opinion for a unanimous Supreme Court that reversed in favor of the college. At issue was whether Davis was "otherwise qualified" for admission to the nursing program and if so, what "reasonable accommodations" the college was required to make in order to treat her in a manner comparable to that of her peers who were not disabled. After examining both the statute and its regulations, the Court, in an initial matter, ruled that "an otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap" (p. 406)

The Supreme Court then turned to whether Davis could meet the requirements of the program with reasonable accommodations. The Court noted that

the physical requirements of the course of study were adopted without any animus toward Davis or persons with disabilities generally. Rather, the Court pointed out that completion of the program required candidates to have the ability to understand and quickly react to spoken language when a speaker's face was unavailable for speech reading. While Davis was able to complete some tasks associated with nursing, the record reflected that she could not accomplish the goals of the college's program without substantial modifications. The Court was of the opinion that the accommodations contemplated by the regulations of Section 504 did not require officials to modify the program substantially. Accordingly, the Court concluded that because officials did not discriminate against Davis, they were under no obligations to make the modifications that she requested.

The precedent set by *Southeastern Community College v. Davis,* in particular its interpretation of "reasonable accommodations" as stopping short of "undue financial or administrative burdens" or modifications that would substantially alter the nature of programs, continues to guide interpretation of Section 504 today both in higher education and in K–12 schools.

Julie F. Mead

See also Rehabilitation Act of 1973, Section 504; *School Board of Nassau County v. Arline*

Further Readings

Clark, S. G. (2007). Making eligibility determinations under Section 504. *Education Law Reporter, 214,* 451–455.

Stone, K. L. (2007). The politics of deference and inclusion: Toward a uniform framework for the analysis of "fundamental alteration" under the ADA. *Hastings Law Journal, 58,* 1241–1295.

Legal Citations

Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).

Southeastern Community College v. Davis, 442 U.S. 397 (1979).

Spencer v. Kugler

Spencer v. Kugler (1972), a relatively minor case that the Supreme Court did not address on its merits, involved a challenge to New Jersey's practice of aligning school district lines with municipal boundaries. The plaintiffs claimed that the practice led to schools with disproportionate numbers of Black students and was therefore a violation of the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act of 1964.

In the initial round of litigation, the federal trial court in New Jersey refused to grant the relief sought by the plaintiff parents. The U.S. Supreme Court, with Justice Douglas dissenting, summarily affirmed the opinion of the three-judge panel, refusing to find that there was segregation of Black students from White students in the schools. The plaintiffs contended that the racial patterns in the schools adversely affected the quality of education afforded to the Black students. With no assurance that population factors would remain static, the plaintiffs' proposed relief would require the board to make racial reassignments on a term-to-term basis. The trial court was of the opinion that the patterns that the plaintiff parents objected to did not constitute a constitutional violation.

As part of its analysis, the trial court pointed out that New Jersey's constitution provided for a thorough and efficient system of public schools under which each municipality was a separate school system. Thus, according to the court, school district boundaries coincide with municipal boundaries. The court clearly noted that racially balanced municipalities were beyond the ken of both the legislatures and the courts.

Acknowledging that in *Brown v. Board of Education of Topeka* (1954) the Supreme Court required unitary school systems, absent any attempt by school officials in New Jersey to draw lines on racially discriminatory grounds, the trial court could not hold that basing district boundaries on municipal boundaries was unreasonable. Therefore, the court decided that the plaintiffs failed to present a cause of action for relief.

In its rationale, the court spent considerable time analyzing the requirements of *Swann v.*

Charlotte-Mecklenburg Board of Education (1971), a dispute that dealt with systems that had histories of creating dual school systems and then instituting freedom of choice plans that did little or nothing to achieve unitary status. In *Spencer,* the plaintiffs unsuccessfully alleged that de facto segregation was a violation of their constitutional rights. The court rejected the plaintiffs' claim that the de facto segregation that took place, even though there was no state action, was tantamount to de jure segregation.

The historical significance of *Spencer* is the fact that it hinged on de facto segregation. The net result of Spencer and similar litigation that remains in effect is that courts cannot devise plans to deal with de facto segregation.

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Fourteenth Amendment; *Swann v. Charlotte-Mecklenburg Board of Education*

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Spencer v. Kugler, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd,* 423 U.S. 1027 (1972).
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

Sports Programming and Scheduling

The scheduling of sports practice and competitions, whether at the pre-K–12 or postsecondary level, is largely the purview of controlling athletic organizations. Each state has a statewide association, in which membership is voluntary, that sets the policies and procedures for all extracurricular sports activity in pre-K–12 schools. For example, in Illinois, it is the Illinois High School Association (IHSA). These associations have counterparts at the collegiate level with the most well-known association being the National Collegiate Athletic Association (NCAA), which regulates everything from tournament entries to eligibility requirements for its member institutions.

For the most part, the courts have refused to become involved in evaluating whether specific policies promulgated by these voluntary athletic associations constitute state action or whether they are legally defensible. The most recent Supreme Court case on this issue is *Tennessee Secondary School Athletic Association v. Brentwood Academy* (TSSAA, 2007). Brentwood Academy ran afoul of the TSSAA's rules when one of its football coaches sent a letter to a student that invited him to football practice. The student was enrolled at Brentwood Academy, but he had not been in attendance for three days, and the TSSAA required that students attend a school for three days before a coach could invite them to practice. As a punishment, the school was excluded from football and basketball playoffs for two years. The school sued. In reviewing lower court rulings that found the TSSAA to be a "state actor," thereby granting Brentwood First Amendment protections, the Court held that the TSSAA's recruiting rule struck "nowhere near the heart of the First Amendment" (p. 2493). The Court maintained that although direct solicitation was not allowed, the school was still free to send brochures, post notices, and otherwise advertise their athletic programs. While joining the TSSAA could not necessitate that member schools give up their constitutional rights, the Court concluded that the recruiting rule was necessary to efficiently administer the state interscholastic athletic league.

There also exists federal statutory control of educational sports programming and scheduling through Title IX of the Education Amendments of 1972, according to which,

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Title IX forbids gender discrimination in educational programs that receive federal funding.

Prior to the amendment of Title IX by the Civil Rights Restoration Act in 1987, the interpretation of the scope of Title IX was control by the U.S. Supreme Court case of *Grove City College v. Bell* (1984), which stated that the application of Title IX was program specific and did not provide blanket coverage to the institution as a whole. In order to rectify this interpretation, Congress amended Title IX to add the wording,

> For the purpose of this chapter, the term "program or activity" and "program" mean all the operations of . . . a local education agency, system of vocational education, or other school system . . . any part of which is extended Federal financial assistance.

With this amendment, it became clear that Title IX covers all actions of entire institutions.

The most recent case dealing with the issue of sports scheduling and Title IX is a case out of the Sixth Circuit, *Communities for Equity v. Michigan High School Athletic Association* (2006), in which concerned parents organized under the name Communities for Equity brought suit against the Michigan High School Athletic Association (MHSAA), alleging that its method of scheduling sports seasons discriminated against female athletes. The MHSAA scheduled the girls to play at disadvantageous, nontraditional seasons, thereby making it impossible for them to participate in the majority of tournament play. A federal trial court, entering a judgment in favor of the parents, was of the opinion that the MHSAA's actions did violate the Equal Protection Clause of the Fourteenth Amendment, the Civil Rights Act of 1964, and Michigan law. On further review, the Sixth Circuit affirmed that its disparate treatment in the scheduling of girls' sports at disadvantageous times was a violation of Title IX. Consequently, the court ordered the MHSAA to submit to it a compliance plan in which it demonstrated that it provided equal treatment to the scheduling of boys' and girls' sports.

Elizabeth T. Lugg

See also Equal Protection Analysis; High School Athletic Associations; Title IX and Athletics

Legal Citations

Communities for Equity v. Michigan High School Athletic Association, 459 F.3d 676 (6th Cir. 2006).
Grove City College v. Bell, 465 U.S. 555 (1984).
Horner v. Kentucky High School Athletic Association, 43 F.3d 265 (6th Cir. 1994).
Tennessee Secondary School Athletic Association v. Brentwood Academy, 127 S. Ct. 2489 (2007).
Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Springfield Township, Franklin County v. Quick

Springfield Township, Franklin County v. Quick (1859) was the earliest U.S. Supreme Court case directly involving an educational issue. *Quick* arose in the context of a dispute related to the fact that provisions in the Northwest Ordinances set aside the 16th section of each township for school purposes for the benefit of township residents.

What the Supreme Court declared in *Quick* is that states do have the right to decide how to fund education within their own borders as long as they are not in violation of any federal laws to the contrary. Even though *Quick* was resolved in 1859, its legacy continues to today as witnessed by ongoing disputes over school funding. While the federal government involves itself in assuring equal opportunities for all students, it is still the duty of the states to determine how to divide the costs of education for the general population of their students.

Facts of the Case

At issue in *Quick* was a township's having sold its 16th section in 1836. Officials in the township took the sum of $7,423.36 that they received for the property, invested the money, and applied the interest to support the schools. Part of the argument in the litigation was whether the township was entitled to this money as well as to additional resources from a fund that accrued under the laws of the state of Indiana.

When Indiana adopted a new constitution in 1851, its eighth article established a school fund, derived from several sources, that was to be consolidated

into a single fund. The first of these sources was the congressional township fund and any land still belonging to it. Ten other sources of funds were listed from which revenue was derived, and all of them were united into a common fund. The common fund was to be distributed among the counties according to the number of students that they had, with each county receiving an equal amount for each student, regardless of what officials provided for the students from their respective congressional townships funds. However, there was another section within article eight that specified that all of the trust funds that the state had were to be applied exclusively to the purposes for which each fund was created. In light of this provision, a suit in 1854 tested the validity of the new constitution.

The Supreme Court of Indiana ruled that selected funding provisions in the new constitution were null and void. Subsequently, when, in 1855 the Indiana legislature passed yet another new law providing for the distribution of the common fund, it inserted a provision that would not allow any township's congressional township fund to be diminished because of the distribution or to be diverted to any other township.

Officials in Springfield township filed suit, claiming that the township was entitled to both the interest from its own congressional township fund and to its distributive share of the common fund. The Supreme Court of Indiana decided against the Springfield township claim, because, according to the new law about the distribution, when a county disbursed funds to townships, officials were required to distribute the amounts given to each township equally, based on the number of students who resided there. At the same time, officials were supposed to take into consideration the amount of money that townships derived from their congressional funds, although county treasurers could not diminish the congressional funds or divert them to any other townships. The result was that in systems where the congressional fund was insufficient to cover expenditures for all students, the state would allocate funds to townships on the basis of need.

The Court's Ruling

On further review, a unanimous U.S. Supreme Court affirmed that the law was constitutional. While commenting that the state was obviously trying to get around the results of the former case, the Court held that legislators did nothing in violation of the allowable use of the congressional funds when they wrote the new law, because the funding of the schools within the state did come under the auspices of the state. To this end, the court acknowledged that Indiana law still allowed each township whatever money it was due from the congressional fund, but that townships were not entitled to an equal distribution of the common fund as well. The Court was thus of the opinion that legislators in Indiana were within their rights to decide how to distribute the common fund.

It is interesting to note that in *Quick,* the issue was one in which the state legislature was trying to be equitable to all residents by providing an amount from the common fund that would equalize how much money each school system got based on the number of students living within the system's boundaries. Officials in Springfield Township believed that they were due an equal share of the common fund as well as their own congressional fund. Similar issues of equity continue into the present day.

James P. Wilson

See also Federalism and the Tenth Amendment; School Finance Litigation

Legal Citations

Springfield Township, Franklin County v. Quick, 63 U.S. 56 (1859).

St. Martin Evangelical Lutheran Church v. South Dakota

St. Martin Evangelical Lutheran Church v. South Dakota, which reached the U.S. Supreme Court in 1981, helped to clarify both state and federal laws pertaining to the payment of unemployment compensation taxes by private, church-owned, church-managed schools. In sum, the Supreme Court did not have to address issues related to separation of church and state

in *St. Martin.* Instead, the Court resolved the dispute on the interpretation of the intent of the original legislators and the wording of the Federal Unemployment Tax Act's (FUTA's) amendments. The end result of *St. Martin* is that the Court concluded that religious schools were still exempted from having to pay unemployment taxes under FUTA.

Facts of the Case

The facts revealed that St. Martin Lutheran Church operated a Christian elementary school that was not a separate legal entity from the church. The church not only financed the school but controlled it via a school board that was elected from within the congregation. When officials in South Dakota tried to impose an unemployment tax on the church for school employees, a referee in the Department of Labor rejected the church's challenge. After a state trial court reversed in favor of the church, state officials appealed.

The Supreme Court of South Dakota reversed in favor of the state in pointing out that FUTA included religious schools under its provisions and that its doing so did not violate either the Establishment Clause or the Free Exercise Clause of the First Amendment to the U.S. Constitution. On further review, the U.S. Supreme Court, in turn, unanimously reversed in favor of the church.

The Court's Ruling

At the outset of its opinion, the Supreme Court included an explanation of the development of the relevant laws. To this end, the Court pointed out that the federal laws for unemployment compensation taxes require that states include similar statutes to cover state-run unemployment plans even though, should they wish to do so, states may provide more benefits than the federal laws allow. In fact, the Court recognized that all 50 states have enacted statutes that are complementary to the federal laws pertaining to unemployment taxes.

At the same time, the Supreme Court noted that Congress amended FUTA in 1976 to narrow the definition of specified employers that were exempt from paying unemployment tax, such as church-related colleges and other schools. The Court observed that historically FUTA, which appeared originally as Title IX of the Social Security Act of 1935 and called for a cooperative federal-state program to provide benefits to unemployed workers, had been fairly narrowly defined. Yet, through the ensuing years, the Court indicated that numerous amendments to FUTA provided coverage for more and more unemployed workers. The Court wrote that from 1960 to 1970, FUTA excluded all employees who worked for religious, charitable, educational, or any other businesses that are exempt from income tax under section 501(a) of the law. However, the Court conceded that a 1970 amendment narrowed the definition to include only those who were employed by religious organizations. The Court declared that a 1976 amendment further restricted those who were exempt from the unemployment tax to individuals whose duties were more directly related to church activities.

In *St. Martin,* the Supreme Court found that the definition of a church was not the building in which its activities took place but consisted of any church-run and church-supported activities. More specifically, the Court defined a church as "an organization which is operated primarily for religious purposes and which is operated, supervised, controlled, or principally supported by a church or convention or association of churches" (26 U.S.C. 3309(b), p. 774). The Supreme Court thus ruled that schools that are religious in nature and are owned or controlled by specific churches or association of churches could be considered Category I schools that are not covered by FUTA.

The Supreme Court added that schools that are controlled or operated by churches or association of churches, even if they were incorporated separately from the churches, fit into Category II, which is also exempt from FUTA. Another group of schools, Category III schools, are religiously affiliated but controlled by lay boards. These schools gained exemptions from FUTA in the later case of *Grace Brethren Church v. State of California* (1982), in which the Court maintained that these schools are exempt from unemployment taxes because such coverage would violate the First Amendment of the Constitution, not Section 3309(b)(1) of FUTA.

James P. Wilson

See also Nonpublic Schools

Legal Citations

Grace Brethren Church v. California, 457 U.S. 393 (1982).
St. Martin Evangelical Lutheran Church v. South Dakota, 451 U.S. 772 (1981).

Stafford Act

The Robert T. Stafford Disaster Relief and Emergency Assistance Act of 1988 provides a means by which the federal government can assist local and state agencies, including public schools, when major disasters or emergencies threaten to overwhelm them. The Stafford Act authorizes the president of the United States to declare "a major disaster" or "an emergency," whichever is more appropriate in a given situation. In either case, the presidential declaration authorizes a wide range of federal services and resources to supplement limited local and state resources. In all instances, federal assistance is intended to augment state and local attempts to resolve the crisis, and federal funds may not be committed until the state and local agencies document maximum effort.

Last reauthorized in 2000, the Stafford Act includes procedures for requesting and obtaining a presidential declaration, defines the type and scope of federal assistance available in each case, and clarifies the conditions necessary to receive the aid. The Federal Emergency Management Agency, commonly referred to as FEMA, is responsible for coordinating federal support efforts under the Stafford Act through three major categories: individual and household, public, and hazard mitigation assistance. Within these categories, the federal government can provide direct grants for living expenses and funds for temporary housing, repair of public buildings, emergency communications systems, and other purposes.

Unless the major disaster or emergency occurs exclusively or predominately in the federal purview, the governor of an affected state must request assistance and a declaration by the president. Pertinent provisions regarding the two types of declarations are set forth in Section 401 of the Stafford Act, 42 U.S.C. § 5170, with respect to major disasters, and in Section 501, 42 U.S.C. § 5191, with respect to emergencies. The president may respond to a governor's request with a declaration of a major disaster, a declaration of an emergency, or a denial of the request altogether.

Major disasters are defined in the Stafford Act as

> any natural catastrophe including any hurricane, tornado, storm, high water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm, or drought which in the determination of the President causes damage of sufficient severity to warrant major disaster assistance under the Act.

Accordingly, § 5170 of the act specifies that gubernatorial requests for major disaster declarations must prove that the disaster is of such magnitude that the state and local government cannot cope with the situation and that federal assistance is required. The state must execute its emergency plan, and state and local expenditures must comply with federal cost-sharing requirements before the federal government may intervene. Finally, the governor's request must demonstrate that federal assistance is necessary to supplement the resources and efforts of the state, local government, disaster relief organizations such as the American Red Cross and the Salvation Army, and compensation by private insurance companies for property loss. Only then may the president declare a major disaster under the Stafford Act.

When an incident that does not rise to the level of a major disaster occurs or threatens to occur, the governor of a state can request that the president declare an emergency. "Emergency" is defined in the Stafford Act as "any occasion or instance for which federal assistance is needed to supplement State and local efforts and capabilities to save lives and to protect property and public health and safety, or to avert the threat of a catastrophe." On occasion, the president may declare an emergency that is related to public schools and the educational process. Riots on college and university campuses and public school violence, such as the shootings at Columbine High School in 1999 or at Virginia Tech in 2007, are examples of emergencies that might trigger a presidential declaration. Governors requesting that a state of emergency be declared must show that an emergency actually exists, that state and local governments do not have the personnel or resources to resolve the problem, and that federal help is imperative.

Assuming that the president declares an emergency related to an incident or incidents at a public school or

a college or university, the following federal relief services are provided to assist state and local agencies in resolving the emergency:

- personnel, equipment, supplies, facilities, and technical services to save lives, protect property and public health, and stabilize the situation;
- coordination of all emergency relief assistance;
- dissemination of health and safety information;
- provisions for campus security;
- investigation of the crime scene(s), if applicable;
- provision for temporary facilities to replace damaged school buildings;
- provision for continuation of essential community services;
- warning of further risks and hazards;
- repairs or restoration of state-owned facilities;
- crisis-counseling assistance and training; and
- legal services for injured parties and public school officials.

Through these and other strategies and services specified in the Stafford Act, the federal government has assisted state and local governments in reducing violence and increasing safety in American public schools.

Robert C. Cloud

See also School Board Policy; School Boards

Further Readings

Bazan, E. B. (2005, September 16). *Robert T. Stafford Disaster Relief and Emergency Assistance Act: Legal requirements for federal and state roles in declarations of an emergency or a major disaster* [report for Congress]. Washington, DC: Congressional Research Service.

Legal Citations

Disaster Mitigation Act of 2000, 42 U.S.C. §§ 5133 *et seq.*
Disaster Relief Act of 1974, 42 U.S.C. §§ 5121 *et seq.*
Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. §§ 5121 *et seq.*

Stare Decisis

Stare decisis represents the principle of doctrinal precedent underpinning American common law. (The term *stare decisis* is Latin for "to stand by things decided.") The doctrine of stare decisis encourages courts to resolve like cases alike, meaning that judges should follow earlier rulings when confronting issues that have been before them in prior litigation. Stare decisis is a basic principle of judicial interpretation of statutory law, common law, and constitutional law. Insofar as this doctrine is a fundamental aspect of judicial decision making, it strongly influences court actions in resolving any matters concerning education law or any other field of law.

In many instances, the U.S. Supreme Court has reviewed the multiple policy reasons for following stare decisis. The Court has repeatedly and consistently indicated that stare decisis is a fundamental aspect underlying the rule of law. This is because stare decisis, by placing the duty on the courts to follow prior precedent and decide like cases in a like manner, "promotes the evenhanded, predicable, and consistent development of legal principles," and accordingly adherence to this principle by courts "fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process" (*State Oil Co. v. Khan,* 1997, p. 20).

Insofar as the policy in favor of such reasons is so strong, the Court has explained that adhering to precedent is usually a wise policy, because in most matters it is more important that the applicable rule of law "be settled" than that "it be settled right" (*Agostini v. Felton,* 1997, p. 235, citing *Burnet v. Coronado Oil & Gas Co.,* 285 U.S. 393, 1932). Accordingly, the Court has maintained that it is willing to depart from stare decisis only where there is a compelling justification for doing so.

While stare decisis weighs heavy in judicial interpretation, it "is not an inexorable command because it 'is a principle of policy and not a mechanical formula of adherence to the latest decision'" (*Payne v. Tennessee,* 1991, p. 828, citing *Helvering v. Hallock,* 1940, p. 119). As such, where a prior decision has proven to be unworkable or badly reasoned, especially if it was reached by a narrow margin or with spirited dissent, the Supreme Court has not been constrained to uphold such judgments.

The Supreme Court has reasoned that the judicial interest in stare decisis is at its height in matters concerning property, contracts, and statutory interpretation. In the context of property and contracts, both of which

can impact education law, the Court has determined that adherence to stare decisis is of heightened importance, because private reliance interests are highly involved in these areas. Stare decisis is significant in statutory interpretation for similar reasons. The legislature is thought to rely on consistent interpretation of the statutes it has enacted in taking, or refraining from taking, future action with respect to such statutes. For example, in *Hilton v. South Carolina Public Railway Commission* (1991), wherein Congress declined to alter a federal statute for three decades after the Court ruled on an interpretation of the law, the justices factored this implied reliance in its judgment not to tread on its previous interpretation.

At the same time, the Supreme Court observed that while it is always an important judicial interest, stare decisis is of its lowest importance in the area of constitutional interpretation. This is largely because such canon is more uniquely the domain of the courts, and because of the difficulty of passing a constitutional amendment, which might be the only possible legislative recourse (*Payne,* 1991, p. 828).

The Supreme Court's unwillingness to be bound by stare decisis is reflected perhaps no more clearly than in its striking down de jure segregation in public schools in *Brown v. Board of Education of Topeka* (1954). In *Brown,* the Court considered whether the provision of a public school education to children under racially segregated conditions violated the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Regarding a similar question as applied to public transportation in *Plessy v. Ferguson* (1896), the Court had held that racial segregation did not run afoul of the Fourteenth Amendment so long as such services were "equal." In *Brown,* the Court examined the then-current state of public education and determined that inherent in the concept of racially segregated provision of public school education was an inequality that could not be remedied. The Court thus rejected its opinion in *Plessy. Brown* demonstrates the Court's willingness to confront and overturn its own precedent to correct fundamental flaws in previous decisions, particularly in the sphere of constitutional interpretation.

Alli Fetter-Harrott

See also Common Law; Rule of Law

Legal Citations

Agostini v. Felton, 521 U.S. 203 (1997).
Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Burnet v. Coronado Oil & Gas Co., 285 U.S. 393 (1932).
Helvering v. Hallock, 309 U.S. 106 (1940).
Hilton v. South Carolina Public Railway Commission, 502 U.S. 197 (1991).
Payne v. Tennessee, 501 U.S. 808 (1991).
Plessy v. Ferguson, 163 U.S. 537 (1896).
State Oil Co. v. Khan, 522 U.S. 3 (1997).

State Aid and the Establishment Clause

Over the past 60 years, the 16 words in the Establishment and Free Exercise clauses of the First Amendment rank among the most litigated language in the entire U.S. Constitution. Enacted as part of the Bill of Rights in 1791, the First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."

At the outset, it is worth noting that the goal of this entry is to provide an overview of Supreme Court litigation under the Establishment Clause in disputes involving state aid to K–12 religiously affiliated nonpublic schools and their students. For this purpose, it is unnecessary to engage in a full discussion of the different approaches to the Establishment Clause by undertaking what could be a lengthy examination of the attitudes of the jurists whose opinions have shaped the Court's First Amendment jurisprudence.

Instead, it is sufficient to note that the Court's judgments have largely been influenced by which of the two camps that have emerged in the majority on the bench at given points in time. The two perspectives that have tended to hold sway among the Court's members are those of the accommodationists and separationists. In the context of state aid, accommodationists believe that the Establishment Clause does not forbid the federal or state governments from providing some forms of assistance, under the legal

construct known as the child benefit test, to children who attend religiously affiliated nonpublic schools. Conversely, separationists support the Jeffersonian metaphor that calls for preserving a "wall of separation" between church and state, language that is not in the Constitution; this is the perspective most often associated with the Supreme Court for the better part of the past half century.

Preliminary Cases

The U.S. Supreme Court extended the First Amendment so that it applied not only to Congress but also to the states in *Cantwell v. Connecticut* (1940). *Cantwell* was a dispute over solicitation of money for religious purposes that the justices resolved seven years before deciding the Court's first case on the merits of a claim involving education, the Establishment Clause, and state aid to religiously affiliated schools and their students in *Everson v. Board of Education of Ewing Township* (1947).

In the years prior to *Everson* and the development of its modern Establishment Clause jurisprudence, the Supreme Court examined two cases involving religiously affiliated nonpublic schools. In both instances, the Court relied on the Due Process Clause of the Fourteenth Amendment rather than the Establishment Clause.

In *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), the Supreme Court invalidated a statute from Oregon that would have essentially forced all nonpublic schools, religious and nonsectarian, to close. According to the law, parents could satisfy the state's compulsory attendance law for children, other than those who would today be classified as having disabilities, only by sending them to public schools. Even in striking down the law, the Court acknowledged that states could impose health, safety, and teacher qualification requirements on the schools as long as those requirements were no more rigorous than the requirements applied to public schools.

Cochran v. Louisiana State Board of Education (1930) dealt with a statute that made textbooks available for all students, regardless of where they attended school. A taxpayer unsuccessfully challenged the law as a private taking through taxation for a nonpublic purpose. In unanimously affirming the judgment of the Supreme Court of Louisiana, the Court remarked that because students, rather than their schools, were the beneficiaries of the law, the statute served a valid secular purpose. This opinion set the stage for the child benefit test that would emerge in *Everson.* While the Court has consistently upheld similar textbook provisions, state courts have vitiated them under their own, more restrictive, constitutions.

Overview of Cases

The Supreme Court's modern Establishment Clause jurisprudence with regard to state aid in K–12 education evolved through three phases. During the first period, which began in 1947 with *Everson* and ended in 1968 with *Board of Education v. Allen,* the Court crafted the child benefit test, which permits state aid on the ground that it helps children rather than their religiously affiliated nonpublic schools. However, during this first stage, the Court helped to sow the seeds of later confusion in creating a two-part test in *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963) to review the constitutionality of prayer and Bible reading in public schools. The Court later expanded this two-part test into the tripartite Establishment Clause standard in *Lemon v. Kurtzman* (1971), a dispute over state aid to religiously affiliated nonpublic schools in the form of salary supplements for teachers.

During the second stage, which started with *Lemon* in 1971 and culminated with *Aguilar v. Felton* in 1985, the Court largely refused to move beyond the limits it created under the child benefit test in *Everson* and *Allen.* When the Supreme Court applied the *Lemon* test in virtually all cases involving aid and prayer or other religious activity, its failure to explain how, or why, the justices applied this tripartite measure so widely created confusion. This situation was exacerbated because the Court developed the first two parts of the *Lemon* test in the context of cases involving prayer and Bible reading, not aid.

When dealing with aid, most programs passed *Lemon*'s first two prongs only to fail the amorphous excessive entanglement prong. Given the confusion that the *Lemon* test created, in *Agostini v. Felton* (1997),

the Court modified it by reviewing only its first two parts—purpose and effect—while recasting entanglement as one element in evaluating a statute's effect.

The third, and most recent, phase with regard to aid to K–12 schools and their students began in 1993 with *Zobrest v. Catalina Foothills School District* (1993) and continues to the present day. During this time, the Court has reinvigorated the child benefit test by making it easier for governmental officials to use public funds to assist students who attend religiously affiliated nonpublic schools.

Against this backdrop, the remainder of this essay reviews the topics and cases involving state aid to religiously affiliated nonpublic schools. The essay examines the litigation primarily under the categories in which it can be placed rather than simply chronologically.

Different Forms of Aid

Transportation

Everson is the first Supreme Court case on the merits of the Establishment Clause and education. At issue in *Everson* was a statute from New Jersey that permitted local school boards to reimburse parents for the cost of transporting their children to religiously affiliated nonpublic schools. The Court affirmed the statute's constitutionality on the ground that the First Amendment did not prohibit states from extending general benefits to all residents without regard to their religious beliefs. In so doing, the Court placed student transportation in the same category as other public services such as police and fire protection.

In addition, *Everson* is noteworthy as the first case in which the Court applied the Jeffersonian metaphor into the lexicon of its First Amendment jurisprudence, writing that "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable" (p. 18). Following *Everson,* some states provide publicly funded transportation to students who attend religiously affiliated nonpublic schools while others refuse to do so under their constitutions.

The only other Supreme Court case involving transportation and religiously affiliated nonpublic schools was *Wolman v. Walter* (1977). In *Wolman,* the justices struck down that part of a statute from Ohio that allowed public funds to be used to take students from religious schools on field trips. The Court held that the statute was unconstitutional, because the field trips were curricular-related insofar as they were instructional rather than nonideological secular services such as transportation to and from school.

Textbooks

Following the lead of *Cochran,* albeit on the basis of the First Amendment, rather than the Fourteenth, in *Board of Education v. Allen* (1969), the Supreme Court upheld a law from New York that required local school boards to loan books to children in grades 7 through 12 who attended nonpublic schools. Relying largely on the child benefit test, the Court observed that the law's purpose was not to aid religion or the religious schools, while its primary effect was to improve the quality of education for all students.

Allen represented the outer reach of the child benefit test prior to *Agostini v. Felton* (1997), discussed below. The Court upheld similar textbook provisions in *Meek v. Pittenger* (1975) and *Wolman v. Walter* (1977), both of which are discussed below.

Secular Services and Salary Supplements

In 1971, in its most significant case involving the Establishment Clause and education, *Lemon v. Kurtzman,* and in its companion case, *Earley v. DiCenso,* the Court struck down a statute that essentially provided salary supplements for teachers in religiously affiliated nonpublic schools. In so doing, the Court created the so-called *Lemon* test by adding a third test, on excessive entanglement, from *Walz v. Tax Commission of New York City* (1970) to the two-part test it created in *Abington Township School District v. Schempp.* In *Walz,* the Court upheld New York State's practice of providing state property tax exemptions for church property that is used in worship services. According to the *Lemon* test,

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular

> legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion." (*Lemon,* pp. 612–613, internal citations omitted)

In reviewing entanglement and aid, the Court explained that it had to take three additional factors into consideration: "we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority" (*Lemon,* p. 615). As noted, the upshot is that until 1997 and *Agostini v. Felton,* discussed below, the Court struck down almost all forms of aid unless it was in the form of textbooks for students who attended religiously affiliated nonpublic schools.

Tuition Reimbursements to Parents

Two months after *Lemon,* the Pennsylvania legislature enacted a statute that granted parents whose children attended nonpublic schools the option of requesting tuition reimbursement. In *Sloan v. Lemon* (1973), the Supreme Court affirmed that the law impermissibly singled out a class of citizens for a special economic benefit. In distinguishing reimbursements from transportation and books, the Court indicated that since the former was unlike the latter, which were purely secular, the plan was unacceptable.

The Supreme Court expanded on *Sloan* in another case from New York, *Committee for Public Education and Religious Liberty v. Nyquist* (1973). In addressing the first of three issues in *Nyquist,* the Court decreed that even though the tuition grants in dispute went to parents rather than to school officials, they were unconstitutional since the parents would have used the money to pay for tuition with funds that could have been diverted for impermissible religious purposes.

Tax Benefits

On the second issue in *Nyquist,* the Supreme Court struck down a provision in the statute that granted parents of children who attended nonpublic schools income tax deductions as long as they did not receive tuition grants under the other part of the law. The Court invalidated this provision because it was convinced that it had the effect of advancing religion since there was essentially no difference between a tax benefit and a tuition grant.

Ten years later, in *Mueller v. Allen* (1983), in an exception from its willingness to expand the parameters of the child benefit test, the Supreme Court upheld a statute from Minnesota that granted all parents state income tax deductions for the actual costs of tuition, textbooks, and transportation associated with sending their children to elementary or secondary schools. The Court distinguished *Mueller* from *Nyquist* primarily on the grounds that the tax benefit here was available to all parents, not only those whose children were in nonpublic schools, and that the deduction was one of many rather than a single, favored type of taxpayer expenditure. The Court concluded that the law passed all three parts of the *Lemon* test.

Reimbursements to Nonpublic Schools

In the third issue in *Nyquist* (1973), the Supreme Court struck down the statute's maintenance and repair provision for nonpublic schools since there were inadequate safeguards on how money could be spent. The Court wrote that since the government cannot erect buildings for religious activities, it cannot pay to have them renovated.

On the same day as it handed down *Nyquist,* in another case from New York, the Supreme Court applied essentially the same rationale in *Levitt v. Committee for Public Education and Religious Liberty* (1973), invalidating a statute that permitted the state to reimburse nonpublic schools for expenses incurred in complying with requirements for the administration and reporting of test results and other records. Insofar as there were no restrictions on the use of the funds, such that school could apparently be reimbursed for teacher-prepared tests on religious subject matter, the Court asserted that the aid had the primary effect of advancing religion.

Four years later in *Wolman v. Walter* (1977), the Supreme Court upheld a law from Ohio that allowed reimbursement for religious schools that used standardized tests and scoring services. The Court distinguished these tests from the ones in *Levitt* because the

ones in the case at bar were neither drafted nor scored by nonpublic school personnel. In addition, the Court reasoned that the law did not authorize payments to church-sponsored schools for costs associated with test administration.

The Supreme Court revisited reimbursements in *Levitt* in *Committee for Public Education and Religious Liberty v. Regan* (1980) after the New York State legislature modified the disputed law from *Levitt.* The revised law granted reimbursements to nonpublic schools for the actual costs of complying with state requirements for reporting on students as well as for administering mandatory and optional state-prepared examinations. The Court explained that the new version of the statute passed all three parts of the *Lemon* test.

Loans of Instructional Materials

In *Meek v. Pittenger* (1975), the Supreme Court reviewed the constitutionality of loans of instructional materials, including textbooks and equipment, to religiously affiliated nonpublic schools in Pennsylvania. As in its previous judgments, the Court upheld the loan of textbooks but struck down provisions dealing with periodicals, films, recordings, and laboratory equipment as well as equipment for recording and projecting. The Court feared that loaning materials other than textbooks had the primary effect of advancing religion because of the nature of the participating schools.

Two years later, the Supreme Court reached similar results in another aspect of *Wolman* in upholding the part of the statute that specified that textbook loans were to be made to students or their parents, rather than directly to their nonpublic schools. Even so, the Court struck down a provision in the law that would have allowed loans of instructional equipment including projectors, tape recorders, record players, maps and globes, and science kits. The Court invalidated the statute's authorizing the loans in light of its concern that because it would be impossible to separate the secular and sectarian functions for which these items were to be used, the materials supported the religious missions of the schools.

In *Mitchell v. Helms* (2000), a case from Louisiana, the Supreme Court expanded the boundaries of the child benefit test. A plurality upheld the constitutionality of Chapter 2 of Title I, now Title VI, of the Elementary and Secondary Education Act, a federal law that permits the loans of instructional materials including library books, computers, television sets, tape recorders, and maps to nonpublic schools. Based on *Agostini v. Felton* (1997), discussed below, because the plaintiffs did not challenge the law's purpose, the plurality thought it necessary to restrict its analysis to the statute's effect. The Court concluded that Chapter 2 did not foster impermissible religious indoctrination, because the aid was allocated by using neutral secular criteria that neither favored nor disfavored religion, and the aid was available to all schools using secular, nondiscriminatory grounds for determining which schools were to receive it. At the same time, the plurality reversed those parts of *Meek* and *Wolman* that were inconsistent with the Court's new holdings on loans of instructional materials.

Auxiliary Services

In another aspect of *Meek*, the Supreme Court struck down a statute that allowed public school personnel to provide auxiliary services on site in religiously affiliated nonpublic schools. Moreover, the Court banned the on-site delivery of remedial and accelerated instructional programs, guidance counseling and testing, and services to aid children who were educationally disadvantaged. The Court asserted that it was immaterial that the students would have received remedial rather than advanced work, because the required surveillance to ensure the absence of ideology would have given rise to excessive entanglement between church and state.

Two years later, in yet another dimension of *Wolman*, the Court permitted the state to supply nonpublic schools with state-mandated tests, and it allowed public school employees to go to nonpublic schools to perform diagnostic tests to evaluate whether students needed speech, hearing, or psychological services. Further, the Court permitted public funds to be spent in providing therapeutic services to students from nonpublic schools but made it clear that this would be acceptable only if the services were not provided in the religiously affiliated nonpublic schools.

Zobrest v. Catalina Foothills School District (1993) ushered in the most recent era in the Supreme Court's Establishment Clause jurisprudence in K–12 schools. At issue was a school board's refusal to provide a sign-language interpreter, as required by the Individuals with Disabilities Education Act, for a deaf student in Arizona who wished to attend a Catholic high school. Reversing earlier judgments that denied the on-site delivery of services for students, the Court pointed out that an interpreter provided neutral aid to the student without offering financial benefits to his parents or school, and there was no governmental participation in the instruction, because the interpreter was only a conduit to effectuate the child's communications. The Court relied in part on *Witters v. Washington Department of Services for the Blind* (1986), wherein it upheld the constitutionality of extending a general vocational assistance program to a blind man who was studying to become a clergyman at a religious college. However, the Supreme Court of Washington later struck down the use of such public funds as being unconstitutional under the state constitution (*Witters v. State Commission for the Blind* (1989)).

A year later, the Court considered a case where the New York State legislature created a school district with the same boundaries as those of a religious community in an attempt to accommodate the needs of religious parents of children with disabilities. After all three levels of the state courts struck the statute down as violating the Establishment Clause, the Supreme Court, in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), affirmed. The Court invalidated the statute essentially because the state not only favored a specific religious group but also because officials failed to consider alternatives such as offering classes at public schools or neutral sites near one of the community's religious schools. While the state legislature sought to remedy the Establishment Clause problem, the state's high court again invalidated it for having the effect of advancing one religion (*Grumet v. Cuomo,* 1997; *Grumet v. Pataki,* 1999).

In 1974, the Supreme Court addressed the first of its three cases involving Title I of the Elementary and Secondary Education Act of 1965. In *Wheeler v. Barrera* (1974), the Court was of the view that because the question of whether officials in Missouri could be required to provide remedial Title I instruction for students who were educationally disadvantaged on site in their religiously affiliated nonpublic schools was an issue of state law, the Court was unable to resolve the question. The Court indicated that officials had options available in meeting Title I's requirement that they provide eligible students with instruction at locations other than their religious schools.

Eleven years later, the Supreme Court revisited Title I in *Aguilar v. Felton* (1985). At issue was the constitutionality of permitting public school teachers in New York City to provide remedial instruction and materials for eligible students who were educationally disadvantaged on site in their religiously affiliated nonpublic schools. A divided Supreme Court affirmed earlier orders striking the law down as violating the Establishment Clause. The Court was satisfied that the program passed the first two parts of the *Lemon* test, because the school board developed safeguards to ensure that public funds were not spent for religious purposes. Yet, even though there were no allegations of impropriety, the Court invalidated the program in light of its fear that the monitoring system ran afoul of the third prong of the *Lemon* test, because it might have created excessive entanglement of church and state.

Decided on the same day as *Aguilar,* and more than a decade after the Supreme Court of Michigan upheld the state constitutional amendment on shared time, the justices struck down a dual-enrollment program in *School District of City of Grand Rapids v. Ball* (1985). The Court affirmed that the program was unacceptable, because it failed all three prongs of the *Lemon* test.

In *Agostini v. Felton* (1997), based on a change in the composition of the bench, the Supreme Court essentially repudiated its judgment in *Aguilar.* In a major shift in its jurisprudence, the Court reasoned that the Title I program was constitutional, because there was no governmental indoctrination, no distinctions were made among recipients based on religion, and there was no excessive entanglement. In a majority opinion that echoed her earlier dissent in *Aguilar,* writing for the Court, Justice O'Connor ruled that a federally funded program that provides supplemental, remedial instruction and counseling on a neutral basis to children who are disadvantaged was constitutional.

The Court upheld the practice, because the school board developed sufficient safeguards for the on-site delivery of services in religiously affiliated nonpublic schools. The most significant aspect of *Agostini* was the Court's modification of the *Lemon* test by reviewing only its first two parts, purpose and effect, while treating the third, entanglement, as one measure in evaluating a law's effect.

Vouchers

Controversy has arisen over the use of vouchers, as lower courts have reached mixed conclusions in disputes over their constitutionality. Yet, it was not until a dispute from Ohio made its way to the Supreme Court that vouchers garnered national attention.

Following several rounds of litigation in federal and state courts, in *Zelman v. Simmons-Harris* (2002), the Court upheld the constitutionality of a statute from Ohio that was designed to assist underprivileged children in Cleveland's failing public schools. In dealing with the most controversial part of the law, on vouchers, the Court relied on *Agostini* and began by considering whether the program had the purpose or effect of advancing or inhibiting religion. Insofar as there was no dispute over whether the program had a valid secular purpose, the Court was satisfied that it did not have the effect of advancing religion. The Court pointed out that the program was acceptable because it conferred aid under neutral secular criteria that neither favored nor disfavored religion, was available to both religious and secular recipients on a nondiscriminatory basis, and was offered directly to a broad class of persons who directed the aid to religious schools based on their own independent, private choices.

Post-*Zelman* litigation challenging vouchers focused on state constitutional grounds, because they are typically more stringent than those under the federal Constitution. Accordingly, the Supreme Court of Colorado (*Owens v. Colorado Congress of Parents, Teachers and Students,* 2004), the First Circuit (*Eulitt ex rel. Eulitt v. Maine, Department of Education,* 2004), the Eleventh Circuit (*Cooper v. Florida,* 2005), and the Supreme Court of Florida (*Bush v. Holmes,* 2006) all struck down voucher programs on the basis of state constitutional provisions.

Conclusion

Ongoing debate over the constitutional viability of state aid to religiously affiliated nonpublic schools under the child benefit test will undoubtedly continue for the foreseeable future as the Supreme Court's perspective shifts depending on the composition of the bench, and the issue is unlikely to be resolved any time soon. The acceptable limits of aid to religiously affiliated schools and their students is just one of the many important topics that bears watching as the Court's membership changes in the coming years.

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See also Child Benefit Test; Nonpublic Schools; Vouchers

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Statute

Statutes, in their most basic form, are the written laws that govern our daily lives and operations. These laws are written by legislative bodies at the state and federal levels, and, in the United States, are the most fundamental source of law. In its Latin root, *statute* is derived from the meaning of "it is decided." Thus, statutes reflect the decisions of law-making groups at various levels and may be based on long-standing customs or new groundbreaking changes. Although the legislatures of state or federal governments actually propose (as bills) and write statutes, the government's system of checks and balances allows the executive, legislative, and judicial branches to all have a hand in the development of the laws that govern everyday life. A bill sponsored by a legislator can be passed into law as a statute, which is then approved by the chief officer of the executive branch (the president of the United States or the governor of any state). From that point, judges interpret these laws as to their constitutionality and implementation.

All statutes are subject to interpretation by members of the judicial branch of government (i.e., the courts), and statutes put into place by a legislature can be found to be unconstitutional by a judicial body and then revoked. In essence, then, statutes are written by legislative bodies but are then interpreted by judicial bodies. In some cases, a statute might contain vague or unclear terminology that the courts must decipher for practical purposes. Additionally, statutes can be modified or even rescinded by the same legislative body that established them. Statutes can also expire if such terms are written into the statute itself, or laws may be passed that automatically cancel a statute that has not been explicitly reauthorized by the legislature. Thus, although they represent binding law, statutes are neither permanent nor unalterable.

Because they are published in written form for use by such parties as citizens, lawyers, and judicial bodies, a group of statutes is typically organized by topic and published in volumes referred to as codes. Federal statutes compose the United States Code and are organized by topic into 50 sections called Titles; these Titles cover all areas of legal specificity including bankruptcy (Title 11), census (Title 13), education (Title 20), food and drug (Title 21), labor (Title 29), money and finance (Title 30), and war and national defense (Title 50). Most state codes are also divided by general subject areas such as a probate code (laws regarding wills, trusts, and other aspects of probate), education code (including but not limited to personnel, contracts, programs, discipline, organization of schools, school finance), family code (marriage, divorce, and child welfare issues), and criminal or penal code (violent crimes and punishments). The specific types of codes vary distinctly by state. The state of Texas, for example, publishes its state laws into 31 different codes, which can be purchased in book format or accessed online.

Insofar as education is a power granted to the states by virtue of the Tenth Amendment to the U.S. Constitution, statutes governing public schools are written and applied by state legislatures. Even the power of school districts to exist and operate must be granted by state statute or constitution, either explicit or implied. The degree of specificity regarding public schools found in statutes varies among states, with some being very specific in terms of what powers are expressly written and others being far more general. Still, federal statutes do have implications for public schools, even though education is a state responsibility. For this reason, most of the federal statutes influencing public education are carried out as part of the General Welfare Clause found in Article 1, Section 8 of the U.S. Constitution, which grants the U.S.

Congress the power to "pay the debts and provide for the common defense and general welfare of the United States." This clause grants the federal government the power to tax and spend monies for the general welfare of the country, which includes educational purposes. Any school or district that receives federal funds is thus bound by federal guidelines and statutes.

Likewise, the Commerce Clause, also found in Article 1, Section 8 of the Constitution, has been used to enforce federal statutes on public education. The Commerce Clause allows the U.S. Congress "to regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes." Although the Commerce Clause would seem to rarely apply to public school functions, phrases within it such as the "advancement of society, labor, transportation, *intelligence,* care, and various mediums of exchange" allow this aspect of federal statute to impact public education at the state level.

Although a statute is simply a written law developed by a legislative body, it differs distinctly from other types of law such as common law or case law. From the time a statute is passed by the legislature, it is considered binding law until it is repealed by other legislation or overturned by a judicial decision.

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See also Regulation; Stare Decisis

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Statute of Limitations

A statute of limitations is just that: It is a type of statute that is passed by legislatures at both the state and federal levels that sets forth the specific time period within which causes of action must be filed or rights enforced. Statutes of limitation therefore represent legislative determinations as to the maximum period of time within which persons may file claims to enforce their rights. The fundamental premise behind statutes of limitation is to advance justice or fairness by barring old claims.

As the Supreme Court of the United States famously stated, statutes of limitation are

> designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them. (*Order of Railroad Telegraphers v. Railway Express Agency,* 1944, pp. 348–349)

Statutes of limitation are essentially procedural in nature. In other words, statutes of limitation do not speak to the merit of a plaintiff's claim. Rather, defendants can raise the bar of the statute of limitations as a defense to claims by plaintiffs. Further illustrating the procedural rather than substantive nature of statutes of limitation, if defendants fail to assert the statute of limitations as a defense, a defense will be waived, and plaintiffs will be permitted to pursue even claims that are filed outside the applicable limitations periods. As alluded to earlier, legislatures at both the state and federal levels enact individual statutes of limitations. Accordingly, the application of statutes of limitations can vary from one jurisdiction to the next.

In general, statutes of limitation are classified by the types of actions or rights that are involved in litigation. For example, statutes of limitation for most tort actions are generally short, usually between one and two years. By contrast, statutes of limitation for contract actions are generally longer, usually between four and six

years. Individual statutes may also include statutes of limitations that are embedded in the text of the statutes themselves and specific to the particular laws.

Also important to understanding the application of statutes of limitation is the concept of accrual. Statutes of limitation begin to run when a plaintiff's cause of action accrues. Put another way, accrual is the point at which the "statutory clock begins to tick." Traditionally, accrual has been said to occur when a defendant's wrongful act takes place or his or her obligation or liability arises. Thus, the statute of limitations is triggered by the conduct of defendants, not the subjective awareness of plaintiffs of their right to sue. However, this understanding of accrual has often led to harsh results.

The most famous illustration is that of a surgeon who leaves a sponge in a patient after surgery. Under the traditional understanding of accrual, the statute of limitations would begin to run at the moment of the doctor's negligence or wrongful conduct. Accordingly, if no complications or other ailments develop that would put the patient on notice of the doctor's error before the expiration of the statute of limitations, the unsuspecting patient may be barred from bringing suit.

In order to prevent this type of result, many jurisdictions have adopted the so-called discovery rule. Under the discovery rule, the statute of limitations begins to run once plaintiffs have notice or information that would put reasonable persons on notice of potential wrongdoings or causes of action. Importantly, under the discovery rule, plaintiffs need not have every specific fact necessary to file suit. Rather, the statute begins to run as soon as plaintiffs suspect that they may have been injured by a defendant's wrongful conduct. In the surgeon example, then, the statute of limitations would begin to run as soon as complications developed and the plaintiff had reason to believe that his or her injury was the result of negligence or wrongful conduct.

Insofar as statutes of limitation constitute complete defenses to suits, school boards, educational leaders, or even individual teachers can be expected to raise this defense any time they are met with stale or old claims. Moreover, as noted above, statutes of limitation may vary by jurisdiction; their application to schools and education-related claims will also vary depending on the state in which the suit are filed or on the types of claim that plaintiffs assert.

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See also Statute

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Stay-Put Provision

After students with disabilities are placed in special education programs, their placements may not be changed unless their parents are notified in writing of proposed changes and have been given opportunities to contest the actions of school officials (20 U.S.C. § 1415(b)(3)). Additionally, the Individuals with Disabilities Education Act (IDEA) provides that while administrative due process hearings or judicial actions are pending, students are to remain in their "then current placement" unless their parents and school boards agree to some other arrangement (20 U.S.C. § 1415(j)). This portion of the law has become known as the stay-put or status quo provision. The purpose of the stay-put provision is to provide educational stability and consistency (*Gabel ex rel. L.G. v. Board of Education of the Hyde Park Central School District,* 2005). Court cases related to this issue are described in this entry.

School Action

The program that students attended at the time that disputes arose is usually considered to be their then-current placement. One court described this concept

as the operative placement actually functioning at the time the dispute first arose (*Thomas v. Cincinnati Board of Education,* 1990). According to this definition, a proposed placement that had never been implemented would not qualify as the stay-put placement. Thus, the stay-put placement generally is the placement that was last agreed upon by the parents and school board. If parents later withdraw their consent for a placement, it still remains the then-current placement (*Clyde K. v. Puyallup School District,* 1994).

On occasion, school personnel may make a placement that is meant to be temporary. When this is done, school officials are required to make their intentions clear. If school officials fail to make their intentions clear, then courts consider these placements to be the then-current placements. For example, in an early case, the staff at the private facility that a child attended called for his transfer to a residential school. The school board agreed to the new placement, but a year later notified the student's parents that inasmuch as school personnel saw no need for continued residential placement, the board would no longer assume financial responsibility for the placement. However, the trial court decided that the residential school was the student's then-current placement because board officials had assumed financial responsibility for it and gave no indication at the time that they intended to do so for one year only (*Jacobsen v. District of Columbia Board of Education,* 1983).

In a subsequent dispute, the same court determined that any limitation on a placement must be spelled out clearly and described in a settlement agreement (*Saleh v. District of Columbia,* 1987). In this case, the student was placed in a private school pending resolution of a placement dispute by mutual consent of the school board and parents. The board later claimed that the private school was an interim placement only. The court did not agree, ruling that it was the then-current placement, because its interim status had not been conveyed clearly. On the other hand, the District of Columbia Circuit affirmed that a private school placement ceased to be the then-current placement at the end of the school year, because a hearing officer's order clearly stated that it was to be for one year only (*Leonard v. McKenzie,* 1989). For similar reasons, the First Circuit wrote that a settlement agreement between the parties calling for a temporary placement in a private school did not make it the child's stay-put placement (*Verhoeven v. Brunswick School Committee,* 1999).

Parent Action

A parentally made private school placement may be the stay-put placement if a school board failed to propose an appropriate program in a timely fashion. For instance, the federal trial court for the District of Columbia noted that where the school board had not proposed a program by a deadline established by a hearing officer, parents were justified in placing their child in a private school, which essentially became his then-current educational placement (*Cochran v. District of Columbia,* 1987).

Conversely, when parents unilaterally remove their child from a program, it does not cease to be the stay-put placement. The Eighth Circuit ruled that the placement a student attended when his parents removed him from the public schools was his then-current placement for IDEA purposes (*Digre v. Roseville Schools Independent School District No. 623,* 1988). Similarly, a federal trial court in Illinois insisted that the stay-put provision does not apply to students whose parents unilaterally place them in private schools (*Joshua B. v. New Trier Township High School District 203,* 1991).

When school officials believe that keeping students in their then-current placements presents a danger to them or others or a substantial disruption to the educational process, a change in placement order can be issued by a court or hearing officer in spite of the stay-put provision (*Honig v. Doe,* 1988; 20 U.S.C. § 1415(k)(3)(B)(ii)). Even so, the burden is clearly on school officials to show that a change is necessary.

Allan G. Osborne, Jr.

See also Due Process Hearings; Disabled Persons, Rights of; Free Appropriate Public Education; Least Restrictive Environment

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Jacobsen v. District of Columbia Board of Education, 564 F. Supp. 166 (D.D.C. 1983).
Joshua B. v. New Trier Township High School District 203, 770 F. Supp. 431, (N.D. Ill. 1991).
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Saleh v. District of Columbia, 660 F. Supp. 212 (D.D.C. 1987).
Thomas v. Cincinnati Board of Education, 918 F.2d 618 (6th Cir. 1990).
Verhoeven v. Brunswick School Committee, 207 F.3d 1 (1st Cir. 1999).

Stevens, John Paul (1920–)

John Paul Stevens was appointed as associate justice to the U.S. Supreme Court by President Gerald Ford in 1975. Although nominally a Republican, Stevens brought with him a reputation as a political moderate. On the Court, he demonstrated an independent streak, tending to be a pragmatic jurist who reached decisions on narrow factual and legal grounds rather than advocating a particular judicial philosophy. However, in recent years, as the Court has moved more to the right, Justice Stevens has frequently voted as a liberal in cases affecting education law.

Early Years

Stevens was born into a wealthy family in Chicago, Illinois, on April 10, 1920. His father owned the Stevens Hotel, which today is the Chicago Hilton. As a child, he grew up in a residential area near the University of Chicago campus, and he received his elementary and secondary education at the university's laboratory school. He then entered the University of Chicago, where he majored in English, edited the student newspaper, and graduated Phi Beta Kappa. After college, Stevens joined the U.S. Navy and was awarded the Bronze Star for his service during World War II as a code breaker in naval intelligence.

Returning home after the war, he enrolled in law school at Northwestern University. At Northwestern, Stevens was an outstanding student, serving as editor-in-chief of the law review, graduating first in his class, and earning the highest grades in the law school's history. On graduation from law school, he clerked at the U.S. Supreme Court for Justice Wiley Rutledge.

Following his clerkship, Stevens was hired as an associate with one of Chicago's most prestigious law firms. Three years later, he formed his own firm. In private practice, Stevens developed an expertise in the field of antitrust law. He taught courses on antitrust law at Northwestern University and at the University of Chicago. During this time, he also served as counsel for committees of the U.S. House of Representatives and U.S. attorney general's office studying monopolies and researching antitrust laws. Steven's reputation for integrity led to his appointment as chief counsel to a commission investigating alleged improprieties of state court judges in Illinois.

On the Bench

In 1970, on the recommendation of a college friend, U.S. Senator Charles Percy, Stevens was appointed by President Richard Nixon for a seat on the Seventh Circuit. During his tenure as an appellate court judge, Stevens authored over 200 opinions, many of which were quite lengthy and accompanied by detailed footnotes. His early writings provided a clue to his approach to judicial decision making, demonstrating a preference for narrowly tailored decisions rather than grand pronouncements on constitutional law.

In 1975, following the resignation of Justice William O. Douglas from the Supreme Court, Judge Stevens was on the short list of possible replacements. Edward Levi, U.S. attorney general and former dean of the University of Chicago Law School, was a strong supporter of Stevens and highly recommended him to President Gerald Ford. The American Bar Association gave Stevens its highest rating. In the aftermath of Watergate, President Ford nominated Stevens as a respected judge with moderate Republican leanings

whose appointment would not create partisan political controversy. Judge Stevens's nomination was confirmed by a unanimous vote of the Senate.

On the Court, Justice Stevens proved to be less conservative than many of his initial backers might have hoped. During his first full term, he voted with liberal Justices William Brennan and Thurgood Marshall nearly 60% of the time. One of the biggest disappointments to conservatives has been Stevens's continued support in cases such as *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) for upholding the principle of a woman's right to an abortion. In *Hill v. Colorado* (2000), he authored the majority opinion upholding a state statute prohibiting protestors at abortion clinics from approaching within 8 feet any person within a radius of 100 feet of a health care facility.

Supreme Court Record

Over the years, Justice Stevens established a record of what his supporters consider to be independence and his critics view as inconsistency. Cases involving race relations and affirmative action are illustrative. In *City of Richmond v. J. A. Croson Co.* (1989), Stevens concurred in the judgment of the Court striking down a 30% minority set-aside program in the local construction industry. However, he filed a dissenting opinion in *Adarand Constructors, Inc. v. Pena* (1995), where he voted to uphold a minority preference program in federal construction projects. Justice Stevens argued that adherence to precedent and principles of federalism justified distinguishing federal set-aside programs, which were permissible, and state set-aside mandates, which were not.

In cases involving race-conscious admission policies to colleges and universities, Justice Stevens authored a concurring opinion in the case of *Regents of University of California v. Bakke* (1978), concluding that the university's admissions policy violated Title VI of the Civil Rights Act of 1964 by discriminating on the basis of race in an institution receiving federal funding. However, in the two more recent cases involving the University of Michigan, *Gratz v. Bollinger* (2003) and *Grutter v. Bollinger* (2003), Stevens voted to uphold both the enhanced point system for minority undergraduate students and the law school admissions policy allowing consideration of race as a factor in admissions.

Freedom of Expression

In cases involving First Amendment freedom of expression, Stevens typically has voted more out of pragmatic considerations than predisposed ideology. For example, in *Federal Communications Commission v. Pacifica Foundation* (1978), he wrote the majority opinion upholding sanctions of a radio station for broadcasting George Carlin's "Filthy Words" monologue at a time and in such a manner as could intrude into the privacy of a person's home or automobile.

Although he is the oldest member of the Court, Justice Stevens was among the first to master modern computer technology, and he authored the opinion of the Court in the case of *Reno v. American Civil Liberties Union* (1997) holding the Communications Decency Act unconstitutional. Notwithstanding the fact that the statute advanced the legitimate goal of protecting minors, its "indecency" and "patently offensive" provisions swept too far and abridged freedom of speech for adults, he wrote. In the case of *Texas v. Johnson* (1989), Stevens voted to uphold flag desecration legislation and dissented from the ruling of the Court that flag burning was a constitutionally protected form of symbolic expression.

Student Rights

In Fourth Amendment search and seizure cases, Justice Stevens has been more sympathetic to the protection of student rights than many of his colleagues. Although he concurred with the result of the Court's decision in *New Jersey v. T. L. O.* (1985) upholding the search of a student's purse by school officials, he dissented in part, arguing that the standard announced by the Court would permit school administrators to search students suspected of violating only the most trivial of school rules. Stevens dissented from the Court's decisions upholding random drug testing of student athletes and participants in extracurricular activities in *Vernonia School District 47J v. Acton* (1994) and *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002).

In cases concerning the rights of homosexuals, Justice Stevens's voting record has been very liberal. In *Boy Scouts of America v. Dale* (2002), he dissented from the Court's opinion holding that a private organization had a right to exclude homosexuals from membership. In *Bowers v. Hardwick* (1986), he dissented from the Court's opinion upholding the Georgia antisodomy statute. More recently, in *Lawrence v. Texas* (2003), he voted with the majority in striking down the state statute criminalizing homosexual conduct between consenting adults.

Establishment Clause

Justice Stevens has taken a strong separationist position on issues involving the First Amendment Establishment Clause. In two recent cases involving public displays of the Ten Commandments in Texas and Kentucky, he found both displays unconstitutional. Stevens has opposed almost all forms of public assistance to parochial schools, such as providing sign language interpreters, remedial instruction, audio visual equipment, and school vouchers. He has also voted against allowing religious groups access to public school facilities, writing forceful dissents in *Board of Education of Westside Community School v. Mergens* (1990) and *Good News Club v. Milford Central School* (2001).

Stevens has been criticized by religious fundamentalists for his opposition to prayer in public schools. He wrote the opinion of the Court in *Wallace v. Jaffree* (1985) holding an Alabama statute authorizing a moment of silence or voluntary prayer unconstitutional because it lacked a valid secular purpose, joined the majority in *Lee v. Weisman* (1992) declaring nonsectarian prayers at public elementary and secondary school graduation ceremonies unconstitutional, and authored the majority opinion in *Santa Fe Independent School District v. Doe* (200) striking down the practice of student-led prayers over the public address system at high school football games.

Indicative of Stevens's propensity to decide cases on narrow grounds is his opinion in *Elk Grove Unified School District v. Newdow* (2004), where a parent of an elementary school student alleged that a school district policy requiring willing students to recite the Pledge of Allegiance unconstitutionally violated the Establishment Clause because of the phrase "under God." The Court ruled that because the parent did not have legal custody of the student, he lacked prudential standing to sue.

In First Amendment Free Exercise Clause cases, Stevens has been less supportive of the rights of religious minorities. He cast a key vote in *Employment Division, Department of Human Resources of Oregon v. Smith (*1990), upholding the denial of unemployment benefits to Native Americans for their use of the illegal hallucinogenic drug peyote as part of a religious ceremony. He also voted with the majority in *City of Boerne v. Flores* (1997), striking down Congress's effort to overturn the *Smith* decision by enacting the Religious Freedom Restoration Act.

Special Education

One of the Court opinions authored by Justice Stevens that has had a tremendous impact on special education was the decision in *Cedar Rapids Community School District v. Garret F.* (1999), holding that the IDEA requires providing students with disabilities related services such as nursing care during school hours, even if the provision would strain the financial resources of the school district.

With the resignation of Chief Justice Rehnquist, Justice Stevens became the most senior member of the Supreme Court. In assessing Stevens's career, supporters cite his intellect, open-mindedness, and independence. During his long tenure on the Court, he has written more concurring or dissenting opinions than any of his contemporaries. Critics, especially conservatives, accuse him of lacking ideological consistency. Stevens has occasionally forged winning coalitions with centrists and liberals. However, some commentators feel that considering his sharp mind and personal charm, he should have exerted greater leadership. Now in his late 80s, Justice Stevens has recovered from cancer and is in relatively good health. His death or retirement could potentially shift the ideological balance of the Supreme Court.

Michael Yates

See also *Cedar Rapids Community School District v. Garret F.; Santa Fe Independent School District v. Doe;* Rehnquist Court; *Wallace v. Jaffree*

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Stone v. Graham

In *Stone v. Graham* (1980), the U.S. Supreme Court addressed a Kentucky statute requiring that school officials post a copy of the Ten Commandments, purchased with private contributions, on a wall in every public classroom in the commonwealth. The Court held that the law violated the Establishment Clause of the First Amendment.

The Kentucky statute required that the following notation was to be placed, in small print, at the bottom of each display of the Ten Commandments: "The secular application of the Ten Commandments is clearly seen in its adoption as the fundamental legal code of Western Civilization and the Common Law of the United States." Opponents of the statute filed suit claiming that it violated the Establishment and Free Exercise clauses of the First Amendment. In a per curiam opinion, the Supreme Court used the *Lemon* test to evaluate whether the statute was permissible under the Establishment Clause. In *Lemon v. Kurtzman* (1971), the Supreme Court held that to be permissible under the Establishment Clause, (a) a statute must have a secular legislative purpose; (b) its principal or primary effect must be one that neither advances nor inhibits religion; and (c) the statute must not foster "an excessive government entanglement with religion." No consideration of the second or third criterion is necessary if a statute does not have a clearly secular purpose.

The Supreme Court held that the statute requiring the posting of the Ten Commandments in public school rooms violated the first part of the *Lemon* test in that it had no secular legislative purpose and was therefore unconstitutional. Accordingly, the Court thought it unnecessary to proceed any further than *Lemon*'s secular purpose test, because it rejected arguments on behalf of the commonwealth that a notation on the bottom of the Ten Commandments, indicating that they are part of "the fundamental legal code of Western Civilization and the Common Law of the United States" (*Stone v. Graham,* 1980, p. 41), was sufficient to indicate the secular purpose of the posting. Moreover, the Court was of the opinion that the main purpose for posting the Ten Commandments on schoolroom walls was clearly religious rather than educational.

The Court decided that posting the Ten Commandments violated the First Amendment because the Commandments were not integrated into the school curriculum, as is the case, for example, when a Bible may constitutionally be used to study subjects such as history, civilization, ethics, or comparative religions. Further, the Court maintained that the posted copies of the Ten Commandments were being used to induce schoolchildren to read, meditate upon, and obey the Commandments, which is not a permissible state objective under the Establishment Clause. The Court considered it to be irrelevant that the copies were purchased with private contributions, because the mere posting of the Commandments demonstrated official state support of their message. As such, the Court pointed out that the First Amendment protects the rights of citizens to post the Ten Commandments on private property and to engage in other kinds of private religious expression. There are many places in America where the Ten Commandments would be welcome and appropriate—houses of worship, private schools and universities, and private parks. It is only when public, state-supported property is used that the First Amendment becomes prohibitive of religious expression.

Stone v. Graham is most often cited for its importance with regard to the body of law that interprets teaching religious doctrine or displaying religious symbols as being sufficient to demonstrate government endorsement of their message. For example, even if school officials were to argue that the Ten Commandments could be viewed through a secular framework, their historically religious origin makes them irrefutably religious. This raises a question that the Supreme Court did not answer in *Stone v. Graham,* namely, the extent and manner in which religious themes, practices, or literatures may be presented in public contexts, when the First Amendment requires the separation of church and state, but the traditions of the country in many instances reflect and grow out of religious practices, such as Sunday "blue laws" or tax benefits for churches. Needless to say, this is an area that is ripe for future litigation.

Malila N. Robinson

See also First Amendment; Fourteenth Amendment; *Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Public Schools; State Aid and the Establishment Clause

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Stone v. Graham, 449 U.S. 39 (1980).

Strip Searches

An unusual and highly controversial form of student search is the strip search. Strip searches are generally perceived to be among the most intrusive forms of searches and are typically administered when students are suspected of posing a considerable threat to school safety. While a legal framework for searching students was established decades prior, uncertainty remains with respect to particular aspects of administering searches, including the appropriateness of the type of search. This entry reviews a number of U.S. Supreme Court cases that have addressed the scope and rationale for strip searches.

The Supreme Court Speaks

In *New Jersey v. T. L. O.* (1985), the U.S. Supreme Court added clarity to discretionary powers of school officials administering searches of students. While it declared that searches of students require only a standard of reasonableness—a less rigid standard than probable cause—the Court also conveyed that students are entitled to legitimate expectations of privacy under the Fourth Amendment. Thus, students' rights are not relinquished entirely—a fundamental principle underlying former landmark students' rights cases.

The majority opinion, however, was far from absolute in addressing specific nuances of administering student searches. The Court offered little definitive and practical guidance with regard to the treatment of unlawfully seized evidence, the role of police in student searches, and the degree of privacy students have in government-owned storage.

Besides the provision that the scope of the search account for the sex, age, and maturity of the student, the majority failed to place any limitations on forms and types of searches allowable, including strip searches. Justice Stevens, in the dissenting opinion in

T. L. O., expressed concern about their use, stating that strip searches "[have] no place in the schoolhouse" (p. 382). With the exception of state laws that prohibit strip searching in schools, lower court cases reveal little consensus as to whether strip searches should be legally allowable.

Rulings in Favor of Schools

Cornfield v. Consolidated High School District No. 230 (1993) is a case that reflects the legal complexity of strip searching. *Cornfield* is also one of the more noteworthy and telling illustrations of judicial restraint in school administrative matters. Brian Cornfield, a 16-year-old high school student, was suspected of harboring illegal drugs in the crotch of his pants. He was subsequently strip searched by two male school officials. No drugs were discovered. Despite Cornfield's contention that his Fourth Amendment rights were violated, the court found the school's actions constitutionally based on the two-part test created in *T. L. O.*

According to the Seventh Circuit in *Cornfield,* the search was reasonably justified based on two factors: the interest of school officials in maintaining order and safety and the student's problematic behavioral history. In reference to the scope of the search, the court upheld the use of the strip search as a reasonable means to "confirm or deny" suspicion of "crotching" drugs (p. 17). While it appeared that school officials may have exceeded legal boundaries of discretion with respect to intruding on the student's privacy, this case and others reflect an accommodating posture toward the strip search as a reasonable alternative if the legal criteria are met.

The Eleventh Circuit, in *Jenkins ex rel. Hall v. Talladega City Board of Education* (1996) illustrated again the effect of *T. L. O.*'s imprecise guideline regarding proper scope in student searches. In *Jenkins,* a student's accusation of theft of $7 from a backpack resulted in two second-grade girls being strip searched by a teacher and guidance counselor in a school restroom. Interestingly, the court disregarded the legality of the search and instead focused on the question of whether it had been established that the teacher and counselor were knowledgeable of the legal standards. Hence, the legality of the search itself was never decided, which in effect created more uncertainty as to what constitutes appropriate scope.

Unlawful Searches

At the same time, some courts have admonished school officials for failing to meet reasonableness requirements when administering strip searches, even when facts mirror aforementioned cases. In *Fewless v. Board of Education of Wayland Union Schools* (2002), school officials received a tip from four students scheduled to serve detention that another student was in possession of marijuana. Fewless, a 14-year-old special education student with a history of behavioral issues, was eventually strip searched. No drugs were discovered. The federal court ruled the search unlawful, as it was neither justified at its inception nor reasonable in scope. The court also noted that Fewless never gave consent to be strip searched.

In *Kennedy v. Dexter Consolidated Schools* (2000), the Supreme Court of New Mexico awarded punitive damages to two high school students who were strip searched because of a missing ring. Two students were subjected to searches while urinating and were later ordered to remove their undergarments. The court held that school officials both lacked individualized suspicion and exceeded lawful scope in administering a strip search.

In *Bell v. Marseilles Elementary School District* (2001), school officials and a municipal officer conducted a partial strip search of 30 to 35 students after 3 students reporting missing money after a gym class. A federal trial court in Illinois, in rejecting the board's motion for summary judgment, ruled that officials violated both parts of the *T. L .O.* analysis, namely justification and scope. According to the court, the police officer lacked reasonable suspicion to implicate the students in the missing money, and the strip searching of the students without a higher standard of suspicion was decidedly intrusive.

On the whole, the sample of cases presented here demonstrates varying and occasionally contradictory legal rationales employed to justify or censure strip searching. Some states, such as Wisconsin and California, have prohibited the use of strip searches in schools. Other states see strip searching as a crucial hedge against crime and violence in schools.

Nonetheless, its utility in public schools remains highly controversial.

Mario S. Torres, Jr.

See also In Loco Parentis; *New Jersey v. T. L. O;* Parental Rights

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Stuart v. School District No. 1 of Village of Kalamazoo

At issue in *Stuart v. School District No. 1 of Village of Kalamazoo* (1874) was whether a local school board had the authority to use its power to levy taxes on the general public in order to support high schools and to apply the funds to provide instruction for children in languages other than English, namely Latin and French. The Supreme Court of Michigan approved the board's decision to operate the high school and offer the language classes even though it lacked the express legislative authority to do so. The Court reasoned that the school board had the power to act, because nothing in the state's constitution, statutes, or policies restricted it from making such decisions in light of the voter approval that its members received when they were elected to represent their community. The Court added that insofar as the board was responsible for school operations, including course selections, it took 13 years before a group of disgruntled taxpayers challenged its actions. Because state officials had not objected to the board's action, the Court was satisfied that the claim against it was without merit.

Kalamazoo is most often cited for its importance with regard to the creation of free, tax-supported secondary schools. Even so, Kalamazoo is perhaps of even greater legal significance for local school boards, because it stands for the proposition that they have the implied authority to act as they deem appropriate in matters of educational policy, school governance, and educational programming. To this end, Kalamazoo stands out as the case that opened the door to granting local school boards the authority to set educational policy and standards for the students under their care.

Kalamazoo stands out as the earliest opinion on how the evolution of governance in American public education has been characterized by broad judicial interpretation of the implied powers of local school officials. More specifically, the Supreme Court of Michigan's decision in *Kalamazoo,* upholding the local board's extension of a common school system to include high schools, served as a bellwether that afforded other governing bodies the ability to extend their authority over educational programming. More recently, the U.S. Supreme Court recognized the viability of this long-held principle of board authority in *San Antonio Independent School District v. Rodriguez* (1973), wherein it found that local school boards have the authority to tailor educational programming to meet the needs of their specific communities.

Following *Kalamazoo,* judicial deference to local school boards has encouraged freedom and

experimentation that is out of proportion to that suggested by the legal structure of public education. Creative boards typically introduce new practices in what may be described as exercises of their implied powers. If revolutionary educational practices are not challenged, or if they survive judicial scrutiny, then other school systems may adopt similar methodologies, thereby leading to their general acceptance. In the vast majority of cases involving new educational practices, local school boards have prevailed, usually on the basis that the adoption of innovative programming is a desirable way of achieving broad legislative and educational goals, especially because change is taking place at the local level.

Charles J. Russo

See also School Board Policy; School Boards

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Student Suicides

Suicide among adolescents has increased dramatically in the United States over the past 40 years. A 1991 Maryland case, *Eisel v. Board of Education of Montgomery County,* recognized a cause of action against a school district and its employees for failing to warn parents of a student's suicidal ideations. However, in the years since *Eisel,* most courts have ruled that school boards and their employees are not legally responsible for a student's death by suicide. This entry briefly examines the issue of student suicides and then looks more closely at education-related lawsuits.

A Rising Problem

Between the late 1960s and late 1990s, the teen suicide rate went up dramatically in the United States, particularly for adolescent males. According to a 1999 report from the U.S. surgeon general's office, suicide is the third leading cause of death for teenagers, with adolescent boys about four times more likely to kill themselves than adolescent girls. The report noted that Hispanic high school students were more likely than other students to commit suicide and Native American male adolescents had the highest suicide rate in the nation.

Nevertheless, the problem of teen suicide may not be as bad as it is sometimes portrayed. Even though teen suicide is the third leading cause of death among teenagers, the suicide rate for young people is lower than the suicide rate for older Americans.

Legal Cases

Teenage suicides occasionally take place in the context of negative school events, but no court recognized the possibility of school district liability for a student's death until 1991, when Maryland's highest court issued its decision in *Eisel.* The Maryland court held that a school board could be held liable for a student's suicide if the district's professional employees knew the student was suicidal and failed to warn the parents or take other reasonable preventive action. According to the court, school counselors have a duty to use reasonable means to attempt to prevent a student from committing suicide if they are on notice of the student's suicidal intent.

Eisel was the first of a line of state and federal court decisions in which parents or guardians sued school districts and their professional employees, seeking to hold the schools and educators responsible for a child's suicide. One group of cases analyzed negligence claims against school districts arising from a student's suicide. A second group of cases considered constitutional claims.

Among the important cases is *Wyke v. Polk County School Board,* in which the Eleventh Circuit upheld a jury's negligence verdict against a school district and two other defendants arising from a student's suicide. The Eleventh Circuit ruled that a school can be liable for a student's suicide if the student attempted suicide at school and school authorities knew about the attempt and then failed to notify the student's parent or guardian. Nevertheless, in *Wyke,* the school board was liable only for approximately one-third of the

damages that arose from the student's death. The jury concluded that the mother bore 32% of the responsibility and that the student's caretaker at the time of death was responsible for 35% of the total liability.

Another important decision in the area of school liability for a student's suicide is *Armijo v. Wagon Mound Public Schools,* a 1998 decision of the Tenth Circuit. Here the court recognized the possibility of a constitutional claim for a student's suicide based on the danger-creation theory. Even so, the court rejected plaintiffs' constitutional theory that the school board owed the suicide victim a duty to protect him against suicide based on a special relationship between the parties. The court also pointed out that the posture of the case required it to draw all inferences in favor of the plaintiffs and remanded the case back to the federal trial court for a consideration on the merits.

In 2004, Richard Fossey and Perry Zirkel surveyed all the cases on the issue of school district liability for student suicide that had been reported at that time. Fossey and Zirkel concluded that the courts, both state and federal, were inhospitable to plaintiffs seeking to hold educators legally responsible for a student's suicide. Courts relied on various legal theories to find in favor of defendants in these cases. In several cases, school districts prevailed on governmental immunity grounds. In some cases, plaintiffs' claims were defeated on the ground that the student's suicide was the result of some intervening cause, not the action or inaction of school authorities. Zirkel and Fossey acknowledged that *Eisel,* the case that had first recognized a cause of action against a school board arising from a student's suicide, had seldom been mentioned in the post-*Eisel* decisions, much less relied upon.

In a 2005 update of their 2004 article, Zirkel and Fossey reiterated their earlier conclusion that educators have little to fear from lawsuits arising from a student's suicide. The trend of litigation since the 1991 *Eisel* decision has not been favorable to plaintiffs in these cases. The authors maintained that school authorities may wish to adopt policies and programs to reduce the tragedy of student suicide based on professional and ethical concerns, but the risk of liability for these events is small.

Richard Fossey

See also Due Process; Negligence

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Swann v. Charlotte-Mecklenburg Board of Education

The U.S. Supreme Court's decision in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) stands out for three reasons. First, *Swann* was the Court's last unanimous opinion in a major school desegregation case. Second, in *Swann,* for the first time, the justices considered the propriety of and upheld a court-ordered busing plan designed to end de jure segregation in public schools. Third, in *Swann,* the Court addressed other permissible means of achieving desegregation, including rezoning of attendance zones, limited use of racial quotas, and reassignment of educational personnel.

Facts of the Case

Swann began in 1965 when a group of plaintiffs unsuccessfully sued their school board over its geographic zoning and free transfer policy. A federal trial court in North Carolina ruled in favor of the school board on the basis that it had made progress toward desegregating the public schools. At the time, 66 of the district's 109 schools were entirely segregated. On appeal, in the initial round of litigation in 1966,

the Fourth Circuit affirmed that the board had met its obligation to act without intent of enabling segregation. However, change was in the offing.

Two years later, in 1968, the Supreme Court found in *Green v. County School Board of New Kent County* that the county had to assume the burden of ending the historic patterns of segregation. The justices added that it was the federal trial court's duty to evaluate the plan's effectiveness and any alternatives that the school board submitted while maintaining jurisdiction until it was apparent that state-mandated segregation was completely eliminated. The plaintiff's attorney in *Swann,* Julius Chambers, thus viewed *Green* as providing a justification to seek further relief in expediting desegregation.

When *Swann* was relitigated in light of *Green,* the federal trial court determined that because the board's plan did not further desegregation, it had to develop a new, amended desegregation plan by the fall of 1970. The judge offered several remedies, including busing and rezoning. When the board's plan failed to impact school desegregation, the court appointed a special master to prepare a plan and, on receiving it, ordered its implementation. The board appealed to the Fourth Circuit, which directed the trial court to conduct hearings on the extensive use of busing elementary students and the reasonableness of the busing plan.

The trial court asserted that the plan was acceptable and again ordered its implementation as modified for junior and senior high schools; it accepted a so-called Finger Plan for rezoning elementary schools. The plan included faculty and student reassignments, closing of schools, and busing to achieve desegregation. After the Fourth Circuit approved the plan for the secondary, but not elementary, schools, the plaintiffs appealed.

The Court's Ruling

On further review, the Supreme Court ruled in favor of the plaintiffs in examining the duties of school officials along with the powers of federal courts to eliminate racially separate public schools. At issue in *Swann* was whether federal trial courts had the authority to craft solutions eliminating segregation when educational officials were unsuccessful in remedying the problem themselves. In response, the justices started by upholding the Finger Plan as a valid exercise of the district court's equitable powers that were consistent with *Brown v. Board of Education of Topeka* (1954).

At the same time, the Supreme Court identified other areas to address when remedial action is warranted. To this end, the Court noted that while it is not necessary for every school in a system to reflect a district's racial composition as a whole, a federal trial court may apply racial ratios or quotas as a starting point in shaping remedies; that one-race schools may be acceptable but should not result from past or present discriminatory actions; that attendance zones may not be laid down as rigid rules for all localities; and that it was possible to use busing as a tool in the fight to desegregate schools.

Further, the Court indicated that when constructing new schools as a remedy for de jure segregation, educational officials and the courts should not use location as a means of perpetuating dual systems. The Court concluded that once school systems have achieved unitary status, school boards did not have to make annual adjustments in the racial compositions of student bodies.

Darlene Y. Bruner

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Dual and Unitary Systems; *Green v. County School Board of New Kent County;* Segregation, De Facto; Segregation, De Jure

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Sweatt v. Painter

In *Sweatt v. Painter* (1950), the National Association for the Advancement of Colored People (NAACP) built a pivotal case in the history of school segregation. *Sweatt* represents the first time the Court ordered a traditionally White university to admit an African American student instead of sending him to an African American university. In a crucial finding, the Court held not only that facilities and their resources were unequal but also that the simple separation of the African American student from his White peers resulted in an unequal education opportunity.

The outcome in this and a related case formed the gateway to integration, as the Supreme Court ordered the admittance of African American students into traditionally White graduate and professional schools. In addition, *Sweatt*'s groundbreaking analysis became the basis for *Brown v. Board of Education of Topeka* (1954).

Facts of the Case

Heman Marion Sweatt, an African American postal worker, was denied admission to the University of Texas Law School despite his academic qualifications. Officials rejected his application, because a state law denied non-Whites access to the university. Instead, officials offered Sweatt a place at Prairie View University, the African American institution associated with Texas A&M University, which the state created and which, officials contended, met the constitutional "separate but equal" requirement mandated by *Plessy v. Ferguson* (1896).

The NAACP saw Heman Sweatt's situation as an opportunity for them to challenge the constitutionality of *Plessy,* which had been extended to education in *Gong Lum v. Rice* (1927). Insofar as the NAACP expected a general reluctance to overturn *Plessy*'s longstanding "separate but equal" doctrine, the organization decided to focus on the inequalities of the separate school, anticipating that states would inevitably choose to desegregate rather than incur the expense of equalizing their separate facilities.

With this in mind, the NAACP filed suits calling for the improvement of facilities for African Americans, targeting the University of Texas Law School, in 1946. The NAACP thus recruited Heman Sweatt as their plaintiff, because he was an African American applicant who was rejected on the basis of his race even though he was otherwise qualified for admission. Sweatt unsuccessfully filed suit in state courts, claiming that officials violated his right to equal protection.

The Court's Ruling

On further review in *Sweatt v. Painter,* the U.S. Supreme Court examined whether the automatic rejection of an application based on race violated the Equal Protection Clause of the Fourteenth Amendment. Reversing in favor of Mr. Sweatt, a unanimous Court held that the Constitution required officials to admit him to the University of Texas Law School, because otherwise they would deny him the opportunity to obtain a legal education while granting it to others.

The *Sweatt* Court rejected *Plessy*'s notion that separate facilities could be equal, explaining that the separate law school for African Americans was not substantially equal to the University of Texas Law School. The Court reasoned that the separate law school was unequal based on tangible factors such as financial resources, size of faculty, number of library resources, number of students, and course offerings. The Court added that the African American law school was also inferior in intangible areas such as the reputation of the faculty, authority of alumni, and overall prestige.

In addition to the inequalities between the African American and White institutions, the Court pointed out that the isolation of these African American students was disadvantageous to their abilities to compete in the legal arena. Considering that Whites made up an overwhelming majority of the legal profession, the Court emphasized that the lack of contact and engagement with Whites due to the segregated system

was problematic. According to the Court, such inequality resulting from this separation indicated that the separate African American school would never have been considered equivalent to the White school, regardless of how much money and prestige the African American school could accumulate.

While the Supreme Court was reviewing *Sweatt,* it simultaneously analyzed *McLaurin v. Oklahoma State Regents for Higher Education* (1950), which addressed the University of Oklahoma's separation of an African American student from his classmates in areas such as the classroom, cafeteria, and library. In *McLaurin,* handed down on the same day as *Sweatt,* the Court decided that isolating the plaintiff from his classmates hindered his academic experience by restricting his discussions and interactions with other students. Both *Sweatt* and *McLaurin* examined whether a racially segregated environment could produce equality in educational experiences, and both concluded that it could not, a direct challenge to *Plessy.*

Following *Sweatt* (and *McLaurin*), graduate and professional schools immediately admitted many more African Americans into their programs. Further, the NAACP's plan to end segregation in higher education transitioned into the battle in elementary and secondary schools, setting the stage for *Brown,* wherein the Supreme Court reasoned that separate schools based on race violated the Equal Protection Clause, because this resulted in unequal educational experiences. *Brown* struck down *Plessy*'s "separate but equal" doctrine in education, holding that desegregation was necessary to provide African American students with access to educational opportunities that were equal to those available to White students.

Wendy C. Chi

See also *Brown v. Board of Education of Topeka;* Equal Protection Analysis; Fourteenth Amendment; *Gong Lum v. Rice; McLaurin v. Oklahoma State Regents for Higher Education;* National Association for the Advancement of Colored People (NAACP)

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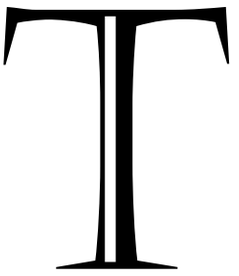

Teacher Rights

Teachers enjoy rights in a variety of areas: freedom of speech, privacy, due process, and discrimination. This discussion of those rights involves primarily federal law. Even so, it is worth noting that there are state-level counterparts to nearly all of the principles covered, including freedom of speech and academic freedom, privacy, due process, and employment law.

Free Speech and Academic Freedom

A discussion of the expression rights of teachers involves the balance between the rights and responsibilities of public school employees and the institutions themselves. This balance is best met through an analysis of the capacities the speakers have taken to express their views. At one end of the balance, one must ask whether teachers are speaking as citizens, as employees, or as educators teaching in classrooms. At the other end, one must ask whether the interest of a school board in restricting teacher speech is inspired by its role as sovereign, employer, or educator, in the sense of being the leader of school curriculum. A series of U.S. Supreme Court cases illustrate this balance.

Teacher as Citizen

For purposes of free speech analysis, the difference between the role of teachers as citizens and as employee is often small. However, the judicial determination of what role speakers play is assuredly an important one, almost entirely dependent on one threshold question, asked most prominently in the landmark Supreme Court case of *Pickering v. Board of Education of Township High School District 205, Will County* (1968): Is the speech related to a matter of public concern? If the answer is "yes," the courts tend to favor speakers as citizens and restrict public employers' suppression of the expressive activities. If the answer is "no," the courts generally find in favor of the employers, allowing them wide latitude in the governance of their internal affairs.

In *Pickering,* a school board sought to dismiss a public school teacher after he wrote a letter to the editor of a local newspaper criticizing the board for its appropriation of funds and its handling of two failed tax levy campaigns. The board countered with accusations that the statements in the letter were false and had a negative impact on the efficient operation of the schools. In reality, the community and many of the teacher's coworkers greeted the letter with a good measure of apathy and disbelief. The letter itself was not directly critical of any particular board members or school administrators. The teacher unsuccessfully appealed his dismissal, but state courts in Illinois rejected his First Amendment claims.

On further review before the Supreme Court, the Court reversed in favor of the teacher. In an initial statement, the Court rejected the argument that public

employees give up their constitutional rights as citizens on accepting government employment. According to the Court,

> The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. (*Pickering,* p. 568)

In striving to arrive at this balance, the Court weighed five factors: whether the subject of the speech was a matter of public concern, the closeness of the working relationships between speakers and those they criticized, whether there was a detrimental impact on the administration of the schools, whether employee performances suffered as a result of the expression and its response, and whether employees spoke in their professional capacity or as private citizens.

In applying these factors to the facts in *Pickering,* the Supreme Court was of the opinion that the letter to the editor dealt with a matter of public concern, namely, the use of taxpayer money in the operation of public schools. Insofar as the relationship between the teacher and the board members he criticized was not close on a daily basis, the Court ruled in favor of the teacher on the second factor as well. Compounded with that finding, the Court noted that there was no detrimental impact on the performances of either the board or the teacher. To this end, the Court pointed out that there was no levy on the ballot at the time of the letter, nor was there any evidence of disruption at the teacher's school.

Also significant to the speech issue in *Pickering* was the Court's discussion of the board's claim that the teacher's statements were false. To the extent that the statements were false, the Court had indicated that the statements must have led to some detriment on the part of the operation of the school board. The Court acknowledged that in *Pickering,* there was no detriment. Further, the Court observed that an accusation, even from one of its teachers, that the board was mismanaging funds reflected a difference of opinion on a matter of general public interest. "Absent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on matters of public importance may not furnish the basis for his dismissal from public employment" (*Pickering,* p. 576).

Teacher as Employee

While the *Pickering* Court included among the other balancing factors the question of whether the speech related to a matter of public concern, the Supreme Court in *Connick v. Myers* (1983) placed special attention on that factor and made it a threshold question before applying a balancing test. In *Connick,* a district attorney (Connick) dismissed an assistant district attorney (Myers) for her refusal to accept an interoffice transfer and for then distributing a questionnaire to coworkers requesting opinions on transfers, office morale, the need for a grievance committee, the level of confidence in supervisors, and the pressure to work on political campaigns. The lower courts ruled in favor of the plaintiff, but the Supreme Court reversed in favor of the employer.

On the threshold question of whether the plaintiff's speech related to a matter of public concern, the Supreme Court reasoned that the First Amendment did not prevent the discharge of a state employee for speaking on matters of internal concern. According to the Court,

> When employee expression cannot be fairly considered as relating to any other matter of political, social, or other public concern, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment. (*Connick,* p. 146)

In answering the question of whether the speech related to a matter of public concern, the Supreme Court explained that it was necessary to look at the content, context, and form of the speech. The *Connick* Court recognized that with the exception of the questionnaire items dealing with political campaigns, the employee's speech constituted a matter of internal concern. Applying the *Pickering* balancing test, the Court ultimately decided that the employer's interest and the necessity in the efficient and successful operation of his office and the maintenance of close working relationships with superiors outweighed the public aspects of the employee's speech.

Related to both *Pickering* and *Connick* is another landmark decision by the Supreme Court in the area of public school teachers and free expression. In *Mt. Healthy City School Board of Education v. Doyle* (1977), an untenured public school teacher sued the school board, alleging that the nonrenewal of his contract was in retaliation for his constitutional exercise of free speech. Among the incidents the school board listed as reasons for not renewing the teacher's contract were his having had arguments with fellow teachers and staff members, making derogatory and obscene comments and gestures to students, and placing a telephone call to a local radio station to discuss the contents of a school district dress code for teachers. Ruling in favor of the board, the Court adopted a burden-shifting test. Under this test, employees must show that their conduct was constitutionally protected and that this conduct was the substantial motivating factor in the employer's decision. If employees satisfy this burden, employers must show that the employees would have been disciplined, such as being dismissed, regardless of whether they engaged in protected activities.

The school board in *Doyle* admitted that the phone call to the radio station was one of the reasons it chose not to renew the teacher's contract. Even so, the Supreme Court asserted that the mere fact that protected speech was used in the employment decision was not enough to warrant the teacher's reinstatement and/or granting an award of back pay. The Court explained that the board would have to demonstrate that it would have recommended the nonrenewal of the teacher's contract anyway, in light of the other incidents. Basically, the Court concluded that employees cannot use a free speech claim to overcome records of unsatisfactory performance justifying employers' adverse employment decision. The Court wrote,

> While a borderline or marginal employee should not have employment decisions weigh against him because of constitutionally protected conduct, that same employee ought not to be able to prevent the employer from reviewing his performance record by adding constitutionally protected conduct to it. (*Doyle.* p. 286)

On remand, the Sixth Circuit accepted the board's argument that it would not have renewed the teacher's contract regardless of whether he had placed the telephone call to the radio talk show.

In another case involving public education, *Givhan v. Western Line Consolidated School District* (1979), the Supreme Court posited that *Pickering* also applies to teachers who express themselves during private conversations with their supervisors. When school officials chose not to renew the contract of a nontenured teacher, she was told that this was partly because she did not get along well with her principal and because she complained about the school board's racially discriminatory employment practices. Although the Supreme Court refused to reinstate the teacher, it reasoned that the lower court was mistaken in finding that the board was justified in not renewing her contract. The Court was of the view that in applying *Pickering,* courts must consider not only the working relationships among employees but also the content of their speech in considering whether private communications are entitled to the protection of the First Amendment.

In *Waters v. Churchill* (1994), a nurse at a public hospital challenged her dismissal after her employers investigated negative comments to a colleague about her supervisor and department. A plurality of the Supreme Court indicated that regarding the regulation of speech, the government may treat its own employees differently than it does private citizens. The Court remarked as follows:

> The government's interest in achieving its goals as effectively and efficiently as possible is elevated from a relatively subordinate interest when it acts as sovereign to a significant one when it acts as employer. The government cannot restrict the speech of the public at large just in the name of efficiency. But where the government is employing someone for the very purpose of effectively achieving its goals, such restrictions may well be appropriate. (*Waters,* p. 675)

Effectively, *Waters* supports the view that even when adverse employment decisions are predicated on government employees' exercises of free speech, the interests of public institutions may outweigh the employees' free speech rights, particularly when the speech can reasonably be forecast to create a substantial disruption or material interference with workplace

efficiency. Even when employee speech is on a matter of public concern, the plurality opinion in *Waters* granted the government, as employer, good-faith leeway in evaluating whether the speech is likely to be disruptive to its operations. In other words, *Waters* stands for the proposition that as long as public employers have reasonable beliefs that speech would disrupt their efficient operations, they may punish employees regardless of what they actually said. At the same time, it is important to note that the punishment must be based on the potential disruption and not in retaliation for the speech.

Garcetti v. Ceballos (2006) extends the argument against excessive judicial intrusion into governmental affairs, while emphasizing the role that employees/citizens play when making disputed statements. In *Garcetti,* a deputy district attorney examined an affidavit used to obtain a search warrant in a pending criminal case and determined that it was flawed; as a result, he authored a report outlining the misrepresentations and suggested that the case be dismissed. The prosecutor's office proceeded with the case, despite the recommendation. The attorney then claimed that he was subjected to a series of retaliatory employment decisions in violation of his First Amendment rights.

A closely divided Supreme Court in *Garcetti* disagreed with the employee on the basis that the controlling factor in such a situation was that he made his remarks as part of his regular job responsibilities. The Court held that "when employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline" (p. 1960). The *Garcetti* Court explicitly recognized *Pickering* as good law and reaffirmed that public employees do not lose their status as citizens merely because they are public employees.

Teacher as Educator

The right of school boards to restrict teachers' expression is at its highest when they wear the "educator hat." In this mode, the state is most concerned about the classroom speech of teachers. The Supreme Court case of *Hazelwood School District v. Kuhlmeier* (1988) governs this part of the balance. In *Hazelwood,* a principal deleted two pages of a school-sponsored newspaper that contained controversial articles written by students as part of a journalism class that was a component in the school's curriculum.

In response to the students' First Amendment free speech claim, the Supreme Court upheld the principal's action, pointing out that school officials may exercise editorial control over the content and style of student speech in school-sponsored activities so long as their decisions are reasonably related to legitimate pedagogical concerns. Important to the outcome in *Hazelwood* was the fact that the Court treated school classrooms and other venues for school-sponsored expressive activities as nonpublic forums. Further, the Court thought it necessary to afford educational administrators broad discretion over school activities and events that bear the school's imprimatur.

There is little question that the *Hazelwood* decision applies beyond student speech to cover teacher speech. For example, a teacher's classroom speech in that nonpublic forum bears the imprimatur of the school. Consequently, school officials may restrict teachers' speech if they can cite legitimate pedagogical concerns for doing so.

In effect, *Hazelwood* helps to answer the larger question of the extent to which K–12 teachers have "academic freedom" in their teaching. In defense of academic freedom, teachers argue that it is their right to teach subject matter within their professional competence and without undue restraints or interference from school administration. Essentially, the teachers' position is that their purpose is to create an atmosphere in which knowledge and ideas may be freely exchanged. In response, school boards maintain that state and federal demands for academic accountability and curricular standards necessarily diminish the academic freedom of teachers. Boards are of the position that essentially, academic freedom is not a right that belongs to individual teachers. With heavy deference to the curricular authority of the state, academic freedom belongs not to individual teachers, but to the institutions that are charged with implementing mandated curriculum. This is not to say that teachers have no freedom to guide the content or style of their teaching.

From a legal perspective, courts have rejected a good number of First Amendment claims filed by teachers, instead upholding a wide range of board decisions, including dismissals, the nonrenewal of contracts, suspensions, reassignments, and reprimands, against teachers who crossed inappropriate lines in classrooms and at other school-sponsored events. In one such case, *Miles v. Denver Public Schools* (1991), the Tenth Circuit upheld the paid suspension of a teacher who used time in a ninth-grade government class to substantiate a rumor about two current students who were allegedly "making out" on a school tennis court. In an effort to apply the *Pickering* standard, the teacher asserted that the topic of the class discussion, the fact that the quality of the school and general society had declined in recent years, was a matter of public concern. However, the court applied *Hazelwood,* reasoning that since the classroom was a nonpublic forum, educational officials had legitimate educational grounds for imposing the suspension, namely, professionalism, ethics, and good judgment. Other examples in which courts upheld disciplinary sanctions that school officials imposed in light of teachers' classroom conduct and speech include discussions of current events at the expense of completing the curriculum; profanity by a teacher; showing R-rated movies that included profanity, sex, nudity, and drug use in violation of board or school policy; biology classes with too much talk of sex; biology and other public school science classes in which a teacher espoused creationism over evolution and allowed and/or used racial slurs.

On a few occasions, courts have ruled in favor of teachers who claimed First Amendment rights to free speech in the classroom. In such cases, it is important for teachers to gain support from their administration and to have strong pedagogical defenses for the curricular decisions they make, such as when a teacher engaged a fifth-grade classroom in a lesson on the industrial uses of hemp (*Cockrel v. Shelby County School District,* 2001) or when a high school teacher required her class to read and discuss *The Adventures of Huckleberry Finn,* despite Mark Twain's use of racially derogatory language (*Monteiro v. Tempe Union High School District,* 1998).

Teacher Privacy

Privacy rights for teachers generally are implicated in two circumstances: searches and seizure and personnel records. Search-and-seizure claims, which typically allege violations of the Fourth Amendment, arise in cases involving searches of classrooms, teachers' personal belongings, and vehicles and in cases involving drug testing policies. Suspicion-based searches of teachers must comport with a twofold reasonableness standard, following the Supreme Court decision in the student search case of *New Jersey v. T. L. O.* (1985): (1) whether the searches were justified at their inception and (2) whether they were reasonable in scope, in light of teachers' privacy expectations, the nature and severity of the alleged infraction, and the seriousness of the contraband that the searches targeted.

Following *O'Connor v. Ortega* (1987), a dispute involving the search of a doctor's locked office at a hospital, it is generally understood that school boards may search teachers' classrooms and other work areas without consent and without suspicion, as there would be little or no expectation of privacy in those areas. Like students' lockers, insofar as teachers' desks and classrooms belong to school boards, they may be searched at any time unless schools adopt policies to the contrary. However, suspicion-based searches of teachers' other property, such as briefcases, backpacks, purses, and cars, is typically held to the reasonable-suspicion standard.

In some circumstances, flowing from two other Supreme Court cases involving public employees, *Skinner v. Railway Labor Executives' Association* (1989) and *National Treasury Employees Union v. Von Raab* (1989), school boards may also adopt suspicion-based urinalysis drug testing policies. Suspicionless searches of teachers, usually in the form of drug-sniffing dogs in parking lots and urinalysis drug tests, are also lawful, just as they are for students. Often, the mandatory drug testing for teachers occurs only as part of the hiring process and later only upon suspicion. Moreover, at least one court has upheld random drug testing of teachers and other school employees who serve in safety-sensitive positions (*Knox County Education Association v. Knox County Board of Education,* 1998).

Similar to the law of search and seizure, the law of personnel records strives to balance individual teachers' rights to privacy with what is good for the whole organization and community. As with search and seizure, privacy is balanced most often with a measure of safety and security. More specifically, the balancing act involving personnel records involves employers' need to use full and valid information for important decision making and the public's right to know about the work of schools, particularly public schools, and their employees.

State and federal open records laws, including the federal Freedom of Information Act (FOIA), allow citizens to access public records and encourage openness in the operation of government agencies. While the FOIA applies only to federal agencies, states have similar laws allowing public access to records of state and local agencies. The definition of *public record* may vary from state to state, but is generally fairly broad.

With respect to personnel information, records usually contain employees' names, age, experiences, qualifications, dates of appointment, current positions, titles, salaries, promotions, suspensions, other changes of positions, and teaching evaluations. Whether any or all of these materials are publicly accessible varies by state. Medical information and other notes and informal materials related to employer decisions concerning individual employees are not accessible by the public.

As to privacy, generally, personnel information that would subject individuals to embarrassment, harassment, disgrace, or loss of employment is not subject to disclosure laws. When personnel records are deemed not to be public records, there may still be exceptions in which disclosure is determined to be in the public's best interest. Examples permitting disclosure include court orders and national security. Readers are strongly encouraged to check their state's statutes for the applicable definitions of *public record* and *personnel record.*

Due Process

Under the Fifth (as applied to the federal government) and Fourteenth Amendments, the government shall not deprive persons of life, liberty, or property without due process of law. For public school boards and public institutions of higher learning, which are regulated largely under state law, the Fourteenth Amendment applies. To make a successful due process claim against their boards, employees must show that they were deprived of one or more of these rights. When school boards make adverse employment decisions that impact their staff, such as when their contracts are not renewed or terminated or they are suspended, their actions particularly implicate persons' liberty and/or property interests. For schoolteachers and other staff, liberty interests include their reputations, good name, honor, standing in their communities, and opportunities to seek and obtain employment. Property interests are manifested in the provisions of persons' existing contracts, such as for salary and other benefits and/or legitimate claims or entitlements to continued employment.

Two leading Supreme Court decisions from the early 1970s illustrate the application of these principles. In *Board of Regents v. Roth* (1972), a nontenured college instructor sued his former employer after his 1-year contract was not renewed because he allegedly made statements critical of the university administration. In his suit, the instructor claimed that the university violated his rights to free speech and due process. On further review of judgments in favor of the instructor, the Supreme Court reversed in favor of the university, holding that individuals whose term contracts are not renewed have no legitimate claim or entitlement to continued employment. In effect, the Court pointed out that the instructor's property rights in the contract that was not renewed had expired. As such, the Court explained that absent evidence of a statute, contract, or institutional policy granting such rights, property rights will not extend beyond the terms of the contract under consideration. Similarly, the Court was of the opinion that the instructor was not deprived of liberty interests as there were no facts indicating that university officials acted in retaliation for the negative comments that he had made. The Court concluded that since there was no evidence that the instructor had lost his reputation or an opportunity to seek new employment, his claim should have been denied.

The facts of *Perry v. Sindermann* (1972) are similar to those in *Roth. Sindermann* involved a nontenured university employee who, while working

under 1-year contracts, did not have his contract renewed after a year in which he made negative remarks about the state board of regents. However, the fact that there were significant differences between the two cases led to a different result such that the plaintiff in *Sindermann* prevailed in his claim. First, the Supreme Court acknowledged that the instructor was a 10-year employee in the state university system, most recently having worked under four successive 1-year contracts at another college. Second, the Court pointed out that the college's faculty handbook stated that faculty should "feel tenured" as long as their work is satisfactory and they have a positive attitude. In light of the plaintiff's longevity in the state college system and the guidelines in his college's faculty handbook, the Court decided that his lack of tenure did not defeat his due process claim. In fact, the Court thought that the college's policies and practices dictated that he receive some form of due process in advance of the nonrenewal of his contract.

Basically, *Roth* and *Sindermann* set up a due process inquiry that answers two questions. The first inquiry asks whether Fourteenth Amendment due process rights of life, liberty, and/or property are implicated when employers make decisions as to whether to dismiss, not renew the contracts of, suspend, or reprimand employees. According to the second inquiry, if the answer to the first is "yes," then the next question is what process is due. If the answer to the first question is "yes," then two types of due process must be afforded, procedural and substantive. Ultimately, any due process inquiry requires a balance of rights of the affected parties. On one hand, there are the employees' constitutional rights to life, liberty, and property. On the other hand, individual constitutional rights are not unlimited; courts must consider employers' interests in a safe, orderly, professional atmosphere with competent, satisfactory employees. Both procedural and substantive due process seek to strike an equitable balance between the rights of employees and employers while avoiding the risk of erroneous deprivations of rights.

Substantive due process asks whether an educational employer's exercise of authority was fair, reasonable, and appropriate in light of its power and the rights of the individual(s) under the circumstances. Substantive due process checks governmental actors for abuse of discretion and/or arbitrary or capricious behaviors. No one doubts the authority that school boards have to enact and enforce reasonable rules and regulations for the management and operation of schools. However, substantive due process reinforces the notion that such authority is not without limits. At the same time, substantive due process is not meant to diminish rule-making and policy-making functions of schools. Rather, it is intended to curb abuses of power.

The purpose of procedural due process is to prevent governmental actors from depriving employees of life, liberty, or property without affording them an opportunity to contest the decision and to offer their side of the story. Usually spelled out in contracts, institutional policies, and statutes, procedural due process requires notice and an opportunity to be heard. The amount of due process that must be afforded varies from circumstance to circumstance, depending on the level of severity and deprivation. For example, in cases of teacher dismissal, individuals' due process rights would be higher than they are in cases of nonrenewal, suspension, or written reprimands. For written reprimands, the due process afforded is typically an opportunity for teachers to read them and offer written rebuttals, which are also to be placed in their personnel files. Under this circumstance, a formal hearing would follow. Due process for teacher suspensions varies by contract and depends on whether they are paid (no property interest affected) or unpaid (property interest affected). As *Roth* indicates, the nonrenewal of an individual's contract does not implicate property or liberty interests under the Fourteenth Amendment. To this end, individuals need to check their contracts, often collectively bargained via union processes, or state statutes. In several states, teachers whose contracts are not renewed are permitted to seek written statement of why their boards acted as they did and may request formal hearings to contest the decisions.

In cases where the contracts of tenured teachers are terminated and as reflected by the Supreme Court in *Cleveland Board of Education v. Loudermill* (1985), property and liberty interests are most assuredly affected, since existing contracts are being terminated before they expire. It is important to note that since tenured teachers have substantive due process property

rights in their jobs, they are entitled to procedural due process; subject to state law and collective bargaining agreements, nontenured teachers typically do not have these rights. In such cases, procedural due process is at its most formal, lengthy, and costly. The procedural rights to notice and an opportunity to be heard often bring with them additional rights to be represented by counsel, to present evidence and subpoena witnesses, to cross-examine witnesses, and to appeal decisions.

Hearings that are conducted pursuant to procedural due process mandates vary in their formality but most often take place at local levels initially. Very rarely do teachers' due process claims go directly to a court. The idea is to keep the conflicts local and as simple and streamlined as possible. Only after at least one administrative hearing is there a right to judicial review. If teachers are ultimately successful in their claims against their school boards, they usually receive reinstatement (in case of nonrenewal or dismissal) and back pay (in cases where salary and benefits were cut or suspended unlawfully).

Discrimination and Harassment

Both state and federal law recognize several protected classes that grant individuals who have allegedly suffered illegal discrimination opportunities to seek redress from their employers, usually in the form of reinstatement (in cases of wrongful dismissal, nonrenewal, or demotion) and back pay (in cases where salary and benefits were suspended or terminated). Discrimination claims from teachers and applicants for teaching positions may arise on the basis of race, national origin, sex, sexual orientation, disability, religion, and age. With one exception, each of these classes is protected under state and federal law. Sexual orientation discrimination is not yet recognized under federal law, but it is in several cities, states, and individual school board policies. Insofar as many states' laws are patterned after federal laws, the present discussion is limited primarily to federal law.

Federal antidiscrimination laws can be divided into two broad categories: those prohibiting discrimination in employment and those prohibiting discrimination in programs or institutions receiving federal financial assistance. The employment laws include Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the bases of race, color, religion, sex, or national origin; the Age Discrimination in Employment Act (ADEA), which forbids discrimination against people 40 years of age or older; the Americans with Disabilities Act (ADA), which outlaws discrimination on the basis of disabilities in both employment settings and in public accommodations; and the Family and Medical Leave Act (FMLA), which allows employees extended leave for personal and family medical needs.

Federal antidiscrimination laws that target decisions made by entities receiving federal financial assistance include Section 504 of the Rehabilitation Act of 1973, which prohibits discrimination on the basis of disability; Title IX of the Educational Amendments of 1972, which forbids sex discrimination in educational settings; the Equal Pay Act of 1963, which outlaws wage discrimination on the basis of sex; and Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin.

Plaintiffs who file employment discrimination suits, either as applicants or as current employees, must typically show that they belong to a "protected class," meaning that they fit within a category of people protected by one or more law; that they were denied a benefit, such as a job, promotion, bonus, salary raise, or coaching contract, on the basis of membership in that category; that they were qualified for the benefit; and that someone outside of the protected class received the benefit. If plaintiffs succeed in stating claims, then employers can prevail if they can show nondiscriminatory reasons for their actions as long as they are not mere pretexts for discrimination. Successful defenses include, but are not limited to, offering the benefit to more qualified persons, reducing the workforce due to declining enrollment or poor financial circumstances, denying benefits due to poor work performance or violations of law or employer rules, rejecting job applicants for failure to meet substantive or procedural application requirements, and declining to make accommodations in cases involving disability or religion where doing so would cause undue hardship to employers.

Plaintiffs filing discrimination suits may claim that they have experienced (a) disparate impact by using evidence, such as statistics, from which judges or juries can infer discrimination or (b) disparate treatment by demonstrating employers' intent to discriminate. Sex discrimination, for example, can include discrimination on the basis of parental status, marital status, pregnancy, or sexual stereotyping, such as gender-based identity or expression.

Employers should be careful when they conduct job interviews so as not to discriminate against applicants. Interviewers may ask about former employment, motivation to work, job stability, initiative and innovation, ability to work with others, self-evaluation, and past accomplishments in academic and professional life. However, interviewers may not ask questions about parental status, marital status, child care issues, church attendance, religious affiliation (except a bona fide occupational qualification for a position in a religiously affiliated school), nationality, age, date of birth, or the nature or severity of disabilities. While employers cannot ask applicants about their disabilities, employees who need or wish to receive accommodations for their disabilities must provide such information.

Under Section 504 and ADA, employers are required to provide reasonable accommodations, such as physical accessibility, job restructuring, modified work schedules, reassignment to a vacant position, and provision of readers or interpreters, unless they would cause undue financial or administrative hardships on the employer. Even with these accommodations, though, employees must still be able to perform the essential functions of the job. Similarly, employers are required to offer reasonable accommodations for the religious beliefs and practices of their employees. Some limits may be placed on religious accommodation, such as imposing a maximum number of days of religious leave per academic year.

Most federal antidiscrimination laws, Title VI, Title VII, Section 504, and Title IX, apply not only in cases of employment discrimination but also in cases of alleged harassment. Harassment claims are most common in cases of alleged sexual harassment. Yet harassment on the basis of race, ethnicity, religion, and disability is also recognized. The standard of liability for the harassment varies, depending on the statute used. Under Title VII, victims of harassment can recover both compensatory and punitive damages, but employers are usually liable only in cases where there were tangible employment actions, such as dismissals or demotions. In cases lacking tangible employment actions, employers may show that they have policies against harassment, that they took actions to respond to known harassment, and that the alleged victims unreasonably failed to take advantage of the policy. Under Title VI (racial or national origin harassment) and Section 504 (harassment based on disability), the standard of liability is essentially the same. If educational employers act with deliberate indifference to known harassment, they are likely to be liable for damages under Title IX in cases in which employees have sexually harassed students. News stories abound involving school personnel as perpetrators of harassment, along with similar reports of students as perpetrators and victims. Even so, there is certainly an unfortunate prevalence of cases in which school personnel are victims under Title VII.

Patrick D. Pauken

See also Academic Freedom; Age Discrimination in Employment Act; *Board of Regents v. Roth;* Civil Rights Act of 1964; Collective Bargaining; *Connick v. Myers;* Due Process; Equal Employment Opportunity Commission; Equal Pay Act; Family and Medical Leave Act; *Hazelwood School District v. Kuhlmeier;* Highly Qualified Teachers; *Mt. Healthy City Board of Education v. Doyle; Perry v. Sindermann; Pickering v. Board of Education of Township High School District 205, Will County;* Reduction in Force; Sexual Harassment; Tenure; *Tinker v. Des Moines Independent Community School District;* Title VII

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Technology and the Law

Supreme Court justices argued more than a century ago that the progress of science, especially in the area of communication technology, made it imperative that America's attention shift to the spirit of the law to protect individuals against the privacy invasions of modern inventions. The technological landscape continues to change at a much faster pace than constitutional law, which has yet to deal efficiently with the latest scientific advances in sophisticated devices and computer communications using telephone or cable lines.

Most federal court judgments have been inconsistent during the growth in telecommunications technology. Many of the subsequent instruments of tele- communication networks, such as facsimile transmissions (or faxes) and electronic mail (e-mail), are based on the telephone and make use of the same underground cables, digital lines, radios, and satellite links to make connections between two or more users. The police and public have used telephones long enough to allow the development of a sizable body of legal code and case law. A discussion of communication technology, information technology, and related legislation follows.

Fax Communications

Facsimile communications are similar to other forms of protected wire communications in that they consist of digital signals transmitted over a traditional wired network. Facsimile transmissions, whether sent from computer to computer or fax machine to fax machine, run the risks of inadvertent misdialing and misdirection due to human error. Despite the absence of absolute security, a properly directed and received fax has the convenience of almost instant correspondence and provides the parties involved with a tangible paper record of every transaction and instance of communication. The case law on fax communications is meager on both state and federal court levels.

Electronic Mail Communication

E-mail presents the judiciary and lawmakers with a difficult area since it falls between a telephone communication and a written correspondence via postal mail. E-mail resembles telephone calls because it consists of intangible electronic signals traveling through wire systems and resembles first-class letters in that the data in the transmission contain nonvocal textual messages. Yet while e-mail is a cross between both, it is afforded the privacy protection of neither against

government interception and acquisition. A revolution in telecommunications, e-mail allows computer users to send messages and data files across the country or the globe almost instantly and to keep an accurate and permanent record of this exchange for later reference on both the sender's and recipient's computers.

Like postal mail, every e-mail message is directed to a uniquely identifiable address and delivered to a password-protected electronic mailbox, where unread messages await the user to access the mailbox and open them. The development of e-mail, chat rooms, listservs, newsgroups, and instant messaging constitute even greater challenges to governments because these communications may be used for illicit or illegitimate purposes. Detection and prevention of these activities entails invading the privacy of the users by accessing and sometimes monitoring their e-mails.

Legislation Governing Copied Materials

The Copyright Act and "Fair Use"

As copiers became commonplace during the 1970s, articles, poems, and book excerpts were reproduced without legal repercussions. Widespread use of copying machines bred violations of copyright laws. In January 1976, Congress amended the original 1909 copyright laws by passing the Copyright Act, which includes photocopying and the educational use of copyrighted materials. Congress has subsequently modified this law by relying on testimony from librarians, publishers, authors, and educators in developing "fair use" guidelines, which allow the use of copyrighted materials without permission from the author under specific, limited conditions. Under the fair use principle, single copies of printed materials may be copied for the educator's personal use. No longer can materials be freely reproduced and distributed; the publisher or author of the work must grant permission and may charge a royalty fee for the material's use.

Copying for Educational Use

Videotapes, DVDs, computer software, and mixed media fall within the fair use guidelines of the copyright laws. Without a license or permission, educational institutions may not keep copyrighted videotapes and recordings for more than 45 days. The tape should not be shown more than once during this period, and then it must be erased.

Copyright and the Internet

Copyright issues involving the Internet have become an important concern as copyright holders have taken action to prohibit the unauthorized use of their materials on the World Wide Web and other platforms. The entertainment and software industries have worked with federal legislators to develop statutory protection that levies hefty penalties for possessing or distributing illegal electronic copies. The growing use of computers prompted Congress to amend the Copyright Act in 1998 and pass the Digital Millennium Copyright Act to protect materials published on the World Wide Web and allow copyright owners to prevent the downloading of their material without permission and a fee. Text, graphics, multimedia materials, and e-mail are protected by copyright laws and fair use guidelines must be applied when using information obtained.

The Future of Technology Law

In light of the vital role that the computer, the Internet and e-mail play in our society, a reinterpretation of various constitutional amendments and perhaps a new subfield of information technology law will develop. The keys to this new legal world may ultimately lie in the hands of the U.S. Supreme Court, which must strike the balance between promoting technology and protecting society. In developing this new body of law, the courts must remember that liberty, as a constitutional right, brought this country thus far and continues to propel it forward.

Doris G. Johnson

See also Copyright; Electronic Communication

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Tenth Amendment

See Federalism and the Tenth Amendment

Tenure

Tenure provides educators with protection from dismissal due to arbitrary and capricious political and administrative actions. Educators are free to express their views in written and verbal commentary. The Association of University Professors (AAUP) as well as federal courts have emphasized the importance of academic freedom in a democracy. The concept of tenure has a long history, representing efforts to protect educators from job insecurity resulting from their verbal or written work. This entry reviews the origins of tenure, its evolution in the United States through the work of the AAUP, and its elaboration in U.S. Supreme Court rulings over the years. It also describes the function of tenure in various educational settings today, where it plays a central role in protecting academic freedom.

Tenure grants teachers and faculty protection from unfair dismissal. In 1245, Pope Innocent the IV granted exemptions to scholars in the University of Paris from appearing at ecclesiastical courts some distance from Paris. The following year, a Court of Conservation was founded to protect university faculty. Over time, universities were given autonomy from local, civil, and ecclesiastical officials. There were some limits to these protections when attacks were made on the prevalent dogma or authoritarianism, but the concept of autonomy provided insulation from excessive political encroachment. In the 1890s, Germany sought student protection through *Lernfreiheit,* or the freedom of university students to choose courses, move from school to school, and be free of dogmatic restrictions. Similarly, *Lehrfreiheit* stressed faculty rights to freedom of inquiry and freedom of teaching with the right to report on findings in an unhindered, unrestricted, and unfettered environment.

Through the founding of the American Association of University Professors (AAUP) in 1915, John Dewey and others sought to protect academics from interference with their employment by external persons or groups. During the early part of the 20th century, faculty members were often dismissed for offending powerful individuals or groups. Such political interference was frequent, and teachers had no recourse against unreasonable interference with their professional responsibilities.

In 1940, the AAUP issued a Statement of the Principles on Academic Freedom and Tenure. The principles included assumptions that tenure is a means toward freedom in teaching and research as well as in extracurricular activities. Tenure is important in recruiting and retaining qualified men and women in the teaching profession. Freedom and economic security were found to be indispensable to the success of an institution in meeting its professional obligations to students and society.

Thirty years later, in 1970, a committee of the AAUP and Association of American Colleges noted that the 1940 statement was not a static code, but rather a framework guiding future changes in the social, political, and economic climate. They noted that in *Keyishian v. Board of Regents* (1967), the Supreme Court reiterated that the United States is committed to safeguarding academic freedom to all citizens, not just teachers. That freedom is especially supported by the First Amendment. The AAUP uses censorship of institutions to encourage adherence to tenure and academic freedom guidelines.

In *Board of Regents v. Roth* (1972), the Supreme Court held that liberty and property rights are created by contract or state law and constitutionally protected. To acquire that protection, teachers are required to serve for a set period of time, often 4 years, before becoming permanent employees. During the probationary period, employees are not entitled to employment property rights. In *Perry v. Sindermann* (1972), the Court held that procedural due process safeguards are required for teachers who have a property or

liberty interest in employment. Pretenure employees under probationary contracts do not have due process rights. States have different tenure provisions, but generally if there is a reduction in force, tenured faculty are dismissed last.

As citizens, educators have the freedom to express their beliefs and opinions and to engage in controversial debate and inquiry. However, they have obligations and responsibilities to be professional and ethical in their work, and tenure does not protect them if they fail to meet these requirements. They are also cautioned by AAUP guidelines to avoid persistent introduction of material that has no relation to the subject they are teaching. As noted in the 1915 AAUP Statement of Principles, when speaking as private citizens, educators have an obligation to inform listeners that they are not speaking as representatives of their educational institutions. This is sometimes difficult in teaching the humanities, where encouraging students to engage in critical inquiry often entails examining assumptions underlying policy decisions. Peer review has been used in recent years to ensure that faculty members are productive and current in their academic fields. Critics of tenure note that this may make it difficult to dismiss faculty members who are incompetent, nonproductive, underprepared, or not up to date in their fields. The enforcement of tenure is a function of individual schools and universities. Major institutions maintain administrative policies to ensure that faculty tenure rights are secure and followed throughout the organization.

Generally, administrators are not granted tenure. Although tenure is becoming less frequent in K–12 institutions, it is usually upheld in universities as a recruiting tool and for retention of top-flight productive scholars. Nontenured faculty who have continuing contracts for a length of time, generally 4 to 7 years, have certain property rights to employment but generally cannot receive de facto tenure absent an affirmative action by educational officials.

Tenure is a work in progress in distance learning institutions as the Internet involves new and emerging tools for teaching. Ethical codes for the use of the Internet are being developed and updated as technology advances. In recent years, there has been an increase in the number of contingency faculty without tenure protection. Since a growing percentage of faculty are contingency and/or part-time adjuncts, efforts are being made to include them in essential tenure protections. Indeed, the number of contingency (e.g., part-time and full-load nontenured faculty) exceeds the number of full-time tenured faculty. This may be a challenge for the future.

In *Sweezy v. New Hampshire* (1957), the Supreme Court noted the importance of tenure in academic freedom:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. No field of education is so thoroughly comprehended by man that new discoveries cannot yet be made. Particularly is that true in the social sciences, where few, if any, principles are accepted as absolutes. Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study, to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die. (p. 250)

This point has been reiterated by succeeding Supreme Court rulings through the years.

James Van Patten

See also *Board of Regents v. Roth; Keyishian v. Board of Regents; Perry v. Sindermann*

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Testing, High-Stakes

Generally, high-stakes tests are any measures whereby the results have important consequences for test takers and/or their schools. The prevalence of

high-stakes tests has greatly increased since they were first used on a large scale during World War I to assign incoming soldiers to their duties. During the 1950s, colleges began widely using the Scholastic Aptitude Test (SAT) as an admissions test, a trend that currently leads almost all college-bound students to take it or other standardized measures, such as the American College Testing (ACT) examination. In addition, many states have recently developed high school exit examinations that prospective graduates must pass in order to receive their diplomas. Tests of this type are given in 22 states, in which 65% of the nation's student populations reside.

Legal challenges have not slowed the diffusion of high-stakes tests. As such, case law has shaped the way that high school exit examinations in particular are administered. The seminal case on the topic is *Debra P. v. Turlington* (1984), in which students in Florida brought a federal class action suit against the state for withholding diplomas from students who failed the test. On review, the Eleventh Circuit, following several rounds of litigation, held that tests can be used only if state officials can conclusively prove that they cover only material that was taught in the classrooms, that they are valid, and that students had received sufficient notice that they would have to take such examinations. Moreover, in acknowledging the higher failure rates of minorities than of nonminorities, the court instructed that the tests can be used only if officials can prove that their racially discriminatory impact was not due to the remnants of past segregation. As to notice, the court was of the opinion that students had to be given ample time to prepare themselves for the examinations.

In later cases, students with disabilities and those who were educated under unconstitutional tracking systems successfully challenged exit examination requirements as a prerequisite for receiving diplomas. A trilogy of cases from Texas demonstrates the nature of ongoing controversy with regard to graduation tests. On one hand, a federal and state court, respectively, agreed that tests could be used (*Williams v. Austin Independent School District,* 1992; *Edgewood Independent School District v. Paiz,* 1993). However, another federal trial court disagreed insofar as it allowed students who passed all of their required courses but failed the state's competency test to participate in graduation ceremonies, on the basis that school officials could not impose new criteria on them without providing adequate notice and demonstrating that the examinations were sufficiently linked to the curriculum (*Crump v. Gilmer Independent School District,* 1992). At the same time, though, while the court granted the students' request for a preliminary injunction that enabled them to participate in the ceremony, it refused to direct educators to grant them their diplomas.

Successful litigation in opposition to high-stakes tests has pursued claims based on substantive and procedural due process violations. This has forced states and school officials to make adjustments in the implementation or designs of tests, but it has not foreclosed the legality of tests in their entirety. Courts have been willing to review state educational policies using a rational basis test that gives states wide discretion in its actions. Thus, states can proceed with policies that emphasize high-stakes tests as long as they satisfy students' procedural and substantive due process rights. Further, insofar as the Supreme Court refused to recognize education as a fundamental right in *San Antonio Independent School District v. Rodriguez* (1973), thereby meaning that it is unlikely to apply strict judicial scrutiny in challenges to testing, states and school systems will probably be able to continue to use high-stakes testing.

The enactment of the No Child Left Behind Act (NCLB) (2002) ushered in a new dimension in an era of increasing emphasis on high-stakes testing. Under the act's "adequate yearly progress" provisions, students must be tested every year in Grades 3 through 8 and once in 10th or 11th grade. This provision sets penalties, which include closing schools and dismissing staff members, for school systems that fail to improve test scores sufficiently. While it is certainly questionable whether states can, or will, impose such draconian measures, the NCLB gives a new meaning to high-stakes testing. Thus, although test scores, whether under state measures or the NCLB, are not always used as a basis for student promotions, the results of examinations create high stakes for teachers and administrators.

Gadeir Abbas

See also Adequate Yearly Progress; Equal Protection Analysis; No Child Left Behind Act; *San Antonio Independent School District v. Rodriguez*

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Thomas, Clarence (1948–)

Clarence Thomas, who currently serves as an associate justice on the U.S. Supreme Court, is only the second African American to sit on the Court. Thomas is viewed as one of the most conservative members of the Court. This entry reviews his early life and career, his judicial appointments, and his record on the high court.

Early Years

Had someone suggested during his childhood that Clarence Thomas would one day sit on the U.S. Supreme Court, the idea would have seemed utterly absurd. Thomas was born in the segregated South in 1948, in a tiny, poor community of South Georgia known as Pin Point. His father deserted the family when Thomas was a small boy. When he was 6 years old, his family's house burned down, and his mother sent him to live in more comfortable circumstances with his grandfather in Savannah. Thomas attended Catholic schools and helped his grandfather with his business.

After high school, Thomas attended the Immaculate Conception Seminary in Missouri. After 2 years in seminary, he transferred to Holy Cross College, a small Catholic college in Massachusetts. During these tumultuous times, when American society was divided by the civil rights movement and the war in Vietnam, Thomas absorbed some of the ambient radicalism. He also grew disillusioned with Catholicism. After graduating cum laude from Holy Cross College, Thomas attended Yale Law School. He graduated from Yale in 1974.

Thomas began his legal career as an assistant attorney general for the State of Missouri. Three years later, Thomas joined the legal department of the Monsanto Corporation. He returned to government service in 1979, working for 2 years as a legislative assistant to Missouri Senator John C. Danforth. From there, Thomas rose rapidly through the ranks of the federal government. Thomas obtained an appointment as an assistant secretary for civil rights in the United States Department of Education. From 1982 to 1990, Thomas served as the chairman of the U.S. Equal Employment Opportunity Commission.

On the Bench

In 1990, President George H. W. Bush nominated Thomas to a federal appellate judgeship for the District of Columbia Circuit. One year later, President Bush nominated him to the U.S. Supreme Court, to fill the seat vacated by Justice Thurgood Marshall. At the time, Thomas was only 43 years old. His confirmation hearings were among the most bitter and hotly contested of any in history. A focal point of controversy involved the allegations from a former coworker, Anita Hill, that Thomas had sexually harassed her. Thomas vehemently denied these allegations and was narrowly confirmed in the Senate by a vote of 52 to 48.

Thomas returned to Roman Catholicism after his appointment to the Court. He married twice, the second time to Virginia Lamp, in 1987. He has one child from his first marriage.

Supreme Court Record

Justice Thomas has been a consistent vote on the Court's conservative wing. Thomas is often described as an originalist, someone who interprets the words of the Constitution as they were understood when it was originally drafted.

Another noteworthy feature of Justice Thomas's views is his skepticism of the doctrine of stare decisis,

the practice of deferring to past decisions. In Justice Thomas's view, no matter how established a decision has become, if the decision is wrong, it must be corrected. In contrast, proponents of stare decisis take the view that stability in the law should be preserved, even if the decisions are flawed in some respect.

On the divisive issues of affirmative action and racial preferences, Justice Thomas has consistently voted to strike down such measures as unconstitutional. For example, in *Adarand Constructors v. Pena* (1995), the Court held that preferences for racial minorities in federal contracts would be reviewed under the demanding "strict scrutiny" test. The high bar of the "strict scrutiny" test means that in practice, it is very difficult to implement such programs. Justice Thomas agreed with the majority view but wrote separately to emphasize the following:

> Good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged. (p. 240)

Justice Thomas's views have subjected him to withering criticism, particularly from within the African American community.

With respect to specific constitutional provisions, Justice Thomas has taken a broad view of the First Amendment's Free Speech Clause. For example, in *McIntyre v. Ohio Elections Commission* (1995), Thomas concluded that a law banning anonymous campaign literature was unconstitutional. Thomas observed that the *Federalist Papers,* which were written by several founding fathers in defense of the federal Constitution, were published anonymously.

On the controversial issue of abortion, Justice Thomas has consistently opposed a federal constitutional right to an abortion. This is unsurprising, given Thomas's historical reading of the Constitution and his conclusion that established precedent is not necessarily entitled to deference.

Justice Thomas has also taken a narrow reading of the Commerce Clause, found in Article I, Section 8, which provides the authority for Congress "to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Because the federal government is a government of limited powers, it must find authority within the Constitution to justify its actions. The Commerce Clause has been interpreted to authorize a wide range of activity by the federal government. Justice Thomas's narrow reading of that clause would curtail the scope of activities permitted to the federal government under the Constitution.

Another noteworthy aspect of Justice Thomas's presence on the Court is that he seldom asks questions during oral argument. Thomas has said that he learns more from listening than from interrupting.

Stephen R. McCullough

See also Affirmative Action; Rehnquist Court; Stare Decisis

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Thorough and Efficient Systems of Education

The term *thorough and efficient systems of education* refers to a standard of educational quality that is mandated by some, but not all, state constitutions. This term, along with similar ones, such as *thorough and uniform* and *thorough and efficient,* are key elements in school finance litigation. Specifically, courts must determine whether educational finance systems created by state legislatures provide sufficient funds to achieve the constitutionally mandated quality standard.

State constitutions contain "education clauses" mandating the establishment of free public education. Even so, the level of the duty imposed by these clauses varies a great deal. Although Grubb (1974) and Ratner (1985), working independently, recognized that the education clauses could be divided into four categories based on their language, Thro (1989) suggested the differences between education clauses are significant for school finance litigation. There are four categories of state education clauses.

First, at one end of the spectrum, are the 21 "establishment provisions" that simply mandate that a free public school system be established. These include the provisions in the constitutions of Alabama, Alaska, Arizona, Connecticut, Hawaii, Kansas, Louisiana, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Oklahoma, South Carolina, Tennessee, Utah, and Vermont. A typical example of an establishment provision clause is Tennessee's, which provides as follows: "The General Assembly shall provide for the maintenance, support and eligibility standards of a system of free public schools" (Tennessee Constitution, Article XI, § 12).

Second, there are 18 "quality provisions" mandating that educational systems of a specific quality be provided. These include the provisions from Arkansas, Colorado, Delaware, Idaho, Kentucky, Maryland, Minnesota, Montana, New Jersey, North Dakota, Ohio, Oregon, Pennsylvania, Texas, Virginia, West Virginia, Wisconsin, and Wyoming. A typical example is the Pennsylvania education clause that provides as follows: "The General Assembly shall provide for the maintenance and support of a thorough and efficient system of public education to serve the needs of the Commonwealth" (Pennsylvania Constitution, Article III, § 14). Generally, the specific quality is "thorough and/or efficient." As the West Virginia Supreme Court observed, Illinois, Maryland, Minnesota, New Jersey, Ohio, and Pennsylvania require "thorough and efficient" systems; Colorado, Idaho, and Montana require "thorough" systems; and Arkansas, Delaware, Kentucky, and Texas require "efficient" systems.

Third, there are six "strong mandate" provisions that establish a level of quality and that also provide a strong mandate to achieve it. These include California, Indiana, Iowa, Nevada, Rhode Island, and South Dakota. A typical example of both the purposive preamble and the stronger and more specific educational mandate is provided by the provisions of the California Constitution, which reads as follows:

> A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people [purposive preamble], the Legislature shall encourage by all suitable means [stronger mandate] the promotion of intellectual, scientific, moral, and agricultural improvement. (California Constitution, Article IX, § 1)

Similarly, the Rhode Island education clause demands that the state legislature will "promote the public schools and . . . adopt all means . . . to secure . . . education" (Rhode Island Constitution, Article XII, § 1). The Indiana and Nevada provisions contain the "all means" language.

Fourth, at the far end of the spectrum are five "high duty provisions" which seem to place education above other governmental functions, such as highways or welfare. These provisions include Florida, Georgia, Illinois, Maine, and Washington. They are most clearly exemplified by the Washington State Constitution's education clause, which provides that "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders, without distinction or preference on account of race, color, caste, or sex" (Washington Constitution, Article IX, § 1). Although other states have Category IV education clauses, Washington is apparently the only one that makes the duty "paramount" (*Seattle School District No. 1 v. Washington,* 1978). A second example is the Georgia provision that reads, "The provision of an adequate public education for the citizens shall be a primary obligation of the State of Georgia, the expense of which shall be provided for by taxation" (Georgia Constitution, Article VIII, § 1, ¶1).

William E. Thro

See also *Rose v. Council for Better Education; San Antonio Independent School District v. Rodriguez*; School Finance Litigation

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Timothy W. v. Rochester, New Hampshire, School District

At issue in *Timothy W. v. Rochester, New Hampshire, School District* (1989) was whether a school board was required to provide special education services to any students with disabilities regardless of the severity of their disabilities. In deciding that a board had to provide services, the First Circuit found that officials may not refuse to offer special education services on the basis that children are so severely handicapped that they are incapable of benefiting from special education. This now well-established rule from *Timothy W.* is commonly referred to as the "zero reject" principle.

Facts of the Case

Timothy W. was a multiply handicapped and profoundly mentally retarded child with complex developmental disabilities, spastic quadriplegia, cerebral palsy, seizure disorder, and cortical blindness. When Timothy was 4 years old, his local school board convened a meeting to determine whether he was qualified as "educationally handicapped" under the Education for All Handicapped Children Act (EAHCA), now the Individuals with Disabilities Education Act, and the corresponding New Hampshire statutes such that he would have been entitled to special education and related services.

At the meeting, Timothy's pediatrician and several other professionals reported that since he was capable of responding to sounds and other stimuli, he should have been provided with an individualized education program (IEP) that included physical and occupational therapy. However, two other pediatricians reported that Timothy had no educational potential. In response, school board officials maintained that Timothy was not "educationally handicapped," because the severity and complexity of his disabilities prevented him from being "capable of benefiting" from special education services. Accordingly, the board refused to provide educational services to Timothy for 2 years.

When Timothy was 7 years old, the school board convened another meeting to discuss his situation. Again, several professionals recommended an educational program that included physical therapy because they thought that Timothy could benefit from positioning and handling. Despite these recommendations, and even though a directive from the state education agency indicated that the board was not permitted to use "capable of benefiting" as a criterion for eligibility for special education services, local educational

officials still refused to provide services to Timothy. Approximately 6 months later, in response to a letter from Timothy's attorney, the board's placement team met again and recommended special education services. Even so, the board refused to authorize the recommended placement and array of services. Timothy's attorney filed a complaint with the state education agency, which ordered the board to place him in an educational program. Again, the board refused.

The Court's Ruling

Timothy's attorney next filed suit in the federal trial court, alleging that the board had violated the EAHCA, New Hampshire special education statutes, Section 504 of the Rehabilitation Act of 1973, and the Equal Protection and Due Process Clauses of the constitutions of the United States and New Hampshire. Timothy's complaint sought monetary damages and an injunction to require the school board to provide educational services. The trial court denied the request for an injunction and abstained from addressing the damages claim in light of pending state administrative proceedings. Insofar as the state agency then pointed out that students' "capacity to benefit" was not an appropriate standard to determine their eligibility for special education, it directed the board to provide services for Timothy. The board appealed this order to the federal trial court, which reversed in its favor. The court held that the board was not obligated to provide Timothy with special education services. Timothy appealed to the First Circuit.

On further review, the First Circuit reversed in favor of Timothy. Looking to the plain language of the EAHCA, the court was of the opinion that any children with qualifying disabilities, especially those with severe disabilities such as Timothy, are entitled to special education and related services. To this end, the court explained that the fact that children may appear to be "uneducable" does not bar them from the protections of the EAHCA. To the contrary, the court ruled that the EAHCA gives priority to those children with the most severe disabilities. As such, the court reasoned that the EAHCA adopts a "zero reject" policy with respect to eligibility and that "capacity to benefit" from special education is not a prerequisite for children to be eligible for services. In concluding, the court took an expansive view of what constitutes special education, noting that it includes fundamental skills, such as the development of motor and communication skills, as well as traditional cognitive skills.

Amy Steketee

See also Disabled Persons, Rights of; Individualized Education Program (IEP); Rehabilitation Act of 1973, Section 504; Zero Reject

Legal Citations

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Timothy W. v. Rochester, New Hampshire, School District, 875 F.2d 954 (1st Cir. 1989), *cert. denied*, 493 U.S. 983 (1989).

Tinker v. Des Moines Independent Community School District

School officials are often confronted with difficult decisions when student attempts at expression result in disorder or the potential disruption of regular school activities. A fundamental case establishing the free speech and political rights of students in school settings is *Tinker v. Des Moines Independent Community School District* (1969). The results in *Tinker* leave school officials with some guidance for regulating student expression. School officials who wish to regulate student expression must be able to demonstrate that student expressive activities would result in material and substantial interference with the operations of the school or invade the rights of others. When school officials have specific facts that reasonably support predictions of disruption, they can regulate student expression, including banning specified activities.

Schools are considered limited public spaces. As such, students have fewer free speech rights in schools than they do on public streets. In schools, student free speech rights must be balanced against the obligation

of school officials to protect student safety and privacy and to deliver a quality education. In general, student free speech rights extend only to expressions of a political, economic, or social nature that are not part of a school program. To this end, as the Supreme Court later ruled in *Hazelwood School District v. Kuhlmeier* (1988), school officials can regulate student writing in school newspapers with much less evidence of disruption than they can for student T-shirts or student discussions in the cafeteria. However, school officials can ban some forms of student expression of lewd or obscene natures, including student T-shirts, without any showing of potential disruption, since such speech has little or no educational value.

Facts of the Case

On December 16, 1965, a 13-year-old 8th grader, Mary Beth Tinker, and a 16-year-old 11th grader, Christopher Eckhardt, wore black armbands to school in protest of the Vietnam War. Mary Beth's older brother John, a 15-year-old 11th grader, wore an armband the following day. School officials suspended the students after they refused to remove their armbands. The protests followed a meeting at the Eckhardt house, where the parents of the students discussed ways to protest the Vietnam War.

On learning of the plan to protest the war, the principals of the Des Moines schools met on December 14, 2 days before the protest, and created a policy specifically prohibiting the wearing of armbands. The new policy said that students who wore armbands in protest of the war would be subject to out-of-school suspension and could return only after agreeing not to wear the armbands. The three students were suspended from school and did not return until after New Year's Day. The parents of these students filed suit in a federal trial court in Iowa seeking an injunction against the school board to prevent officials from disciplining the students.

The petitioners argued that wearing the armbands in school was within the students' constitutional rights to free speech. The trial court disagreed and dismissed the case, ruling that the board operated within its rights in suspending the students, although there was no finding that their actions created a substantial disruption of school activities. On further review, the Eighth Circuit affirmed without comment.

The Court's Ruling

The question presented to the U.S. Supreme Court was whether the First and Fourteenth Amendments to the Constitution allowed school officials to prohibit students from wearing symbols of political expression in school when the symbols are not "disruptive of school discipline or decorum." The petitioners argued that the students' wearing of the armbands was protected by the Free Speech Clause of the First Amendment and the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The respondents countered that officials were within their rights to regulate student expression in the interest of maintaining an educational environment free from the disruption that the administration anticipated.

Justice Fortas, writing the majority opinion, penned the often-quoted line that neither teachers nor students "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate" (*Tinker,* p. 506). Fortas reasoned that the wearing of armbands was akin to "pure speech" and was therefore protected by the Constitution. He contrasted the policy regulating armbands to other policies, such as dress codes, which previous court decisions upheld as constitutional. The difference, Fortas maintained, was in the intention of the message and the motivation of the administration in barring the expression. Fortas wrote that "undifferentiated fear" of disturbance was not enough to ban student expression. Fortas added that in seeking to limit student expression, "Where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained" (p. 509).

While agreeing in principle with the majority opinion, Justice Stewart, in his concurrence, qualified his agreement by noting his apprehension at the concept that First Amendment rights are "co-extensive" with those of adults. Stewart cautioned that in some cases, it is permissible to limit the rights of children.

The dissenting opinions of Justice Black and Justice Harlan focused on the need for school officials

to establish discipline and an educational environment free from distracting and emotionally charged disruptions. Justice Black argued at length for the school, noting that the disruptions anticipated by the administration actually occurred and that the armbands took students' minds off their schoolwork. In a statement about the consequences of the court's decision, Justice Harlan dramatically warned,

> One does not need to be a prophet or the son of a prophet to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. (*Tinker,* p. 525)

In sum, *Tinker* stands out as the first, and perhaps most important, case dealing with the free speech rights of students in American public schools.

Chad D. Ellis

See also *Bethel School District No. 403 v. Fraser;* Free Speech and Expression Rights of Students; *Hazelwood School District v. Kuhlmeier*

Legal Citations

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Tinker v. Des Moines Independent Community School District (Excerpts)

Tinker v. Des Moines Independent Community School District *stands out as the first Supreme Court case addressing the free speech rights of students. The Court concluded that unless it results in a reasonable forecast of material and substantial disruption, then school officials may not limit student free speech*

Supreme Court of the United States

TINKER

v.

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT

393 U.S. 503

Argued Nov. 12, 1968.

Decided Feb. 24, 1969.

Mr. Justice FORTAS delivered the opinion of the Court.

Petitioner John F. Tinker, 15 years old, and petitioner Christopher Eckhardt, 16 years old, attended high schools in Des Moines, Iowa. Petitioner Mary Beth Tinker, John's sister, was a 13-year-old student in junior high school.

In December 1965, a group of adults and students in Des Moines held a meeting at the Eckhardt home. The group determined to publicize their objections to the hostilities in Vietnam and their support for a truce by wearing black armbands during the holiday season and by fasting on December 16 and New Year's Eve. Petitioners and their parents had previously engaged in similar activities, and they decided to participate in the program.

The principals of the Des Moines schools became aware of the plan to wear armbands. On December 14, 1965, they met and adopted a policy that any student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband. Petitioners were aware of the regulation that the school authorities adopted.

On December 16, Mary Beth and Christopher wore black armbands to their schools. John Tinker wore his armband the next day. They were all sent home and suspended from school until they would come back without their armbands. They did not return to school until after the planned period for wearing armbands had expired—that is, until after New Year's Day.

This complaint was filed in the United States District Court by petitioners, through their fathers, under s 1983 of Title 42 of the United States Code. It prayed for an injunction restraining the respondent school officials and the respondent members of the board of directors of the school district from disciplining the petitioners, and it sought nominal damages. After an evidentiary hearing the District Court dismissed the complaint. It upheld the constitutionality of the school authorities' action on the ground that it was reasonable in order to prevent disturbance of school discipline. The court referred to but expressly declined to follow the Fifth Circuit's holding in a similar case that the wearing of symbols like the armbands cannot be prohibited

unless it 'materially and substantially interfere(s) with the requirements of appropriate discipline in the operation of the school.'

On appeal, the Court of Appeals for the Eighth Circuit considered the case en banc. The court was equally divided, and the District Court's decision was accordingly affirmed, without opinion. We granted certiorari.

I

The District Court recognized that the wearing of an armband for the purpose of expressing certain views is the type of symbolic act that is within the Free Speech Clause of the First Amendment. As we shall discuss, the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct by those participating in it. It was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.

First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years. . . .

On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.

II

The problem posed by the present case does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment. It does not concern aggressive, disruptive action or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to 'pure speech.'

The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners. There is here no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone. Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students.

Only a few of the 18,000 students in the school system wore the black armbands. Only five students were suspended for wearing them. There is no indication that the work of the schools or any class was disrupted. Outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises.

The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained.

In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.

On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid

the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam. It is revealing, in this respect, that the meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)

It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit, said, school officials cannot suppress 'expressions of feelings with which they do not wish to contend.'

In *Meyer v. Nebraska,* Mr. Justice McReynolds expressed this Nation's repudiation of the principle that a State might so conduct its schools as to 'foster a homogeneous people.' . . .

This principle has been repeated by this Court on numerous occasions during the intervening years. In *Keyishian v. Board of Regents,* Mr. Justice Brennan, speaking for the Court, said: "'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'"

The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the

students' activities would materially and substantially disrupt the work and discipline of the school. In the circumstances of the present case, the prohibition of the silent, passive 'witness of the armbands,' as one of the children called it, is no less offensive to the constitution's guarantees.

As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

Reversed and remanded.

Citation: *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969).

Title I

"Title I" is a shorthand reference for a federal statute designed to improve the educational achievement of poor students by providing federal funds to impoverished school districts. While the amount of funding has fluctuated over the decades, Title I remains the single largest federal educational program for elementary and secondary school children. It reaches millions of students and tens of thousands of school districts.

The Law and Its Context

For most of our nation's history, federal involvement in education was limited. A major shift occurred during the administration of President Lyndon B. Johnson. One of the components of President Johnson's "War on Poverty" included the Elementary and Secondary Education Act (ESEA), which Congress enacted in 1965. Title I of this act provided substantial funds to improve the education of financially disadvantaged school children. One purpose of this law was to alleviate the large disparity in funding between Black and White schools in the segregated South. Thus, Title I was a component of a broader body of civil rights measures.

Title I funds are allocated on the basis of complex formulas that depend on student enrollment, census poverty data, and other sources. The federal government allocates the money to state education agencies that, in turn, distribute it to local school districts. States must then account to the federal government for their use of the funds. Generally speaking, states are allowed considerable discretion in deciding how to use the funds.

Title I has evolved each time Congress has reauthorized the program. The first wave of change centered on ensuring that Title I funds were used to supplement rather than to replace local funds. Congress also sought to impose stricter enforcement of spending, to make sure the funds were being spent for proper objectives. President Ronald Reagan's more restrictive view of the role of the federal government and his skepticism about the effectiveness of federal programs led to spending cuts in Title I. However, the complex regulations were also simplified. Title I funding was gradually restored in later administrations.

Impact and Evolution

States' use of Title I funds in religious schools has proved controversial. For example, New York created a program to pay the salaries of teachers in religious schools, but those teachers could not teach religion or participate in religious activities. The state audited

these schools for compliance. In *Aguilar v. Felton* (1985), the Supreme Court found that this program was unconstitutional because of the "excessive entanglement" of the government in religious affairs. Then, in 1997, in *Agostini v. Felton* (1997), the Court reversed itself and concluded that the New York program was, in fact, constitutionally permissible under the First Amendment's Establishment Clause.

Under President William Clinton, Congress amended Title I to require states to develop uniform standards for all students, including poor students, and to craft programs that will enable poor students to meet those standards. This package of reforms was known as the Improving America's Schools Act of 1994. These reforms reflected a shift from fiscal accountability, ensuring that the funds were properly spent, to academic accountability, ensuring that poor students actually improved their academic performance.

Another milestone in the movement to ensure better results for poor children was the passage of the No Child Left Behind Act (NCLB), signed into law in 2002 by President George W. Bush. The intent behind NCLB was to improve accountability and results for Title I funds. Among other things, NCLB requires Title I schools to make "adequate yearly progress" and seeks to ensure that teachers are properly qualified. A school that fails to make adequate yearly progress must allow parents to choose a different public school and also to prepare an improvement plan to correct the problems. Schools that do not make adequate yearly progress for 2 years are also required to provide tutoring assistance to certain students. NCLB has been criticized by some as unrealistic and unduly burdensome.

Following the passage of Title I, policymakers and educators had high expectations for improvement of the educational performance of poor children. They hoped that millions would be lifted out of poverty. Title I has fallen short of these lofty expectations. Nevertheless, many proponents of Title I link the program to improvements in academic performance for poor children.

Stephen R. McCullough

See also *Agostini v. Felton;* Civil Rights Movement; No Child Left Behind Act

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Title VII

The decade of the 1960s witnessed a broad congressional attack on discrimination in American society. Among targeted areas were housing, voting, education, and employment. Title VII of the Civil Rights Act of 1964, the first comprehensive federal employment discrimination statute, has provided an effective tool for litigants to challenge discrimination in the workplace and has altered employment practices in both public school and higher education in the United States. Title VII prohibits employment discrimination based on race, color, national origin, religion, and sex. In addition to basic hiring, dismissal, promotion, and demotion decisions, it extends to such wide-ranging employment issues as sexual harassment, pregnancy and maternity leave benefits, religious leave to observe one's religious holy days, and retaliation for exercising one's rights under Title VII. This entry reviews the general framework of Title VII in terms of the burden of proof required and the types of claims allowable. It then describes the mechanisms in place for administrative enforcement and judicial relief. Last, it discusses the use of Title VII with specific types of discrimination, including pregnancy and religious discrimination, harassment, and retaliation. In light of workers' reliance upon Title VII to challenge allegedly discriminatory practices in the job setting, the growing ethnic and racial diversity in the United States, and the

continued push for social justice in all aspects of American life, Title VII will continue to be a vital piece of antidiscrimination legislation in the future.

Title VII outlaws employment discrimination by employers with 15 or more employees. When enacted in 1964, Title VII did not apply to public employers; a 1972 amendment extended coverage to political subdivisions, including public schools, colleges, and universities. Title VII prohibits an employer from discriminating against employees and prospective employees (applicants) in hiring, discharge, compensation, and "terms, conditions, or privileges of employment" on the basis of race, color, national origin, religion, and sex. It provides an exception for religious educational institutions in the hiring of employees of a particular religion to perform duties connected with the institution.

General Framework of Title VII

Burden of Proof

The burden in Title VII cases rests upon the employee or prospective employee to establish that the employer acted in an unlawfully discriminatory manner. To clarify the statutory process, the Supreme Court developed a three-step test of shifting burdens and order of proof in *McDonnell Douglas Corporation v. Green* (1973) and *Texas Department of Community Affairs v. Burdine* (1981). To prevail in a Title VII claim, the plaintiff must first establish a prima facie case that he or she (a) is a member of a protected group; (b) applied for a job for which he or she was qualified and for which the employer sought applicants; (c) was rejected; and (d) after the rejection, the employer continued to seek applicants of the plaintiff's qualifications. The burden then shifts to the employer, who must rebut the plaintiff by producing a legitimate, nondiscriminatory reason for the plaintiff's rejection. In the final stage, the plaintiff must establish that the employer's given reason was a pretext for actual impermissible discriminatory reasons. As the *Burdine* Court explained, at this step, the plaintiff can either show directly that the employer was more likely motivated by a discriminatory reason or indirectly that the employer's stated reason was not credible. Courts adapt the basic *McDonnell Douglas-Burdine* test to fit charges of discriminatory dismissal, demotion or transfer, and denial of tenure.

Types of Claims

Plaintiffs may bring two types of claims under Title VII. Disparate-impact claims, infrequent in the education setting, challenge facially neutral employment policies or practices that on the surface appear nondiscriminatory but nonetheless disproportionately and significantly impact a protected group. An employer's primary defense is that such policy or practice is justified by business necessity. An example of a school disparate-impact case is *Thomas v. Washington County School Board* (1990), in which the Fourth Circuit ruled against the hiring practices of a school district with a predominantly White workforce. The court found the district's practices of hiring relatives of school district employees and posting vacancy notices in the district's buildings, while generally not advertising the vacancies, constituted a disparate-impact violation of Title VII. In another impact case, *United States v. South Carolina* (1977), a federal district court upheld South Carolina's use of National Teacher Examination (NTE) scores for certification and teacher salary purposes through the state aid formula, even though the NTE disqualified a greater proportion of Black test takers and applicants and placed them in disproportionately lower pay categories. South Carolina established a business necessity through a validation study that showed that the NTE scores were rationally related to the legitimate objective of selecting qualified teacher applicants.

More common in the education setting are Title VII disparate-treatment claims. In these cases, plaintiffs allege that school districts treated employees or job applicants differently and with unlawful intent. For example, a female teacher passed over for promotion to an administrative position might establish that the nonpromotion was unlawfully based on her gender. Or, in previous decades, Black applicants for teaching positions in a southern school district might have challenged the district's record of having never hired minority teachers as being an unlawful practice under Title VII.

Administrative Enforcement and Judicial Relief

Title VII created the federal Equal Employment Opportunity Commission (EEOC) to serve as an enforcement mechanism of Title VII. Before litigating, individuals must exhaust administrative remedies by filing a claim with the EEOC within 180 days after the alleged discrimination occurred. After notice is given to the employer, and absent a conciliation agreement between the parties or filing of suit against the employer by the EEOC, the agency notifies the aggrieved person, who then has 90 days to bring civil action.

When employees or prospective employees establish that employers intentionally engaged in unlawful employment practices, Title VII authorizes courts to award a wide range of equitable relief to the prevailing plaintiffs. Courts may issue affirmative injunctive relief ordering the employer to stop engaging in the unlawful discriminatory practice and to hire, reinstate, or take other equitable action. Court awards also may include attorneys' fees and back pay; awards of tenure, seniority, and front pay are possible but less common.

Specific Unlawful Employment Practices

Pregnancy

Congress enacted the Pregnancy Discrimination Act of 1978 (PDA) as an amendment to Title VII to clarify and protect the rights of pregnant employees. The PDA outlaws discrimination against employees or prospective employees based upon "pregnancy, childbirth, or related medical conditions." Further, employers must treat pregnant and maternity leave employees the same as employees suffering from other temporary disabilities in fringe benefits and leave policies that govern the length of leave, the use of leave for disabilities, and the conditions to return to work (such as medical and administrative clearance and notice requirements).

Harassment

Title VII prohibits harassment, which is generally defined as offensive words or actions, normally more than stray remarks or isolated behavior, that substantially annoy, alarm, or distress a person with no legitimate, official purpose. While harassment in the work- place can be religious, racial, or ethnic, most claims are gender based. The victim and harasser may be male or female, of the opposite or same sex. There are two basic types of sexual harassment. *Quid pro quo* (Latin for "something for something") harassment is when an employer makes employment decisions, including hiring, promotion, pay raise, nonfiring, or transfer, contingent upon sexual favors. A second type of harassment, a *hostile* (or abusive) work environment, exists when mistreatment based upon one's gender is so severe or pervasive that a reasonable person should not have to tolerate it or that it affects one's job performance. Examples may include offensive verbal (such as name-calling and "dirty" jokes) and physical (for example, leering or touching) conduct. The alleged victim must report the unwelcomed behavior to a school official who has the authority to take corrective or preventive action; liability exists if the administrator reacts to the actual notice of the alleged harassment with deliberate indifference.

Religion

In addition to Title VII's general ban against religious discrimination, a 1972 amendment, Section 701(j), states that "religion" includes the religious beliefs, observances, and practices of an employee or prospective employee. An employer must make reasonable accommodations for such workers unless doing so would cause an undue hardship on the operation of the organization. Supreme Court rulings have held that employers must offer a reasonable accommodation but not necessarily the employee's preferred choice and that an accommodation resulting in more than a de minimis cost to the employer constitutes an undue hardship.

In applying Title VII to the school setting, courts consistently hold that employees have a right to miss work to observe their religious holidays and to maintain their employment status when doing so. But an employer has no Title VII obligation to provide paid leave for an employee's absences for religious observances. For example, in 1984, the Tenth Circuit ruled that a school district had to allow a Jewish teacher

to miss work to observe Yom Kippur and Rosh Hashanah, a total of 3 days; but if not fully covered by the district's leave policy, the district did not have to provide the teacher paid leave to cover all missed days.

Retaliation

Title VII protects from retaliation those individuals who challenge employment actions under the statute. Title VII outlaws an employer from retaliating against employees or prospective employees who oppose a practice made unlawful under the statute by filing a Title VII complaint or litigation or by participating in an investigation or proceedings under Title VII. Provided that the complainants acted in a good-faith belief that Title VII had been violated, they are protected from reprisal, whether successful or unsuccessful in their challenge. For example, a federal court in West Virginia in 1981 found that a school district transferred and removed coaching duties from a junior high school basketball coach because she filed state and federal agency charges challenging gender inequities in her district's athletic programs.

Ralph Sharp

See also *Ansonia Board of Education v. Philbrook;* Civil Rights Act of 1964; Disparate Impact; Equal Employment Opportunity Commission; *Griggs v. Duke Power Company; Harris v. Forklift Systems;* Hostile Work Environment; *McDonnell Douglas Corporation v. Green; Meritor Savings Bank v. Vinson; Oncale v. Sundowner Offshore Services;* Sexual Harassment; Sexual Harassment, Quid Pro Quo; Sexual Harassment, Same-Sex

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United States v. South Carolina, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd*, 434 U.S. 1026.

Title IX and Athletics

Title IX of the Education Amendments of 1972 prohibits public and private educational institutions that receive federal funds from discriminating due to gender in any aspect of their operations. The statute, which explicitly prohibits quotas, is coextensive with the prohibitions against gender discrimination provided by the Constitution's Equal Protection Clause. While there is no mention of intercollegiate or interscholastic athletics in the actual statute, the implementing regulations make it clear that athletics is covered by Title IX. The Office for Civil Rights (OCR) of the U.S. Department of Education is the agency charged with the enforcement of Title IX. Under the OCR's interpretation, which has been universally endorsed by the federal appellate courts, an institution must do one of three things to comply with Title IX in the context of athletics participation.

First, each gender's representation in varsity athletics must be substantially proportionate to its representation in the student body. The fact that the OCR expects a gender's representation among athletes to be "substantially proportionate" to that gender's representation in a student body necessarily begs the question of what is meant by "substantially proportionate." In 1996, the OCR clarified that athletic opportunities are

> substantially proportionate when the number of opportunities that would be required to achieve proportionality would not be sufficient to sustain a viable team, i.e., a team for which there is a sufficient number of interested and able students and enough available competition to sustain an intercollegiate team.

In plain English, the OCR first reviews how many additional participation opportunities must be offered to the underrepresented gender in order to achieve perfect proportionality. If this number is sufficient to field a viable team, then an institution is not considered substantially proportionate and must add a team. If it is not sufficient to field a viable team, nothing more is required.

To illustrate how the OCR test works, suppose a university is 55% female but offers 700 athletic participation opportunities. Men have 385 athletic participation opportunities, while women have 315

participation opportunities. This means women represent 45% of the athletes (315 divided by 700) though they represent 55% of full-time undergraduates. The first step is to consider how many opportunities must be added for women to achieve perfect proportionality of 55%. If male participation remains constant, which is the assumption employed by the OCR, the university must add 156 participation opportunities for women. If a university did so, it would have 471 female opportunities (315 current + 156 additional) and 385 male (all current). The second step is to address whether the number of new participation opportunities required, 156 in this example, is sufficient to field a viable team. Obviously, it is sufficient. In fact, the university could field seven or eight new women's teams with 156 additional opportunities.

Although the above example is purely hypothetical, the actual practice of the OCR yields similar results. In a letter dated August 24, 2000, OCR advised the University of Wisconsin that based on its deviation of 2.89 percentage points (involving an enrollment of women of 52.96% compared with their intercollegiate athletic participation of 50.07%), it failed to comply with its commitment in a plan submitted to OCR to meet the first prong of the three-part test. In this letter, OCR stated the deviation represented as many as 46 participation opportunities for women, which would be sufficient to sustain the addition of a viable women's team. In short, if one gender is 50% of the student body, its representation among varsity athletes must approximate 50%.

Second, if an institution has not achieved substantial proportionality, the institution may demonstrate that it has a continuing history of expanding opportunities for the underrepresented gender. In other words, it is acceptable for female representation among athletes to be substantially below their representation in the student body if the institution has consistently added new teams for women and intends to do so in the future. In evaluating "history," the OCR looks at the institution's record for adding teams, its record of increasing participants on existing teams, and its response to requests to add teams. In assessing "continuing practice," the OCR examines the institution's current policy for adding teams. In practical terms, this means that an institution must have consistently added new teams for the underrepresented gender about every 3 to 4 years, must refrain from eliminating any teams for the underrepresented gender, and must have a plan for adding new teams in the future. To be sure, the fact that the OCR demands that teams be added in the future begs the question of when they may cease adding teams. Apparently, the answer is that an institution is excused from adding teams when it finally achieves substantial proportionality. Until that time, the institution must add teams at the rate of about once every 3 years.

Third, an institution may demonstrate that it is currently meeting all interests and abilities of the underrepresented gender. Because students are constantly entering and leaving the institution, survey data quickly become useless. Thus, if an institution is going to demonstrate that it is filling all needs and thereby meet the third prong, it must do surveys on a continuing basis. Presumably, this means that an institution must periodically survey the underrepresented gender and add a new team every time there is an indication of an unmet interest and ability until substantial proportionality is achieved.

As a practical matter, all three options eventually lead to substantial proportionality, the first option. Unless an institution has achieved substantial proportionality, it must either (a) add teams for the underrepresented gender periodically until such time as substantial proportionality is achieved, (b) cut opportunities for the overrepresented gender immediately so that substantial proportionality is achieved, (c) add a team every time there is an indication of an unmet interest and ability among the underrepresented gender until substantial proportionality is achieved, or (d) implement some combination of the first three options. The question is not *whether* the quota will be reached, but *when.*

In addition to mandating a particular level of participation, there are also regulations concerning the provision of athletic scholarships. As to athletic financial assistance, the regulation is specific. The regulation provides for athletic scholarships as follows:

> 1. To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex

> *in proportion* to the number of students of each sex participating in interscholastic sports. (emphasis added)
>
> 2. Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41(c).

In effect, if 45% of the athletes are female, females should receive approximately 45% of total athletic financial assistance. Although, as in the case of the participation requirements, no level of permissible deviation from exact equality in scholarship aid has been established, OCR has issued a guidance letter that provides as follows:

> If any unexplained disparity in the scholarship budgets for athletes of either gender is 1% or less for the entire budget for athletic scholarships, there will be a strong presumption that such a disparity is reasonable and based on legitimate nondiscriminatory factors. Conversely, there will be a strong presumption that an unexplained disparity of more than 1% is in violation of the "substantially proportionate" requirement.

To be sure, the financial assistance regulation and the accommodating interests and abilities regulation work in tandem. As a gender's participation increases, its share of scholarship money must also increase. Thus, while adding some extra nonscholarship players may help the institution achieve substantial proportionality in the participation context, it may actually cause noncompliance in the financial context. Conversely, limiting nonscholarship players to achieve financial assistance compliance may cause the university to fail the substantial proportionality test. It is extremely difficult to meet both standards.

William E. Thro

See also Equal Protection Analysis; Title IX and Sexual Harassment

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Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681.

Title IX and Sexual Harassment

Title IX of the Education Amendments of 1972, which prohibits gender discrimination by any educational institution, public or private, that receives federal funds, has been interpreted as prohibiting sexual harassment. In *Gebser v. Lago Vista Independent School District* (1998), the Supreme Court applied Title IX to sexual harassment of a student by an instructor. A year later, in *Davis v. Monroe County Board of Education* (1999), the Court extended that holding to sexual harassment of one student by another student.

In the context of faculty-student sexual harassment, discrimination by the school is demonstrated by showing that an "appropriate person" actually knew of the conduct and that the response of the school was deliberately indifferent. The first element, "knowledge by an appropriate person," refers to a school official who, at a minimum, has authority to address the alleged discrimination and to institute corrective measures on the school's behalf. In other words, "appropriate persons" are those who have the authority to address the misconduct by terminating or otherwise disciplining the offending party. The second element, "deliberate indifference," means that a school official knows of the conduct and, as a matter of official policy, has done nothing. Consequently, a school effectively causes a continuing violation. In other words, liability is imposed when the school knows of the harassment and affirmatively chooses to do nothing.

When the person engaging in sexual harassment is a student, rather than an instructor, additional

requirements are imposed. In *Davis,* the Court stressed that the language of Title IX, coupled with the requirement that the recipient have notice of the proscriptions under the statute, requires that recipients subjected to liability have substantial control over the harasser and the environment in which the harassment occurs. As the Court noted, "Only then can the recipient be said to 'expose' its students to harassment or cause them to undergo it 'under' the recipient's programs" (*Davis,* p. 645). In reaching this conclusion, the Court relied in part on the requirement in Title IX that harassment occur under the operations of a funding recipient. The Court qualified the requirement involving control with respect to entities in higher education:

> A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy [citation omitted], and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims. (p. 649)

The Court imposed two additional conditions on its test for peer sexual harassment that were not addressed in *Gebser.* One provides a defense if the recipient can show that its response to harassment was not "clearly unreasonable." The Court distinguished this from a "mere 'reasonableness' standard," stating that in an appropriate case, "There is no reason why courts, on a motion to dismiss, for summary judgment, or for a directed verdict, could not identify a response as 'not clearly unreasonable' as a matter of law" (*Davis,* p. 649). The other condition, which is based on the attachment of Title IX to actions that occur under any program or activity, requires that damages be "available only where behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect" (p. 652). Finally, the Court sought to avoid an overly expansive application of its holding to common behavior, particularly among children, involving things such as "simple acts of teasing and name calling" (p. 652).

The Court also stressed that it did not contemplate or hold that a mere decline in grades is sufficient to survive a motion to dismiss. The Court attempted to provide some general guidance as to when gender-oriented conduct rises to the level of actionable sexual harassment by stating that it "depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved" (*Davis,* p. 651). In both *Gebser* and *Davis,* the Supreme Court implicitly held that Title IX liability turned on a finding of intentional discrimination by the educational institution. In other words, before Title IX liability can be imposed, a party must demonstrate that officials at an educational institution made a conscious choice to discriminate. It is not enough to show that an employee or agent of the institution behaved improperly. Rather, a plaintiff must prove that an educational institution endorsed such conduct or failed to stop the harassment.

William E. Thro

See also *Davis v. Monroe County Board of Education; Gebser v. Lago Vista Independent School District;* Sexual Harassment; Sexual Harassment, Peer-to-Peer; Sexual Harassment of Students by Teachers

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Transportation, Students' Rights to

The duty of school boards and educational leaders to provide transportation for regular education students has become one of the most overwhelming tasks in the increasingly multifaceted world of educational leadership. At this point, suffice it to say that if students are entitled to transportation as part of their mandated related services under the Individuals with Disabilities Education Act, a variety of additional federal laws and regulations come into play.

Basic Requirements

Public school officials must sort through a seemingly endless array of state and federal statutes, rules, and regulations to arrange transportation for all categories of students designated by state statutes, as well as categories mandated by federal law and court judicial orders. For typical administrators, this range includes students who reside farther than the maximum walking distance, students from nonpublic schools who travel to schools within or outside of their districts, students with disabilities (as noted above), and students going to and from extra and cocurricular activities. In addition to scheduling issues, school officials may be called on to provide transportation to groups for which no state reimbursement is available.

Absent legislative or judicial mandates to provide student transportation, local school boards are free to decide whether to furnish transportation or to charge for making it available. Generally, if the provision of student transportation is truly optional, litigation seeking to force boards to provide service will fail either because the state has declared no clear legislative intent to provide transportation or because a state's constitution, legislature, or courts have declared no fundamental constitutional right to an education. In its only case on point, *Kadrmas v. Dickinson Public Schools* (1988), the U.S. Supreme Court upheld the imposition of a fee to transport a student to school. Even so, previously, the Supreme Court of Utah permitted students to be transported at district expense if their presence was required in school-related activities (*Beard v. Board of Education of North Summit,* 1932). The court made a distinction between those who were participants in the extracurricular activities and those who were spectators. At the same time, the court added that the board could not at district expense furnish transportation to spectators of school activities. Subsequently, an appellate court in California found that a board's refusal to provide transportation for indigent students was an abuse of discretion (*Salazar v. Dawson,* 1992).

Most public school boards are responsible for providing safe and wide-ranging transportation plans for the majority of their students. For example, Ohio law requires school boards to provide transportation for students in kindergarten through eighth grade who live more than 2 miles from school. To this end, Ohio law provides clear evidence that a significant number of students, such as those who attend secondary school, are not required to be transported to and from school. While most boards do provide transportation for students K–12, they are not required to do so for all students. For example, an appellate court in Ohio held that a school board could eliminate high school busing due to financial constraints (*Russell v. Gallia County Local School District,* 1992).

Safety and Other Issues

As part of the process of providing transportation, school officials must recruit, employ, and train bus drivers who satisfy state standards and must frequently supervise and/or evaluate them to ensure that they operate buses in compliance with state and federal requirements. School boards that operate their own buses must regularly inspect the vehicles to establish that they conform to the state and federal safety standards.

The above operational decisions are played out against an environment of possible legal liability when students are injured as a result of the operations of school buses. Responsibility for student safety requires

unending review of matters such as travel times, choice of pick-up and drop-off points, and alert attention to never-ending complaints. The prospect of troublesome behavior on buses may require contemplation of supervisory techniques, such as the use of videotaping or adult assistants on buses. Defenses, such as governmental immunity and contributory negligence, which may be available, do not offset the time and energy that must be invested to adequately defend a charge of negligence. In addition, even in the absence of legislative or constitutional mandates to furnish transportation, boards are not necessarily protected from litigation when students are injured in situations where arguably the presence of safe transportation would have prevented their being harmed.

Conflicts sometime develop concerning statutes that approve transportation but do not spell out the distance beyond which it must be supplied for students or circumstances under which it must be provided. In such a case, the Supreme Court of Appeals of West Virginia maintained that a school board violated the Equal Protection Clause of the Fourteenth Amendment in refusing to provide transportation to children who lived on a gravel road 2 miles away from school (*Shrewsbury v. Board of Education County of Wyoming,* 1980). Further, in a case in which a statute directed local boards of education to make transportation available to students wherever it was reasonable and desirable to so, parents of a small number of students sought transportation due to the existence of hazards between their dwellings and the school. Ruling in favor of the parents, the Supreme Court of Connecticut was of the opinion that a board had to furnish transportation (*Town of Waterford v. Connecticut State Board of Education,* 1961).

In addition to actually providing transportation, local school boards have the option of paying a mileage rate to parents who reside in out-of-the-way locations. Courts generally have upheld such arrangements as a reasonable means of satisfying the legal requirement of providing transportation for students. Even so, the mileage rates at which boards reimburse parents may well be subject to judicial review.

C. Daniel Raisch

See also Disabled Persons, Rights of; *Kadrmas v. Dickinson Public Schools;* Nonpublic Schools; Related Services; Rural Education; Year-Round Schools

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TRUANCY

Truancy, put simply, is the act of missing school. Truancy is identified as 1 of the 10 most important problems in schools. In fact, since student absenteeism has risen as high as 30% in some communities, this trend has had grave consequences for both children and their communities. This entry discusses causes and effects and some strategies for dealing with the problem.

Causes and Effects

Research has demonstrated that truancy is a reliable predictor of delinquency, gang involvement, substance abuse, and teen pregnancy. Further, insofar as many truants become dropouts, it also correlates with unemployment, low salary, imprisonment, and welfare.

Truancy affects communities by expending resources and time of family courts as well as juvenile justice systems, along with dealing with the rise in

associated crimes. In addition, there can be a loss of state and federal education funding due to high absenteeism. This, in turn, could create either a rise in local property taxes or a reduction of educational resources, thereby impacting all students. Finally, insofar as truancy is correlated with unemployment and underemployment, it can have long-term effects for communities through lost tax revenues and expenditures on public assistance. Accordingly, it is in the interest of communities to reduce the rate of truancy.

The first set of factors correlated with truancy consists of student characteristics. Truant children tend to have low self-esteem and lack social competence. Further, drug and alcohol abuse, mental health issues, or poor physical health contribute to truancy. The second set of factors relate to families. These factors include lack of parental supervision, poverty, alcohol and drug abuse, domestic violence, and indifferent attitudes toward education. The third set of factors concern economic matters, such as parents having multiple jobs, students having to work to help support themselves and their families, the lack of affordable transportation and child care, single-parent households, and high mobility rates. The fourth set of factors includes school-based issues, such as perceived uncaring attitudes of teachers and administrators, school size, falling behind in schoolwork, boring and irrelevant curriculum, and bullying.

The legal definition of *truancy* varies from one state to the next. However, all definitions are connected with compulsory education laws that require children, generally between the age of 7 and 18 years, to continuously attend school. In general, school boards and educational officials have the authority to determine whether absences are excused. Even so, the number of unexcused absences required to make cases for truancy is set by state officials.

Approaches to Truancy

Jurisdictions also differ in their approach to truancy. Most states deal with truancy either through school-based intervention programs or via the mechanism of state law enforcement. In the court system, truancy is classified as a status offense because it would not be a violation if committed by an adult. Consequently, children can be categorized as status offenders in one state but be left alone by the legal systems of other jurisdictions.

The juvenile justice system, according to many scholars, is the least effective means of addressing truancy. The current emphasis on punishment in that system, rather than addressing the complexity of truancy, criminalizes truants. As such, children in the juvenile justice system tend to receive less rehabilitation and are more likely to become recidivists. Moreover, the adversarial nature of the juvenile justice system impedes its effectiveness in truancy cases. To this end, there is a tendency for parents and children to be set in opposition to one another, escalating rather than getting at the root of the problem.

Another justice system means of addressing truancy is to make parents liable for their children who are truant, often imposing fines or jail sentences. Parental liability statutes are typically incorporated in state tort and criminal laws. The logic behind these statutes is that since parents are responsible for their children, they must accept the consequences of the actions of their offspring. Advocates for this approach believe that this method gets parents' attention and compels them to focus more closely on the education of their children. Opponents respond that just like juvenile court, insofar as parental liability is adversarial, this approach exacerbates existing problems while possibly creating new ones.

Many jurisdictions choose school-based intervention programs in attempting to reduce truancy. The strength of this approach is that it works with children during the school day. This approach includes reorganizing the structure of middle schools to include assigning mentor teachers to individual or small groups of children; the ability to connect with teachers helps children feel less isolated and intimidated by middle school settings. School-based programs are more effective with early intervention.

Other alternatives to legal and school-based interventions are community-based programs to address truancy. Some of these programs work in concert with school officials, while others operate separately. In mentoring programs that work with school officials, educators provide mentors, either peers or volunteer members of communities. These mentors encourage the student to attend school by providing a support system. This approach may also promote students'

interests in school by engaging them in extracurricular activities.

Mediation programs typically work outside of the school environment. In mediation, neutral third parties assist students and their parents to reach their own solutions. Mediators have no authority to impose solutions, but systematically help participants to identify the problems, work through the conflicts, agree on solutions, and develop plans of improvement. Advocates of mediation maintain that it has several advantages over using the court system to reduce truancy. First, supporters point out that mediation is a nonadversarial process, since parents and children are encouraged to work together to reach agreements on both problems and solutions. Second, proponents of mediation note that it focuses on rehabilitation, not punishment, thus promoting more durable change. Third, advocates of mediation explain that it enables participants to identify problems and produce more effective solutions. Finally, supporters maintain that mediation is a flexible process that can be tailored to the specific needs of the participants.

In sum, since the reasons for truancy are various and complex, it is important that educational officials work with the legal system in developing a multiplicity of programs to address the problems such behavior engenders.

Patricia A. L. Ehrensal

See also Compulsory Attendance; Juvenile Courts

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Tuition Reimbursement

When school personnel fail to provide students with disabilities with the free appropriate public education (FAPE) called for in the Individuals with Disabilities Education Act (IDEA), the courts can grant appropriate relief (20 U.S.C. § 1415(i)(2)). One of the more common forms of relief is to provide tuition reimbursement to parents who may have obtained appropriate services privately.

The administrative and judicial proceedings concerned with contested placements under the IDEA can take months or even years before reaching final resolution of the underlying dispute. While these actions are pending, the IDEA requires that students remain in their current educational placements unless their parents and school board officials or states agree otherwise (20 U.S.C. § 1415(j)). Parents who are convinced that their child's current placement is inappropriate may not wish to have the child remain in that placement during the lengthy proceedings. Under these circumstances, parents may opt to remove their children from their current placements and enroll them in private facilities.

Under some circumstances, parents who succeed in showing that school board placements are inappropriate can be reimbursed for the cost of tuition and other expenses associated with their unilateral private placement. Initially, this relief was provided largely under case law, but the IDEA and its regulations now explicitly authorize judges and hearing officers to award tuition reimbursement (20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.148).

The Supreme Court has delivered two important pronouncements regarding tuition reimbursement for parents who unilaterally place their children in private schools. In *Burlington School Committee v. Department of Education, Commonwealth of Massachusetts* (1985), the Court acknowledged that the IDEA allowed reimbursement as long as the parents' chosen placement was determined to be the appropriate placement for their child. The Court emphasized that when Congress empowered the courts to grant appropriate relief, it intended to include retroactive relief as an available remedy.

The Court articulated that reimbursement merely requires school boards to pay the expenses that they would have been paying all along if school personnel had developed proper individualized education programs (IEPs) from the outset. If reimbursement were not available, the Court observed, the rights of

students to a FAPE and parental rights to participate fully in developing appropriate IEPs would be less than complete. On the other hand, the Court cautioned parents who make unilateral placements that they do so at their own financial risk, because they will not be reimbursed if school board officials can show that they proposed and had the capacity to implement appropriate IEPs.

In the Supreme Court's second case involving tuition reimbursement, *Florence County School District Four v. Carter* (1993), the justices unanimously affirmed that parentally chosen placements need not be in state-approved facilities for parents to obtain tuition reimbursements. In *Carter,* parents dissatisfied with the IEP that school officials developed for their daughter placed her in a private school that was not on the state's list of approved facilities. A federal trial court ruled that insofar as the school board's proposed IEP was inadequate, it was required to reimburse the parents for the cost of the private school placement.

On appeal, the Fourth Circuit affirmed. The court found that the private school provided an educational program that met the Supreme Court's standard of appropriateness as outlined in *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982), though it was not state approved and did not fully comply with the IDEA. The Fourth Circuit insisted that when a school board defaults on its obligations under the IDEA, reimbursement for a parental placement at a facility that is not approved by the state is not prohibited as long as the educational program provided at the school meets the *Rowley* standard.

The Supreme Court concurred, remarking that the IDEA is designed to ensure that all students with disabilities receive an education that is both appropriate and free. The Court emphasized that barring reimbursement under the circumstances in *Carter* would have defeated the IDEA's statutory purposes.

Naturally, parents are not entitled to be reimbursed for their private school tuition when school boards are successful in showing that they offered a FAPE. The most recent versions of the IDEA place some restrictions on a parent's ability to obtain a tuition reimbursement award, even when it is shown that a school board failed to provide a FAPE.

Under those provisions, at least 10 days before removing a child from the public schools, parents must notify school officials in writing that they are dissatisfied with the IEP of their child and afford educators the opportunity to take appropriate corrective action (20 U.S.C. § 1412(a)(10)(C)(iii)). Parents who fail either to challenge the IEPs of their children or to provide school officials with the written notice required by the IDEA prior to making unilateral placements are not entitled to reimbursements. Even prior to the inclusion of this provision in the IDEA, courts were hesitant to grant tuition reimbursement awards in situations in which school officials had not been given the opportunity to act.

At this writing, the Supreme Court has agreed to review yet another dispute involving tuition reimbursement. At issue in *Board of Education of the City of New York v. Tom F.* (2007) is whether parents who place their children in private schools are entitled to tuition reimbursement if the children have never attended the public schools.

Allan G. Osborne, Jr.

See also Free Appropriate Public Education; Individualized Education Program (IEP)

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Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq*.

Tuition Tax Credits

Tuition tax credit policies fall into two broad categories. The older form allows a credit on state taxes for educational expenses, including private school tuition, incurred by parents or guardians. The second is a type

of tuition tax credit policy more akin to vouchers; these are best described as "tuition tax credit vouchers." This entry describes these plans, their rationale, and some of the legal challenges they have faced.

Tax Credit for Expenses

In three states, parents who incur expenses for school books, tuition, or computers for their children may take credits on state taxes in order to serve as partial offsets against those expenses. These laws have existed in Minnesota and Iowa for decades; Illinois adopted such a policy in 1999. The U.S. Supreme Court upheld an earlier version of the Minnesota policy (one that allowed for an above-the-line deduction, rather than a tax credit) against an Establishment Clause challenge in *Mueller v. Allen* (1983).

Tuition Tax Credit Vouchers

Conventional voucher plans deliver state-allocated funds to schools through the private decisions of parents (see the "Vouchers" entry in this encyclopedia). In a roundabout way, this sort of voucher system can also be accomplished using tax credits. In 1997, Arizona became the first state to adopt this second type of tuition tax credit policy, one best described as "tuition tax credit vouchers." At that time, 5 years before the landmark *Zelman v. Simmons-Harris* (2002) decision, Arizona legislators were concerned about the legality of voucher legislation under the U.S. Constitution. They turned to tuition tax credits as a path toward the same goals. In a nutshell, the Arizona tax credit mechanism lets those who owe state taxes reallocate some of that money from the state general fund to a "scholarship-granting" organization (the legislation in Arizona and elsewhere refers to the voucherlike grants as scholarships).

Tuition tax credit voucher plans insert two intermediate steps into the conventional voucher process. First, the grants are issued by privately created, nonprofit organizations, rather than directly by the government. Second, state allocation is achieved through a tax credit given to donating taxpayers. The direct money pathway is from taxpayer to scholarship-granting organization to parent to school. The indirect part of the pathway is the forgone tax obligation given by the state government to the taxpayer.

Pennsylvania and Florida have followed Arizona and adopted tuition tax credit voucher policies in 2001, and Iowa and Rhode Island joined this group in 2006. These laws differ in various respects, most notably in whether the tax credit is full or for only a portion (e.g., 65% or 90%) of the donation and in whether the credit is available for private taxpayers, corporate taxpayers, or both. They also differ in whether they impose caps on individual donations and ceilings on overall donations and, if so, the amount of the caps and ceilings. They are described in a forthcoming publication by Welner.

Rationale for Tuition Tax Credit Vouchers

Tuition tax credit voucher systems are designed to provide government support for private schooling but to do so without any direct state payments. This is accomplished by having the tuition money pass through many sets of hands before making its way to private and parochial schools, but the overall policy effect is very much the same as with conventional vouchers. Arguably, this tax credit system still results in the government footing the tuition bill—through forgone tax revenues. Yet compared with voucher systems, control over funding decisions is largely delegated to two additional parties: (1) a subgroup of taxpayers, who can decide to which scholarship-granting organizations they will allocate the funds and (2) the scholarship-granting organizations, which are given the authority to decide grant recipients.

Legal Rulings on Tuition Tax Credit Vouchers

Arizona's law was challenged in state court but upheld in *Kotterman v. Killian* (1999). The Arizona Supreme Court decided that because the money never makes its way into the state general fund, there can be no state appropriation and thus no violation of the provisions in the state constitution that "No public money or property shall be appropriated for or applied to any religious worship, exercise, or instruction, or to the

support of any religious establishment" (Arizona Constitution, Article II, §12) and that "No tax shall be laid or appropriation of public money made in aid of any . . . private or sectarian school" (Arizona Constitution, Article IX, §10):

> No money ever enters the state's control as a result of this tax credit. Nothing is deposited in the state treasury or other accounts under the management or possession of governmental agencies or public officials. Thus, under any common understanding of the words, we are not here dealing with "public money." (*Kotterman,* p. 618)

A federal court challenge was still ongoing at the time of this writing in 2007. However, the Supreme Court's holding in *Zelman,* grounded in a rationale of religious neutrality plus "genuine and independent private choice" (p. 648), is straightforwardly extendable from conventional vouchers to tuition tax credit vouchers. This permissive *Zelman* legal standard makes the new Arizona challenge difficult for the plaintiffs.

Research Findings

Research on the effects of tuition tax credit policies is scant. State reporting laws have been lax, as have official evaluations and audits. However, some basic, descriptive information is available. Perhaps the most noteworthy statistic is that more students receive tuition tax credit vouchers than receive conventional vouchers. As of 2004–2005, approximately 56,500 students received tuition tax credit vouchers in the three jurisdictions with the policy (Iowa and Rhode Island did not yet have the policy). The same year, fewer than 40,000 students received publicly funded traditional vouchers.

Research does point to some issues of equity. According to Glen Y. Wilson, in Arizona, when recipients are not means tested (i.e., they need not be low income), the state's wealthiest students appear to be receiving the vast majority of the law's benefits. The donor side of the equation also favors wealthier residents, since a taxpayer must itemize in order to receive the benefit. No research has yet been conducted on student-level outcomes, particularly achievement outcomes, resulting from tuition tax credit policies.

Kevin G. Welner

See also *Mueller v. Allen;* State Aid and the Establishment Clause; Vouchers; *Zelman v. Simmons-Harris*

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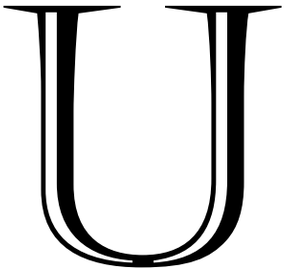

Unions

Unions are organizations specifically designed to protect and improve the social and economic welfare of their members. The primary responsibility of modern unions is to actively bargain with management officials regarding labor issues, such as wages, benefits, and the contractual terms and conditions associated with the employment of union members. Unions charge their members dues as a means of compensating union officials for the bargaining services they provide union members. Unions can also charge nonmembers fees, less than full dues, also known as agency fees, for the cost of representing their interests. This formal process of negotiating the contractual terms of employment, including salaries, working conditions, and fringe benefits between union officials representing employees and employers, is called the *collective bargaining process.* This entry looks at the historical background of teacher unions and important litigation related to union fees.

Growth of Public Employee Unions

While unions involved in private sector bargaining are governed primarily by federal law, unions working with public sector organizations, including public education, are governed by state law. In 1958, New York City Mayor Robert Wagner's Executive Order 49 permitted public employees to participate in collective bargaining for the first time. In 1959, Wisconsin became the first state to enact legislation authorizing unionization for public employees.

On the federal level, in 1962, President Kennedy's Executive Order 10988 gave national expression to the trend in establishing a policy recognizing governmental employees unions, thereby providing a major impetus for teachers' unions and collective bargaining. Subsequently, in 1970, President Nixon's Executive Order 11491 reinforced Kennedy's Executive Order by establishing a structure to administer federal labor relations.

A strike by public school teachers in April 1962, even though it just lasted for 1 day, led to the first collective bargaining agreement between a teacher association and a school board. Currently, the majority of states allow teachers to collectively bargain. At present, only a handful of states, including North Carolina, Texas, Utah, and Virginia, prohibit collective bargaining by employees of public school boards.

While private sector labor union membership has decreased over the past 30 years, public sector union membership, especially among teachers, has risen sharply over the same period. In education, the largest and most powerful unions representing educational employees are the American Federation of Teachers (AFT) and the National Education Association (NEA). The AFT was founded in New York City, partly as a result of the 1962 strike, and from its inception was a

union organized by and composed of teachers. The AFT has more than 1.4 million members. In contrast, the NEA was originally founded as a professional organization for school administrators in the mid-19th century. However, over time, the NEA has grown to become one of the largest public sector unions in the United States, with a current membership of over 2.7 million members. Within the United States, current estimates indicate that over 80% of all public school teachers are members of the AFT, NEA, or local organizations affiliated with one of the two.

Agency Fees

One of the most litigated issues involving public sector unions has been whether they have the legal right to use nonunion member agency fees for political or ideological purposes unrelated to the union's collective bargaining responsibilities. *Agency fees* are fees that nonunion employees are required to pay in lieu of union dues paid by union members. In *Abood v. Detroit Board of Education* (1977), the U.S. Supreme Court ruled that a teachers' union could require nonmember teachers to pay agency, or service, fees to cover expenses associated with bargaining activities but could not require them to pay expenses associated with the support of the union's political or ideological activities. According to the Court, the First Amendment prohibits public sector unions from using nonunion members' agency fees for advancing unions' political or ideological causes that are unrelated to their collective bargaining duties and responsibilities.

Approximately a decade after *Abood,* the Supreme Court again addressed the issue of a union's use of agency fees imposed on nonunion employees, albeit not in a school setting. In *Communications Workers v. Beck* (1988), the Court reinforced *Abood*'s holding that unions have no legal right to use mandatory dues or fees to advance political or ideological endeavors. Yet under *Beck,* the responsibility of determining whether union officials were spending dues of nonmembers on political activities fell on the employees.

To provide more specific procedural guidelines in educational settings, in *Chicago Teachers Union, Local No. 1 v. Hudson* (1986), the Supreme Court reasoned that public sector unions must expressly inform nonunion employees specifically how much of their agency fees, or dues, are being spent on noncollective-bargaining-related activities and offer nonunion member employees a refund for that amount. As a direct result of *Hudson,* public sector unions must send all their nonunion member employees what are commonly referred to as "Hudson packets," informing them of their legal right to refuse permission to spend their agency fees on any noncollective bargaining activities.

Most recently, the Court dealt with the legal issue of agency fees for nonunion members in *Davenport v. Washington Education Association* (2007), wherein it found that states can legally require public sector unions to obtain permission from their nonunion members prior to spending agency fees on political or ideologically related activities. Collectively, *Abood, Beck, Hudson,* and *Davenport* emphasize the legal precedent that states have the legal right to prevent public sector unions, including teachers' unions, from mandating that nonmembers pay agency frees for noncollective-bargaining-related activities.

Kevin P. Brady

See also *Abood v. Detroit Board of Education;* Collective Bargaining; Contracts; *Davenport v. Washington Education Association*

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Unitary Systems

See Dual and Unitary Systems

United Nations Convention on the Rights of the Child

On November 20, 1989, the General Assembly of the United Nations noted under the Declaration of the Rights of the Child that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Asserting that a further articulation of those safeguards was necessary, the assembly ratified the Convention on the Rights of the Child (hereinafter "the Convention"), which came into force at the United Nations on September 2, 1990. The Convention specifically states that it does not take away from the rights stated in prior documents of the United Nations that deal with the protection of children.

All but two members of the United Nations have signed the Convention: the United States and Somalia. Thus, the Convention provides sovereign states and governments a standard for the treatment of all children based upon principles stated as rights and freedoms. The Convention and its relevance to education are discussed in this entry.

Key Convention Articles for Education

Under the Convention, there are four core principles: (1) nondiscrimination; (2) devotion to the best interests of the child; (3) the right to life, survival, and development; and (4) respect for the views of the child. Fifty-four articles articulate the civil, cultural, economic, political, and social rights of those less than 18 years of age and more specifically with respect to their health care; education; and legal, civil and social services. There are two optional protocols: Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts, adopted May 25, 2000, and entered into force on 12 February 2002, and the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution, and Child Pornography, adopted May 25, 2000 and entered into force on 18 January 2002.

The Convention specifically refers to education in Articles 23, 28, and 29, while other articles that impact education include 33, 37, and 40. The Convention provides that all children, including those with mental and physical disabilities, have a right to a free education in the primary and secondary grades, one that develops their personality, talents, and both mental and physical abilities. School discipline is provided for, but it must ensure the dignity of the child and be in conformity with the Convention, which prohibits cruel, inhuman, or degrading treatment or punishment. The legal rights provided to adults in North America are provided to children, such as the right to be presumed innocent.

Application to Education

The application of the Convention as part of a country's domestic law has been problematic for several reasons. First, the Convention states the rights of individuals' vis-à-vis their own government, which is very different from state-to-state international law, as in the law of the seas. Second, the executive, not the legislative branch of government, ratifies the Convention; until the legislature affirms that decision, the Convention is not part of the country's domestic law. This is the case in Canada, Australia, and the United Kingdom, where the Convention has not been made domestic law through ratification by their legislatures. Nevertheless, the Convention has been considered as nonbinding legally but relevant to shaping the

common law, to generating a reasonable expectation on the part of a litigant, or to being used for statutory interpretation when the domestic law is ambiguous or reflects the Convention's principles. The court, using a contextual approach, may refer to the values expressed in the Convention in interpreting the law.

In countries where ratification by the executive branch automatically makes such international treaties domestic law, as in Spain, Austria, and Romania, this difficulty does not exist. Thus, educational matters of corporeal punishment, rights of the disabled, and freedom of religion have been considered by various courts.

As noted, only two member countries of the United Nations are not signatories to the Convention: the United States of America and Somalia. However, the Convention has been cited by the Supreme Court of the United States, leading to a controversy regarding whether foreign law should be considered persuasive or conclusive, the areas of domestic law in which foreign law should apply (constitutional and private), and which foreign legal systems should be cited by American courts. In general, it is fair to say that although the Convention has not been signed by the United States administration nor brought into domestic law by the Congress of the United States, there are members of the U.S. Supreme Court (*Roper v. Simmons,* 2005) who perceive such international human rights principles as a "repository of wisdom," which, in a philosophical rather than persuasive or obligatory fashion, may be considered in the determination of human rights in domestic law. Even so, the view that foreign law may be cited in domestic cases is not unanimous among the justices of that Court and has been raised as a serious concern in the Congress of the United States.

Convention Remedies

There is no remedy for failure to abide by the Convention except in the case of jurisdictions in which the Convention is binding in domestic law. The United Nations provides, through its Committee on the Rights of the Child, for regular monitoring of the implementation of the Convention by signatories.

The United Nations Convention on the Rights of the Child provides an international standard with which countries can assess their performance in the tasks of the protection and nurturing of those less than 18 years of age. Although it is not legally applicable or enforceable within a country unless through the operation of law of that country, it is nevertheless employed philosophically by courts in matters of principle and, in some cases, as a reference point for statutory interpretation.

J. Kent Donlevy

See also Universal Declaration of Human Rights

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United States v. American Library Association

United States v. American Library Association (*ALA,* 2003) is the most recent decision by the U.S. Supreme Court in a series of cases regarding the federal government's attempts to protect children from harmful online content. Although *ALA* concerned public libraries, it is generally presumed to also apply to public schools. In *ALA,* for the first time, the Supreme Court validated congressional attempts to protect students,

via filtering software, from accessing indecent material on the Internet.

Facts of the Case

ALA is best understood by knowing the history of previous congressional attempts to regulate indecent Internet content. The first effort at legislation by Congress, the Communications Decency Act (CDA), was part of the Telecommunications Act of 1996. The act imposed criminal sanctions on anyone who behaves as follows:

> Knowingly (A) uses an interactive computer service to send to a specific person or persons under 18 years of age, or (B) uses any interactive computer service to display in a manner available to a person under 18 years of age, any comment, request, suggestion, proposal, image, or other communication that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards, sexual or excretory activities or organs.

The CDA also prohibited the transmission of materials that were "obscene or indecent" to minors under the age of 18.

The Supreme Court invalidated the CDA in *Reno v. American Civil Liberties Union* (1997), holding that the statute's indecency provisions violated the First Amendment. The Court struck down these provisions on the basis that they extended to commercial speech, did not define what "patently offensive" meant, and did not permit parents to decide for themselves the acceptability of online materials for their children.

Congress tried again in 1998 with the Child Online Protection Act (COPA), which required commercial online distributors to restrict access by minors to "harmful material" that showed sexual acts or nudity. In 2003, a federal trial court disallowed initial enforcement of COPA because the age verification procedures it required unduly hindered protected speech by adults. The Supreme Court upheld that judgment in 2004 in *Ashcroft v. American Civil Liberties Union,* ordering the case to go to full trial. The federal government lost at trial and, at this time, is in the process of appealing.

The third attempt by Congress was the Children's Internet Protection Act (CIPA). CIPA, which became law in 2000, applies to schools and libraries that received funds or discounts under the federal "e-rate" program. CIPA requires these schools and libraries to operate "a technology protection measure with respect to any of its computers with Internet access that protects against access through such computers to visual depictions that are obscene, child pornography, or harmful to minors." CIPA had the same standards for adults but omitted the "harmful to minors" provision. In addition, CIPA allowed libraries to disable the technology protection measure for adults engaged in research or other lawful activity. In 2003, the U.S. Supreme Court agreed to accept *ALA* and decide the constitutionality of CIPA.

The Court's Ruling

Despite a lengthy lower court decision that found that because of the "severe limitations" of Internet filtering technologies, public libraries could not comply with CIPA without blocking "a very substantial amount" of speech that was constitutionally protected, the Supreme Court ruled that CIPA did not violate the First Amendment. The Court was satisfied that CIPA was constitutional insofar as librarians could unblock filtered material or disable Internet filtering software for adults who requested them to do so. At the same time, the Court also noted that public libraries were free to forgo their eligibility for e-rate funds if they wished to keep their computers unfiltered.

To the extent that the Court upheld the relative efficacy of Internet filtering tools, schools receiving e-rate funds must have an Internet filter in place or forgo the funds. Insofar as most schools that are eligible desperately need their e-rate funds to keep their computer networks current, few, if any, schools have opted out. Internet filters thus exist in the vast majority of K–12 schools, either because of CIPA or due to community pressure.

A number of analysts have expressed concern about both the under- and overblocking that occur with Internet filters. Even so, these filters will continue to serve as the primary mechanism for preventing student access to age-inappropriate Internet content in the near future. As an interesting side note, in the COPA appeal noted above, the federal government is arguing the

ineffectiveness of the Internet filtering technologies for which it advocated in *ALA*.

Scott McLeod

See also Acceptable Use Policies; Children's Internet Protection Act; First Amendment; Free Speech and Expression Rights of Students; Technology and the Law

Legal Citations

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Children's Online Privacy Protection Act, 15 U.S.C. § 6501.
Communications Decency Act, 47 U.S.C. § 230.
Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).
United States v. American Library Association, 539 U.S. 194 (2003).

United States v. Lopez

United States v. Lopez (1995), in which a student challenged a new federal law prohibiting the possession of guns in and around schools, reflects a textbook examination of the power of Congress under the Commerce Clause. *Lopez* reflects the Supreme Court's analysis of congressional authority in the limited context of school safety. The congressional action in this case was passage of the Gun-Free School Zones Act, part of the Crime Control Act of 1990. Congress used this legislation to address growing concerns about school violence, and the act was signed into law on November 29, 1990. The act provided that "it shall be unlawful for any individual knowingly to possess a firearm in a place that the individual knows, or has reasonable cause to believe, is a school zone." The maximum penalty was 5 years of imprisonment. While *Lopez* may be known as the case that invalidated the Gun-Free School Zones Act, it presents an insight into how the federal courts review federal legislation, including laws that impact schools.

Facts of the Case

Alfonso Lopez Jr. was a 12th-grade student in the San Antonio, Texas, schools. When on March 10, 1992, Lopez was confronted by school officials based on an anonymous tip, he admitted that he was carrying an unloaded .38 caliber handgun. Lopez also had five bullets for the handgun. Lopez claimed that he brought the gun to school for delivery to a third party at the end of the school day in exchange for $40.

Lopez was charged with violating a Texas statute prohibiting the carrying of a firearm at school. The state charge was quickly dropped, and Lopez was charged with a violation of the Gun-Free School Zones Act of 1990. Lopez entered a plea of not guilty, and his attorneys moved to dismiss the charge on the grounds that Congress had exceeded its authority in adopting the Gun-Free School Zones Act.

A federal trial court in Texas denied the motion to dismiss on the basis that the act was a constitutional exercise of the well-defined power of Congress to regulate activities in and affecting commerce, finding that the business of elementary, middle, and high schools impacts on interstate commerce. Lopez waived his right to a jury trial. There was no material issue of fact, and Lopez was convicted on the basis of the undisputed evidence. He was sentenced to 6 months of imprisonment and 2 years of supervised release.

Lopez appealed his conviction to the Fifth Circuit, which reversed on the issue of congressional authority. The Fifth Circuit ruled that the law represented an impermissible extension of congressional power under the Commerce Clause.

The Court's Ruling

On further review, the Supreme Court in *United States v. Lopez* (1995) affirmed the order of the Fifth Circuit in a 5-to-4 judgment. Writing for the majority, Chief Justice Rehnquist held that the Gun-Free School Zones Act exceeded the congressional authority to regulate commerce among the several states. The chief justice spent a considerable time in his analysis discussing the development and meaning of the Commerce Clause. Rehnquist explained that the act was neither a regulation of the channels of interstate commerce nor an attempt to prohibit interstate transportation of a commodity through those channels.

Consequently, Rehnquist determined that if the Gun-Free School Zones Act were to withstand judicial

scrutiny, it would have to be an activity that substantially affects interstate commerce. Rehnquist reviewed situations in which the court had upheld federal regulation when economic activity substantially affected interstate commerce. Rehnquist was of the opinion that regardless of how broadly one might seek to construe its terms, the Gun-Free School Zones Act was a criminal statute that had nothing to do with interstate commerce or economic activity. Consequently, Justice Rehnquist found that the act could not be sustained.

Rehnquist also reasoned that the Gun-Free School Zones Act did not contain any jurisdictional elements leading to a finding that it impacts on interstate commerce. Rehnquist noted a lack of congressional findings prior to the act's passage and noted that it did not include an element that would have limited its reach to firearms with a potential link to interstate commerce.

The government attempted to argue that possession of the gun in a school zone could result in a violent crime that would have the potential to impact on the national economy. The government claimed that the significant cost of insurance associated with violent crime affects the economy because the expense is spread throughout society. It also contended that the economy is harmed when the presence of violent crime limits the willingness of individuals to travel to areas they believe to be unsafe. The government suggested that the presence of guns in the schools presents a serious threat to the learning environment; this, in turn, could result in a less-educated citizenry, which would have an obvious adverse impact on the nation.

Rehnquist rejected the government's attempt to justify the congressional action. He pointed out that "if we were to accept the government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate" (*Lopez,* p. 564). Rehnquist noted that congressional authority under the Commerce Clause is subject to a degree of legal uncertainty for two main reasons. First, he stated that the enumerated powers of Congress have a judicially enforceable outer limit. Second, he noted that under the Constitution, Congress does not have the authority to enact virtually any type of legislation that it wishes. Rehnquist refused to follow earlier rulings that granted great deference to Congress. In the end, Rehnquist and the majority affirmed the ruling of the Fifth Circuit and struck down the Gun-Free School Zones Act as an impermissible exercise of congressional power under the Commerce Clause. There were two concurrences (Kennedy and Thomas), and three dissents (Stevens, Souter, and Breyer), the latter of which essentially argued that the act fell within the sphere of congressional authority.

Jon E. Anderson

See also Gun-Free Schools Act

Further Readings

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United States v. Lopez, 514 U.S. 549 (1995).

United States v. Montgomery County Board of Education

At issue in *United States v. Montgomery County Board of Education* (1969) was a federal trial court's order regarding a desegregation plan to integrate the faculty of a school system in Alabama. The U.S. Supreme Court ruled that an earlier order was a reasonable step forward. It called for a ratio of 3 White to 2 African American teachers in order to have at least one teacher who was of a different race than the majority of teachers in a school; it also mandated that in schools with 12 or more teachers, at least 1 of every 6 teachers or staff members should be of a race different from that of the majority. *Montgomery* stands out as the first case on the merits of faculty desegregation.

Facts of the Case

Montgomery began in 1964 when African American children and their parents filed suit seeking desegregated schools. Based on the mandates established by the litigation in *Brown v. Board of Education of Topeka I* (1954) and *II* (1955), the trial court directed the school board of a formerly segregated district to establish a unitary system as soon as possible, while setting forth a plan including teacher ratios.

Moreover, the court indicated that it would annually review the board's progress toward achieving unitary status. When the board challenged the trial court's order, the Fifth Circuit modified it by changing the specific mathematical numbers and ratios to require only substantial or approximate ratios because it thought that the order was rigid and inflexible. The court also denied a request for a rehearing en banc.

The Court's Ruling

On further review, the Supreme Court reversed the decision of the Fifth Circuit and remanded with instructions to reinstate the original order from the trial court. At the outset of its analysis, the unanimous Court reiterated the findings of *Brown I* and *Brown II,* which held not only that segregation of the races was unconstitutional but also that the primary responsibility for abolishing segregated school systems rests with local authorities. The Court noted that as *Brown II* admonished, changes were to be made at the earliest practicable date "with all deliberate speed." Yet in *Montgomery,* the Court pointed out that its review of local circumstances revealed that state and school officials had done all they could to continue to maintain a dual system of racially segregated schools.

The primary issue before the Supreme Court related to the part of the trial court's order that involved the desegregation of faculty and staff. More specifically, the dispute focused on the specific numerical goals based on ratios of White-to-African American teachers, identified earlier in this entry, in order to move the district's goal to one of proportional representation in all schools as it existed in the entire school system. In rejecting the Fifth Circuit's belief that the trial court's order was rigid and inflexible, the justices were satisfied that it was not, because it was subject to annual review.

To this end, the Court reinstated the order requiring assignment of faculty and staff based on specific ratios to ensure that the ratio of minority-to-nonminority faculty in the schools was the same as in the school system, pointing out that it was not objectionable simply because it contained fixed mathematical ratios.

In recognizing that the school board had a history of noncompliance, the Court chided officials for operating as if *Brown I* and *II* had never been litigated. In upholding the trial court's order, the justices were strongly of the opinion that school officials had to adopt more aggressive and clear measures to move the district to unitary status in compliance with the dictates of the Fourteenth Amendment's requirement of equal educational opportunities for all children regardless of their race.

Deborah Curry

See also *Brown v. Board of Education of Topeka; Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Dual and Unitary Systems; Equal Protection Analysis

Further Readings

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Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
United States v. Montgomery County Board of Education, 395 U.S. 225 (1969).

United States v. Scotland Neck City Board of Education

United States v. Scotland Neck City Board of Education (1972) dealt with a legislative act that

allowed a city to establish its own school district while the county system was undergoing court-ordered desegregation. At issue in *Scotland Neck* was whether the creation of the new city district impeded the desegregation of the county school system. The U.S. Supreme Court ruled that implementing the statute would have created a new district out of an existing system in which 57% of the students were White and the other students were African American, while the other schools in the district were about 90% African American. The Court decided this was unconstitutional.

Facts of the Case

In *Scotland Neck,* the U.S. Justice Department instituted legal action to compel a county to create a unitary school system. Prior to 1965, the county school system was segregated. County officials subsequently developed a freedom-of-choice plan. Insofar as the plan produced very little desegregation, the Department of Justice moved to have the county create a unitary system "with all deliberate speed." However, before county officials could implement the new plan, the legislature of the state of North Carolina passed a law that allowed the city to create its own school district.

A federal trial court granted the Department of Justice's request to enjoin the implementation of the statute on the basis that it impeded the desegregation of the county schools. In response to an appeal by city officials and the legislature, the Fourth Circuit reversed in their behalf. On further review, the Supreme Court invalidated the statute.

The Court's Ruling

At the outset of its analysis, on a day when the Supreme Court resolved two desegregation cases with similar issues, it referred to its rationale in the other dispute, *Wright v. City Council of Emporia* (1972). In *Wright,* the justices refused to permit officials to carve city school districts out of segregated county systems, since doing so would have slowed down their shifts to unitary status. The difference between the two cases was that in *Wright,* the resistance came from city officials, while in *Scotland Neck,* it came from the state legislature.

As such, the Court noted that the law would have allowed the county and city to maintain the racially segregated identities in the schools in violation of the Equal Protection Clause of the Fourteenth Amendment. To this end, citing to its own precedent in *Swann v. Charlotte-Mecklenberg Board of Education* (1971), the Court explained that there was a presumption against desegregation plans that create schools with disproportionate racial compositions.

At the heart of its rationale, the Supreme Court was of the opinion that implementation of the statute would have impeded the creation of a unitary school system because it would have led to substantial disparity in the racial composition of the schools in the city and county. The Court next rejected the defendants' argument that the statute would have stemmed "White flight" from the public schools to private schools. The Court refused to give any weight to this argument, instead pointing out that the primary legal focus had to be on dismantling the dual school system.

Historically, *Scotland Neck* stands out as another example of states and school boards trying to avoid the mandate to create unitary school systems. Eighteen years after *Brown v. Board of Education of Topeka,* the Supreme Courts made it clear that it was in no mood to permit public officials to continue their evasive tactics with regard to implementing equal educational opportunities for all students.

J. Patrick Mahon

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Civil Rights Movement; Dual and Unitary Systems; Fourteenth Amendment; *Swann v. Charlotte-Mecklenberg Board of Education;* White Flight

Legal Citations

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).
Brown v. Board of Education of Topeka II, 349 U.S. 294 (1955).
Swann v. Charlotte-Mecklenberg Board of Education, 402 U.S. 1 (1971).
United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972).
Wright v. City Council of Emporia, 407 U.S. 451 (1972).

United States v. Virginia

United States v. Virginia (1996) is often called the "VMI" case because the U.S. Supreme Court had to determine whether the all-male Virginia Military Institute (VMI) unconstitutionally discriminated against women. In *United States v. Virginia,* the Court ruled that by operating the all-male military academy, the Commonwealth of Virginia violated the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.

Facts of the Case

VMI is a public college in Virginia, founded in 1839, which admitted only male applicants. VMI's mission was to produce citizen-soldiers. In order to meet its mission, VMI used what it called an "adversative teaching method." Under this methodology, to prepare citizen-soldiers, educators at VMI employed physical and mental stress, absence of privacy, and indoctrination into specified military values.

The dispute began in 1990 when the United States sued the Commonwealth of Virginia, arguing that the male-only admissions policy was a form of sex discrimination in violation of the Equal Protection Clause. After losing in the Fourth Circuit Court, Virginia chose to develop a new institution for women rather than change the VMI male-only policy. The Virginia Women's Institute for Leadership (VWIL), officials maintained, remedied any discrimination caused by the VMI's male-only admissions criteria. The United States disagreed and again filed suit arguing that Virginia violated the Equal Protection Clause. Ultimately, VMI went all the way to the Supreme Court, which held that Virginia violated the Equal Protection Clause.

The Court's Ruling

The Supreme Court began its analysis by noting that insofar as the VMI policy discriminated on the basis of sex, it was subject to scrutiny under the equal protection analysis. Over the years, the Court developed three tests to evaluate whether a public policy constitutes unconstitutional discrimination. *Strict scrutiny,* applied in cases in which race is at issue, is the most difficult test for a state (or commonwealth) to overcome because it requires a compelling governmental interest that is narrowly tailored. *Rational basis,* on the other hand, requires a state to demonstrate only that there was rational relationship to a legitimate state interest at stake, and it is usually very easy for a state to meet this burden. In sex discrimination cases, the court uses the *intermediate scrutiny test.*

Utilizing the intermediate scrutiny test, the Supreme Court had to evaluate whether the reasons Virginia officials gave for the male-only admissions policy were exceedingly persuasive. According to the Court, the burden is always on the state to prove that a policy is justified. As such, Virginia officials had to prove that the policy served an important government objective and that the means used were substantially related to achieving those objectives.

The Supreme Court first turned to a consideration of whether VMI's male-only admissions policy violated the Equal Protection Clause. Virginia argued that single-sex education provided important educational benefits and that having the VMI contributed to diversity in educational approaches. However, the Court found that there was no persuasive evidence that the VMI policy furthered the state's diversity mission.

Next, Virginia claimed that its teaching methods could not work if they were modified. The Court thought that VMI could still meet its mission of producing citizen-soldiers by utilizing its adversative teaching methods and that this was not inherently unsuitable for women. As such, the Court was of the opinion that Virginia unconstitutionally discriminated on the basis of sex.

The Supreme Court then had to evaluate whether Virginia remedied its violation of the Equal Protection Clause by establishing the VWIL. Commonwealth officials asserted that the separation of female and male students was justified because there are differences between the way men and women learn and develop psychologically. Yet the Court pointed out that even though VMI's methods might not have been appropriate for most women, this did not justify denying all women the opportunity to attend the VMI. The Court thus concluded that since VMI violated the

Equal Protection Clause, it had to admit qualified male and female applicants.

Utilizing the analysis that was first enunciated in *Mississippi University for Women v. Hogan* (1982), the Supreme Court's rationale in *United States v. Virginia,* the VMI case continues to provide insight into how the judiciary treats sex discrimination. Even so, it is important to keep in mind that Title IX also deals with sex discrimination in educational institutions. Title IX, for example, explicitly limits what types of educational institutions are allowed to have single-sex admissions policies. To this end, private undergraduate programs are generally exempt from Title IX's prohibition against single-sex admissions policies, as are religious institutions, if they have obtained waivers of its provisions. In sum, though, for most institutions, Title IX provides more guidance regarding sex discrimination and gender equity.

Karen Miksch

See also Civil Rights Act of 1964; Equal Protection Analysis; Single-Sex Schools

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Universal Declaration of Human Rights

On December 10, 1948, the General Assembly of the United Nations adopted the "Universal Declaration of Human Rights" (hereinafter "the Declaration") in response to the carnage and barbarism of World War II. Although the statement is not legally binding upon member states, it expresses the moral conscience of the world and is based upon five principles: respect for the rule of law, dignity of the person, fair and equitable treatment of individuals by governments, tolerance and acceptance of diversity, and the value of democratic participation.

The Declaration contains a preamble and 30 articles. Article 1 affirms the principle "that everyone is entitled to fundamental rights without regard to distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin." Together with the United Nations International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, the Declaration forms what is commonly called the "International Bill of Rights."

The Declaration has inspired the Dominion of Canada in the creation of its Charter of Rights and Freedoms, and organizations such as Amnesty International have referred to it in relation to the rights and freedoms claimed by individuals vis-à-vis their own and other governments. The U.S. Supreme Court has asserted that the Declaration has moral authority but does not grant citizens rights, nor does it bind the courts. In the United Kingdom, the courts have held that the Declaration may be consulted on human rights. Although the declaration has been incorporated in the constitutions of some countries in continental Europe, it does not create any new rights for Europeans. In Australia, the Declaration is given significant persuasive weight, but it is not part of domestic law. India gives great significance to the Declaration as an interpretive tool for its constitution, and South African courts use it as a reference on principles.

Article 26 of the Declaration speaks directly to education and provides, among other things, for free and compulsory elementary education that "shall be directed to the full development of the human personality . . . [to] promote understanding, tolerance and friendship among all nations, racial or religious groups." Individuals in various countries have used this article to argue for extra assistance in schools for disabled children, language testing, and religious programming in schools, independent religious schools, the right of a teacher to be associated with a Maoist organization, and the right of children not to be discriminated against in school due to the political convictions of their parents.

The United Nations Universal Declaration of Human Rights is a nonbinding international document that sets an international standard for the treatment of individuals and minority groups by member governments both internal and external to those governments. It was intended by the United Nations Commission on Human Rights to be the fountainhead from which would emerge specific further documents that would bind member states. Those two other documents, the International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights, were adopted by the United Nations in 1966 and came into effect in 1976. However, in many countries, the documents must be ratified by legislative bodies to have effect, and this has not always been accomplished.

Nevertheless, the Declaration stands as an influential international document that can be referred to by most litigants in their jurisdictions as persuasive moral authority.

J. Kent Donlevy

See also United Nations Convention on the Rights of the Child

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Peter Van Schaik v. Stephen Peter George Neuhaus, (1996) Australian Capital Territory Supreme Court. 37

Sosa v. Alvarez-Machain, 542 U.S. 692 (2004).

U.S. Department of Education

In 1980, Congress established the U.S. Department of Education (ED) in the Department of Education Organization Act. ED combined several offices from various federal agencies. It is now responsible for assisting the president and Congress in creating and implementing educational policy, along with administering and coordinating most of federal assistance programs for education.

In 1867, President Andrew Johnson signed legislation creating the first Department of Education. At the time, the department's primary task was to collect information and statistics on the nation's schools. However, people feared that it would exert too much control of the local school system and demanded its elimination. The department was reduced to the status of the Office of Education in 1868. Over time, the Office of Education was a part of several different federal agencies, including the Department of the Interior and the former Department of Health, Education and Welfare.

Increased federal funding for education in the 1950s and 1960s led to the creation of improved educational programs for poor students at every grade level through college. Federal legislation in the 1970s led to improved access to education for minorities, women, people with disabilities, and non-English-speaking students.

According to the ED, its mission includes ensuring access to equal educational opportunity for every individual; improving the quality of education through efforts of the states, local school systems, other state actors, the private sector, public and private nonprofit educational research institutions, community-based organizations, parents, and students; promoting participation of the public, parents, and students in federal education programs; advancing the quality and appropriateness of education through federally supported research, evaluation, and sharing of information; and improving the coordination, management, and accountability of federal education programs and activities to the public and the legislative and executive branches of government.

ED is involved in four major activities: establishing policies related to federal educational financial aid, its distribution, and monitoring; collecting data and overseeing research on schools and distributing the information to educators and the public; identifying problems in education and focusing attention on them; and enforcing federal statutes that prohibit discrimination in programs and activities that receive federal funding and ensuring equal access to education for all individuals.

Under the Tenth Amendment to the U.S. Constitution, the states are granted the authority to act in areas such as education as long as they are not prohibited from doing so in other sections of the Constitution. Insofar as education is not mentioned in the Constitution, the federal government has no power to act in this regard. Therefore, as a federal agency, ED is not permitted to exercise control in educational curricula, instruction, administration, or personnel at any educational institution, school, or school system. Individual states and municipalities have the power to establish schools and develop academic requirements.

Educational funding sources demonstrate the predominant role of the states and communities. The Department of Education (2002) states that a majority of educational expenditures are paid with state, local, and private dollars, with less than 9% coming from federal sources, such as ED, Department of Health and Human Services, and Department of Agriculture. When including secondary education, federal contributions, including student loans and other aid, make up only 12% of the total of all educational spending.

The Department of Education administers programs and initiatives in education across the United States. One of the most visible initiatives is the No Child Left Behind Act (NCLB), which reauthorized the Elementary and Secondary Education Act. The NCLB, which was signed into law in 2002 by President George W. Bush, is the primary federal law that affects elementary and secondary education. The NCLB is based on four general principles: increased accountability for states, school districts, and schools; greater choice for parents and students, especially for students attending poorly performing schools; more flexibility for states in using federal funds; and a stronger emphasis on reading.

ED is also involved in programs that are designed to improve math and science education, foreign-language studies, and high schools. In addition, ED supports the Teacher-to-Teacher Initiative, which provides technical support, professional development, and recognition for teachers of all grade levels.

Suzann VanNasdale

See also Federalism and the Tenth Amendment; No Child Left Behind Act

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U.S. Supreme Court Cases in Education

To paraphrase Alexis de Tocqueville, an early writer on the American democracy, every educational issue eventually becomes a judicial question, and those judicial questions eventually reach the U.S. Supreme Court. Indeed, it seems that there is virtually not a single aspect of education that the Court has not addressed at some point in its history. In many instances, the foundations of modern constitutional law have been laid in education cases. Insofar as the Court hears approximately a half dozen cases per term that have a direct or indirect impact on education law, those who work in education law, whether as advocates or as academics, must constantly monitor its docket and decisions.

The Supreme Court's impact on education law has paralleled its influence on broader American society. During the 19th century, when the Court generally was disconnected from broader society, it was also disconnected from education. When the Court used the Due Process Clause to invalidate progressive economic regulations, it also used the clause to invalidate

statutes designed to promote education. As the Court abandoned this mode of judicial activism in favor of blind deference to government officials, it also began to defer to education officials.

Following World War II, at which time the Supreme Court began to vigorously enforce the Bill of Rights and the Equal Protection Clause against the states, education cases were frequently the mechanism for that enforcement. When the Court attempted to transform American society, starting with *Brown v. Board of Education of Topeka* in 1954 through the 1970s, education cases, particularly the desegregation cases, were at the forefront. Similarly, as the role of the national government in education has expanded, the role of the Court, as the ultimate arbiter of federal law, has also expanded. Conversely, as the Court realized that the judiciary is not omnicompetent, education cases first signaled the retreat from micromanagement and broad societal transformation.

This entry explores the Supreme Court's education cases through the lens of its overall jurisprudence. To this end, it examines how the education cases, regardless of whether they confer landmark or minor decisions on technical points of statutory construction, contribute to and ultimately reflect developments in constitutional doctrine and the role of the Court. The text is divided into seven substantive sections, each of which deals with a specific period in American history, and ends with a brief conclusion.

From the Framing to the Twentieth Century (1789–1900)

During the first century of the American Republic, the Supreme Court did not regularly render decisions that affected the average American. However, when the Court did so, it spoke with a thunderclap. To be sure, a few cases from this initial era substantially changed America. *Marbury v. Madison* (1803) established the role of the Court in the American constitutional system as final arbiter in legal disputes. *McCullough v. Maryland* (1819) and *Gibbons v. Ogden* (1824) ensured that the national government, like the states, was a separate sovereign. *Dred Scott v. Sanford* (1857) arguably made the Civil War inevitable. The *Slaughterhouse Cases* (1872) rejected a natural law reading of the post–Civil War amendments. *Plessy v. Ferguson* (1896), which institutionalized "separate but equal" in race relations, effectively nullified the Equal Protection Clause for half a century. Despite these landmarks, the Court's direct influence on education was minimal.

The Lochner Era (1901–1937)

During the first third of the 20th century, the Supreme Court, in a significant departure from the reasoning of the *Slaughterhouse Cases,* frequently used the Due Process Clause of the Fourteenth Amendment to nullify progressive social welfare legislation. Most famously, in *Lochner v. New York* (1905), the Court invalidated a statute from New York that regulated the maximum hours that bakers could work. The Court's rationale was that the statute violated the "Liberty of Contract" such that individuals were free to work for as long or under whatever conditions they wished and the state could not interfere. The Court employed similar rationales on occasion throughout the 1910s and 1920s to invalidate child labor laws and other economic legislation.

The *Lochner* substantive due process era reached its peak during the early years of the Roosevelt administration, when the Court, usually by narrow 5-to-4 majorities, consistently invalidated various portions of the New Deal legislation. Modern scholars almost universally regard the *Lochner* era as the epitome of judicial activism. The Court, without reference to the Constitution's text or structure, consistently substituted its judgment for that of the legislature.

During the *Lochner* era, the Supreme Court heard only two major education cases, applying the substantive due process approach in both. In *Meyer v. Nebraska* (1923), the Court invalidated a statute that prohibited teaching a foreign language to elementary school students. While one can debate the wisdom of such a policy, there is nothing in the Constitution's text, structure, or history that prohibits the pursuit of such a policy. Similarly, in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), the Court invalidated an Oregon statute requiring parents to send their children to public schools. Although one could argue that the Free Exercise Clause arguably protects

the right to send one's children to private religious schools, that Free Exercise argument applies only if religion motivates the choice. It would not apply if the parents simply believed that the educational benefits of private school were greater. While *Meyer* and *Pierce* have never been overruled, their reasoning must be regarded as suspect in light of the Court's subsequent repudiation of substantive due process analysis.

Judicial Restraint and Incorporation (1937–1953)

Beginning with *West Coast Hotel v. Parish* (1937), the Supreme Court retreated from its substantive due process analysis and began to defer to the judgment of government officials. This deference reached its height with *Wickard v. Filburn* (1942), wherein the Court held that growing crops for the benefit of one's own livestock constituted interstate commerce, and *Korematsu v. United States* (1944), wherein the Court refused to invalidate the forced internment of Japanese Americans. However, as the competing opinions in *Adamson v. California* (1947) demonstrate, the Court began to contemplate whether the Bill of Rights restrains the states.

Education cases followed these in trends. *Minersville School District v. Gobitis* (1940), which upheld a statute requiring students to pledge allegiance to the flag, is a classic example of deference to government officials. In *Gobitis,* the Court decided that the strong religious objections of Jehovah's Witnesses were insufficient to overcome the state's policy choice. Yet, 3 years later, *West Virginia State Board of Education v. Barnette* (1943), which reversed *Gobitis* on the same issue, represented one of the earliest and strongest statements of the civil liberties of minorities.

In *Everson v. Board of Education of Ewing Township* (1947), the Supreme Court applied the Establishment Clause to the states for the first time in a case involving education. While *Everson* approved of the state's efforts to provide transportation for parochial school students, *Illinois ex rel. McCollum v. Board of Education* (1948) invalidated voluntary religious instruction in the public schools. Conversely, *Zorach v. Clausen* (1952) upheld a program whereby children were released from the public schools to attend religious instruction. These cases foreshadowed the fundamental changes in religious jurisprudence that would come in the Warren and Burger Courts.

Warren Court (1953–1969)

Under the leadership of Chief Justice Earl Warren, the Supreme Court redefined its role in American life. When Warren took over as chief justice, there was serious debate about whether some provisions of the Bill of Rights even applied to the states. While the cases discussed next did not directly impact schools, the fact that they transformed American society eventually influenced much about life in the United States, including education.

As *Dennis v. United States* (1951) demonstrates, even when it was clear that constitutional provisions applied to the states, the Supreme Court gave them narrow interpretations. By the time Warren stepped down in 1969, there was no doubt that virtually the entire Bill of Rights applied to the states and, more important, that its provisions were interpreted expansively. Cases such as *Mapp v. Ohio* (1961), *Gideon v. Wainwright* (1963), and *Miranda v. Arizona* (1966) fundamentally altered how law enforcement and criminal trials work. *Baker v. Carr* (1962) and *Reynolds v. Sims* (1964) transformed state legislative elections, while ensuring that a "Senate-like" check would not exist at the state level. *Griswold v. Connecticut* (1965), which recognized a constitutional right to privacy, helped spark the "sexual revolution" and, more significantly, provided the cornerstone for the Court's abortion jurisprudence. *Katzenbach v. McClung* (1965) and *Loving v. Virginia* (1967) ensured that African Americans could be full participants in the everyday discourse of life. In short, the Warren Court fundamentally changed many aspects of constitutional law and, indirectly, everyday life.

As revolutionary as the changes were, the real impact of the Warren Court on American society came in the area of education. *Brown v. Board of Education of Topeka* (1954), along with *Marbury v. Madison* (1803) and *Ex parte Young* (1908), arguably is one of the three cornerstones of American constitutional law. *Brown's* significance, in constitutional, political, and societal terms, simply cannot be overstated. Although one can never diminish the contributions and moral

leadership of Robinson, Parks, King, and others, *Brown* highlighted the harsh reality of segregation. Indeed, the Court's landmark judgments in *Baker, Katzenbach,* and *Loving* are at least tangentially the result of *Brown.* Moreover, *Brown's* progeny, *Brown II* (1955), *Cooper v. Aaron* (1957), and *Green v. County School Board of New Kent County* (1968), among others, forced the president, Congress, and the states to confront the problem of educational inequality.

The impact of the Warren Court's education cases was not limited to *Brown* and the problem of racial inequality. In *Engel v. Vitale* (1962), the Court held that the Establishment Clause precluded the recitation of state-authored prayers in public schools. A year later, in *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963), the Court invalidated the practice of prayer and Bible reading in the public schools. *Epperson v. State of Arkansas* (1968) struck down a law prohibiting the teaching of evolution and so paved the way for the inclusion of ideas that are offensive to some religious groups. However, in *Board of Education v. Allen* (1968), the Court upheld the practice of lending textbooks for secular subjects to students who attended religiously affiliated nonpublic schools. Although the constitutional result of these cases was to remove mandatory religious expression from the public schools, the practical result was to generate a continuing controversy over how much voluntary religious expression is permitted in the public schools. Moreover, this controversy is not limited to the public schools, but extends to all aspects of the public square.

Finally, in *Tinker v. Des Moines Independent Community School District* (1969), the Supreme Court reasoned that students do not shed their constitutional rights to free speech at the schoolhouse gate. Accordingly, school officials may not discipline students for engaging in speech that does not materially and substantially disrupt the work and discipline of schools. *Tinker* directly prompted a wave of student speech litigation that continues four decades later. In fact, as explained in more detail below, the Court continues to struggle with the appropriate standard. Just as important, *Tinker* indirectly prompted students to raise other nonspeech claims.

The Warren Court era lasted only 16 years. Even so, it laid the foundation for all modern education law decisions. *Brown* ensured racial equality in the schools. The prayer cases abolished mandatory religious speech and put voluntary religious speech on the defensive. *Tinker* resulted in an expansion of student rights.

Burger Court (1969–1986)

The controversial decisions of the Warren Court were a major issue in the 1968 presidential election. Having announced his intention prior to the election, Chief Justice Warren stepped down in June 1969 and was replaced by Warren Burger. Within a period of 30 months, newly elected President Richard Nixon made three additional appointments: Justices Harry Blackmun, Lewis Powell, and William Rehnquist. Nixon and many conservatives thought that the Court would now turn substantially to the right and would reverse many of the Warren Court's landmark opinions. However, this belief was wrong.

The Burger Court did limit the implications of the Warren Court in several ways, but it also expanded those precedents and established new doctrines. Most significantly, in *Roe v. Wade* (1973), the Court recognized a constitutional right to abortion. That decision polarized the American public and helped to redefine American politics. Except for *Dred Scott v. Sanford* (1857), there has perhaps never been a more divisive Supreme Court decision. Yet the immediate impact of *Roe* was not nearly as great as some other Burger Court decisions.

After nearly two decades of delay and outright resistance to the mandate of *Brown,* the Supreme Court in *Swann v. Charlotte-Mecklenburg Board of Education* (1971) approved mandatory busing to eliminate the vestiges of de jure segregation. Following *Swann,* federal trial courts throughout the country began to implement mandatory transportation plans. The Court struck another blow for educational equality with *Plyler v. Doe* (1982), which required school boards to provide education to children whose parents were undocumented aliens. At the same time, the Burger Court restricted the scope of interdistrict remedies and mandatory busing in *Milliken v. Bradley*

(1974), in which it concluded that suburban districts that had not engaged in race discrimination could not be forced to participate. Moreover, in *San Antonio Independent School District v. Rodriguez* (1973), its only case on school finance, the Court rejected the notion that public education is a fundamental right and that wealth is a suspect class. Consequently, all school finance litigation shifted to state courts.

In *Regents of the University of California v. Bakke* (1978), the Supreme Court offered important, but ambiguous, guidance on the use of racial preferences in higher-education admissions. Justice Powell announced the judgment of the Court in an opinion that was joined in one part by a group of four justices, joined in another part by a different group of four justices, and had some parts that reflected Justice Powell's opinion alone. Only by closely parsing the various sections on Powell's opinion is it possible to obtain the Court's holding. Specifically, the Court ruled that while institutions cannot impose racial quotas, they can consider race as one factor in the admissions process.

Like the Warren Court before it, the Burger Court was skeptical of religion in the public schools. *Lemon v. Kurtzman* (1971) invalidated a program that provided financial assistance in the form of salary supplements to teachers in religiously affiliated nonpublic schools. More important, *Lemon* enunciated the Supreme Court's standards for evaluating Establishment Clause issues. Although the last three decades have seen consistent criticism of the *Lemon* test from many justices, the lower courts, and the academy, it continues to be applied in many religion cases. Under this standard, a practice is unconstitutional unless it has a secular purpose, has a principle or primary effect that neither advances nor inhibits religion, and does not foster "excessive entanglement" of religion. Yet despite the skeptical nature of *Lemon, Mueller v. Allen* (1983) upheld tax credits for parents who sent their children to private schools.

Continuing a trend that began in *Tinker,* the Supreme Court expanded the rights of students. According to *Goss v. Lopez* (1975), students were entitled to due process when facing significant disciplinary sanctions. However, in *New Jersey v. T. L. O.* (1985), while the Court noted that the Fourth Amendment applied in schools, it upheld an educator's search of a student. Further, *Wood v. Strickland* (1975) and *Carey v. Piphus* (1978) established that school boards may be liable financially when officials violate student rights. Nevertheless, the expansion of student rights was not absolute, since in *Ingraham v. Wright* (1977), the Court declined to extend *Goss* to corporal punishment. Also, in *Bethel School District No. 403 v. Fraser* (1986), while reaffirming *Tinker,* the Court allowed school officials to discipline students who engaged in vulgar speech.

Even as the Supreme Court was expanding the rights of students, it appeared to be limiting the rights of public school teachers and university professors. *Board of Regents v. Roth* (1972) and *Perry v. Sindermann* (1972) clarified when public employees were entitled to due process before dismissal. In *Mt. Healthy City School District Board of Education v. Doyle* (1977), the Court was of the opinion that teachers' constitutionally protected speech did not necessarily insulate them from dismissal if their school boards had independent reasons unrelated to the constitutionally protected conduct in acting. *Doyle* clarified the Burger Court's earlier judgment in *Pickering v. Board of Education of Township High School District* (1968) that teachers are free to comment on matters of public concern.

Finally, responding to new statutes designed to protect the disabled, the Burger Court was somewhat cautious. In *Southeastern Community College v. Davis* (1979), the Court maintained that a student who was deaf could be excluded from a nursing program. Moreover, *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) adopted a relatively narrow interpretation of the Education for All Handicapped Children's Act, now the Individuals with Disabilities Education Act (IDEA), in refusing to require a sign language interpreter for a student who was deaf.

Rehnquist Court (1986–2005)

On the eve of the bicentenary of the Constitution, Chief Justice Burger resigned, and Associate Justice William H. Rehnquist was elevated to the center seat.

During this period, the Supreme Court was sharply divided along liberal and conservative lines. Between October 1986 and October 1991, the Court arguably had a liberal majority. From October 1991 until June 2005, the Court arguably had a conservative majority. However, in both of these eras, there were numerous circumstances in which one or more justices switched sides and rendered a liberal or conservative decision. Insofar as the Court was sharply divided and some justices had a tendency to "swing," it was difficult for the Court to reach clear and logical decisions. As such, the Rehnquist Court's jurisprudence, particularly in the last 5 years of its existence, could be characterized as embodying "split the difference" jurisprudence.

Despite the ambiguity of the Rehnquist Court's decisions, it did leave a significant legacy in one area, federalism. Prior to the Rehnquist Court, the principles of federalism, which is more appropriately called "dual sovereignty," were largely useless as a limitation on the powers of the national government. That began to change with *Gregory v. Ashcroft* (1991), wherein the Court determined that the states could impose mandatory retirement on state judges. A year later, in *New York v. United States* (1992), the Court indicated that Congress could not compel the states to enact specific legislation. Similarly, in *Printz v. United States* (1997), the Court observed that Congress could not compel state officials to enforce federal law. Beginning with *Seminole Tribe of Florida v. Florida* (1996) and extending through several other cases, the Court limited the power of Congress to abrogate the states' sovereign immunity, a development that is particularly important to states' litigation strategy. Yet the more significant federalism cases were those that limited the power of Congress over interstate commerce, such as *United States v. Lopez* (1995), a case involving guns in schools, and *United States v. Morrison* (2000), and those that limited congressional power to enforce the Fourteenth Amendment, *City of Boerne v. Flores* (1997) and *Morrison.*

The Rehnquist Court's legacy for education law was also significant. Like its jurisprudence in other areas, the Court largely "split the difference" in education law cases, including those involving race. Most obviously, in the University of Michigan racial preference cases, *Grutter v. Bollinger* (2003) and *Gratz v. Bollinger* (2003), respectively, the Court upheld the law school admissions system that utilized race as one factor among many, but it invalidated the undergraduate admissions system that assigned a specific number of points based on race. In doing so, the Court decided that the achievement of the educational benefits of a broadly defined diversity was a compelling governmental interest that might justify the use of race. At the same time, the Court emphasized that a system in which race was the determining factor was not narrowly tailored. The practical effect of these cases is to adopt the diversity rationale offered by Justice Powell in *Regents of the University of California v. Bakke* (1978). Even so, these cases also impose significant limitations on how institutions may use race.

The Supreme Court also steered a middle course with respect to desegregation. Although the Court did not end judicially mandated court-ordered busing, it did substantially limit the power of the lower courts to employ it as a remedy. *Dowell v. Board of Education of Oklahoma City Public Schools* (1991) significantly narrowed the definition of unitary school systems, thereby making it substantially easier for boards to end federal court supervision. A year later, in *Freeman v. Pitts* (1992), the Court explained that school boards had no duty to remedy racial imbalances that were caused by residential housing patterns rather than acts of intentional discrimination. Further, in *Missouri v. Jenkins* (1995), the Court placed limits on the ability of federal trial courts to order broad desegregation remedies.

The Supreme Court followed the "split the difference" approach in religion cases involving education. On the one hand, the Court issued several judgments whereby the government favored religion, at least indirectly. In *Agostini v. Felton* (1997), the Court not only permitted the practice of allowing the delivery of federally funded remedial programs for disadvantaged children on-site in their religiously affiliated nonpublic schools; it also recrafted the *Lemon* test, in reviewing only its first two parts, purpose and effect, as it recast entanglement as one element in evaluating a statute's effect. In *Zelman v. Simmons-Harris* (2002), the Court ruled that Ohio could implement a

school choice program, whereby parents choose to send their children to religiously affiliated nonpublic schools at public expense, using vouchers, because they made the choice to do so voluntarily and freely. The Court's rationale in *Zelman* was similar to its analysis in *Zobrest v. Catalina Foothills School District* (1993), wherein it found that a student in a religiously affiliated nonpublic school was entitled to receive special education services at public expense. *Board of Education of Westside Community Schools v. Mergens* (1990), *Rosenberger v. Rector & Visitors of the University of Virginia* (1995), and *Good News Club v. Milford Central School* (2001) all held that student religious clubs must be treated the same as nonreligious clubs. Further, in *Lamb's Chapel v. Center Moriches Union Free School District* (1993), the Court ensured that outside religious groups had the same access to school facilities as outside nonreligious groups.

On the other hand, there were instances in which the Supreme Court invalidated religious expression or assistance to religion. In *Lee v. Weisman* (1990), the Court rejected prayers by nonstudents at graduation ceremonies. Ten years later, in *Santa Fe Independent School District v. Doe* (2000), the Court struck down the practice of beginning high school football games with prayer. Further, in *Board of Education of Kiryas Joel Village School District v. Grumet* (1994), the Court invalidated the creation of a school district that was designed to benefit only a small religious sect.

The Supreme Court displayed its "split the difference" rationale in school sexual harassment cases. After *Franklin v. Gwinnett County Public Schools* (1992) established that school boards could be liable for damages under Title IX for instances of teacher-on-student sexual harassment, in *Gebser v. Lago Vista Independent School District* (1998), the justices clarified the circumstances under which boards can be liable when their employees sexually harass students. The Court limited liability to those situations in which school officials who had authority to act actually knew of the conduct but responded with deliberate indifference. In so ruling, the Court charged a middle course between absolute liability, the position of the plaintiff, and no liability whatsoever, the position of the school board. A year later, in *Davis v. Monroe County School District* (1999), the Court essentially extended *Gebser* to sexual harassment of one student by another.

The Rehnquist Court's special education decisions reflect an expansion of disability rights. *Honig v. Doe* (1988) established that school officials could not expel or impose lengthy suspensions on students with disabilities if their misbehaviors were manifestations of their disabilities. Further, in *Cedar Rapids Community School District v. Garret F.* (1999), the Court was of the view that school boards can be required to provide related services, such as the attention of school nurses to students with disabilities while they attend class. Moreover, in *School Board of Nassau County v. Arline* (1987), the Court decided that school boards must accommodate the needs of teachers with disabling conditions.

Although the Rehnquist Court refused to overturn the student rights recognized in *Tinker* and *T. L. O.,* it did impose significant limitation on those rights. *Hazelwood School District v. Kuhlmeier* (1988) established that student expression in school-sponsored publications was not absolute and that officials could restrict their speech as long as their actions were rationally related to legitimate pedagogical concerns. Seven years later, in *Vernonia School District No. 47J v. Acton* (1995), the Court held that student athletes could be subjected to random drug tests. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002) essentially extended its rationale to all students who participated in extracurricular activities.

Roberts Court (2005–Present)

Following the completion of the October 2004 Term, Justice Sandra Day O'Connor announced her retirement, and President George W. Bush nominated Judge John Roberts to take her place. Before Roberts's confirmation hearings could begin, Chief Justice Rehnquist died. The president then withdrew Roberts's nomination for the O'Connor seat and nominated him for chief justice. Justice O'Connor remained on the Court until January 2006, when she was replaced by Justice Samuel Alito. While the short tenure of the Roberts

Court makes it difficult to draw decisive conclusions regarding its general direction and ultimate place in history, it has already rendered significant education law decisions.

In *Parents Involved in Community Schools v. Seattle School District* (2007), a plurality of the Court ruled that the boards of public school systems that had not operated legally segregated schools or had been found to be unitary could neither classify students by race nor rely on such a classification in making student assignments to educational programming. At the same time, the Court acknowledged that achieving diversity was a compelling governmental interest only in the context of higher education. Effectively, *Parents Involved* precludes school boards from using race in the assignment of individual students. As a practical matter, *Parents Involved* makes it extraordinarily difficult for urban school districts to maintain racially balanced schools.

In *Morse v. Frederick* (2007), the Court decided that educators can act to limit student speech that can reasonably be regarded as encouraging illegal drug use; however, the Court left many unanswered questions regarding the exact scope of student free expression rights. However, *Morse* does provide clarity on speech that encourages illegal drug use.

In a little more than 2 years, the Roberts Court resolved three disputes involving special education. In *Schaffer ex rel. Schaffer v. Weast* (2005), the Court indicated that when parents and school officials cannot agree on the contents of student individualized education programs (IEPs) and placements of children, the objecting party, typically parents, bears the burden of proof in challenges unless state law imposes a different standard. A year later, in *Arlington Central School District Board of Education v. Murphy* (2006), the Court noted that the IDEA could not impose conditions such as requiring school boards to reimburse parents for the costs of paying for expert witnesses who help them to prevail in their disputes with educators, unless they were set out unambiguously in the statutory text. *Murphy* thus makes it more difficult for litigants to advocate expansive interpretations of the IDEA. Moreover, insofar as *Murphy* applies to all Spending Clause statutes, it should have significant ramifications for Title IX, Title VI, and Section 504 claims. Most recently, in *Winkelman ex rel. Winkelman v. Parma City School District* (2007), the Court expanded parental rights. In *Winkelman,* the Court interpreted the IDEA as conferring rights on the parents of students with disabilities that were separate and distinct from those of their children. As such, the Court maintained that since parents have their own rights, they may bring pro se actions.

In *Zuni Public Schools District No. 89 v. Department of Education* (2007), the Court upheld the Department of Education's standards for the distribution of federal impact aid monies. More specifically, the Court pointed out that the secretary of education could consider the population of individual school systems in evaluating whether states had programs that equalized expenditures among their districts.

Finally, in a case with implications for higher education, *Rumsfeld v. Forum for Academic and Institutional Rights* (2006), the Supreme Court reasoned that the Solomon Amendment is constitutional. *Rumsfeld* came after years of legal wrangling surrounding the question of military recruitment on college and university campuses. Many institutions had sought to exclude military recruiters from their campuses because they thought that the federal law concerning homosexuality in the military was offensive to their institutional values. Congress enacted the Solomon Amendment to override the actions of institutions that excluded military recruiters by requiring them to afford the military the same access provided to other recruiters or lose specified federal funds. The Supreme Court concluded that the Solomon Amendment's mandate was consistent with the First Amendment and did not violate the institutional freedoms of speech or association.

Conclusion

The Supreme Court's role with respect to education closely parallels its overall place in American life. At a time of judicial detachment from American life, the Court did not involve itself in education. When the Court used the Due Process Clause to second-guess legislative policy choices involving economics, it

applied similar reasoning to education statutes. In an era when the Court deferred to government and began to incorporate the Bill of Rights in suits against the states, its education decisions reflected the same trends. As the Warren Court brought a revolution to American constitutional law, education cases such as *Brown* and disputes involving prayer in public schools led the way. While the Burger Court expanded some rights even as it limited others, its education jurisprudence was indicative of the overall jurisprudence. If the Rehnquist Court can be described as "split the difference" jurisprudence, its school-related cases illustrate this trend. Finally, the early days of the Roberts Court give some indication of how the justices may reshape education, but it is clearly a work in progress with much still to be determined.

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See also Burger Court; Rehnquist Court; Roberts Court; Warren Court

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V

Vaccinations, Mandatory

In efforts to protect the health and well-being of their citizens, all 50 states of the United States have enacted compulsory vaccination requirements as a condition for entry into public and private schools. These requirements are enacted as statutes, and in most cases, state legislatures delegate to their health departments the responsibility to implement and oversee the implementation of compulsory vaccination requirements. In addition, states are empowered, either by statute, regulation, or judicial interpretation, to exclude children who have not been vaccinated from school attendance and, if children lack valid exemptions, may initiate truancy or other proceedings against them and/or their parents. For various reasons, the enactment and enforcement of these requirements has resulted in litigation against the states and/or school boards by parents on behalf of their children who object to these requirements on multiple grounds, including those of health, philosophy, conscience, and/or religion. This entry summarizes the law and policy on school vaccination and describes some court challenges.

Law and Policy

Compulsory vaccination requirements in the United States date back some two centuries, with Massachusetts becoming the first state to enact a compulsory smallpox vaccination that gave its state health board the right to require citizens to be vaccinated when the board determined that the best interests of the public health and safety were served. Compulsory vaccinations as a condition for school attendance soon followed, with early legal challenges to these requirements occurring in the late 1800s.

While the 50 states set the requirements for compulsory vaccinations, the federal Center for Disease Control (CDC) currently recommends that children receive the following vaccinations on a recommended schedule between birth and 6 years of age: hepatitis B (HepB); rotavirus (Rota); diphtheria, tetanus, and pertussis (DTaP); *Haemophilus influenzae* type b (Hib); pneumococcal (PCV); inactivated poliovirus (IPV); influenza; measles, mumps, and rubella (MMR); varicella (VAR) (chicken pox); hepatitis A (HepA); and meningococcal (MPSV4). While compulsory vaccination requirements as a condition for school entry vary from state to state, all jurisdictions require the diphtheria, tetanus, measles, and rubella vaccinations, and nearly all states require the hepatitis B and varicella vaccines.

As compulsory vaccination policies have evolved, so have policies regarding exemptions to these requirements. Currently, all 50 states provide for either temporary and/or permanent medical exemptions, with all requiring a physician's verification that one or more vaccines would pose detrimental risks to a child's health; a few states allow for verification to come from a chiropractor. In addition, 48 states

provide for religious exemptions; the requirements for seeking and gaining a religious exemption vary from state to state, with most states providing that students with religious exemptions may be excluded from attending school in times of epidemic. Depending on the source, 17 or 18 states currently provide exemptions based on reasons of philosophy, conscience, moral convictions, and/or personal beliefs, with the first such exemption enacted by Idaho in 1978 and the most recent by Arkansas in 2005. Finally, at least one state, Texas, provides an exemption for students who are currently on active duty in the U.S. armed forces.

Court Rulings

As noted above, legal challenges at both the federal and state levels date back to the late 1800s and early 1900s, with the decisions generally favoring the state and/or local school districts. Legal challenges at both the federal and state levels have generally centered on whether compulsory vaccination requirements or their exemptions are within the police power of the state to, among other things, regulate the health of its citizens, violate the Establishment and Free Exercise Clauses of the First Amendment to the U.S. Constitution, and/or violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the U.S. Constitution.

In the earliest U.S. Supreme Court case, *Jacobson v. Commonwealth of Massachusetts* (1905), the justices upheld the Massachusetts compulsory smallpox vaccination requirement as within its police power to regulate the health of its citizens. Similarly, state courts have rejected challenges to the state's police power to regulate health by compelling vaccinations.

First Amendment Establishment and Free Exercise Clause challenges have also been largely unsuccessful, except in cases where objectors argued for religious exemptions that require objectors to be members of recognized churches whose teachings are specifically opposed to vaccinations. In these cases, some courts found that religious exemptions that favor such objectors over those who do not belong to organized churches violate the free exercise rights of nonchurch members. However, in many of these cases, the courts ruled that legislatures have written into statute provisions that sever religious exemptions that are subsequently ruled constitutional, leaving religious objectors with no exemption at all.

As to the Due Process and Equal Protection Clauses of the Fourteenth Amendment, in a 1922 case from Texas, *Zucht v. King,* the Supreme Court rejected a challenge to a compulsory vaccination school attendance requirement on the grounds that the requirement did not deprive the child of liberty without due process of law and that the Equal Protection Clause was not violated merely because the requirement affected only schoolchildren. In the years since then, other courts have been of the opinion that compulsory vaccination requirements do not interfere with parents' due process rights to direct the upbringing of their children, nor do they violate equal protection rights of objectors, with the exception of the application of religious exemptions only to members of a recognized church.

In sum, despite continued legal challenges and the more recent formation of interest groups advocating for greater informed consent rights to decide whether children are vaccinated, the power of the states to regulate the health of its citizens by requiring, in pertinent part, compulsory vaccinations as a condition for school attendance is beyond dispute, as is the power of states to conditional school attendance on being appropriately vaccinated. With limited exceptions, the courts have upheld this power, and there is little evidence to suggest that this trend will be reversed.

David P. Thompson and Linda Carrillo

See also Compulsory Attendance

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Vernonia School District 47J v. Acton

The U.S. Supreme Court's judgment in *Vernonia School District 47J v. Acton* (1995) stands out as its first of two decisions on the important topic of drug testing of students. In *Acton,* the Court held that a school board's random drug-testing policy for student athletes was reasonable under the Fourth Amendment.

Facts of the Case

Acton began when, in response to parental concerns of increased drug use among students, a school board in Oregon instituted a drug-testing policy for student athletes. The policy focused on student athletes because they were leaders of the drug culture at their high school and there were at least two incidents wherein members of teams were injured due to the effects of drug use. The policy, which contained safeguards to protect the privacy rights of the student athletes, required all of those who wished to try out for interscholastic athletic teams to submit to urinalysis drug testing.

A seventh-grade student was suspended from interscholastic athletics because he and his parents refused to sign a consent form for drug testing, and they challenged his exclusion. A federal trial court upheld the policy, but the Ninth Circuit reversed on the basis that the policy violated both the Fourth and Fourteenth Amendments and the Oregon Constitution.

The Court's Ruling

On further review, the Supreme Court reversed in finding that the drug-testing policy did not violate the Fourth and Fourteenth Amendments. The Court stated that the Fourteenth Amendment does extend constitutional guarantee of the Fourth Amendment to searches and seizures by state officers, including public school officials. As an initial matter, the Court explained that since the collection and testing of urine under the policy was a search subject to the Fourth Amendment, it was necessary to turn to the question of its reasonableness. To this end, the Court pointed out that even though school officials are agents of the state, due to their custodial and tutelary relationship with students, they have the authority to act in loco parentis in safeguarding the children in their care. According to the Court, this relationship grants educators the ability to determine the appropriate nature and extent of children's constitutional rights in schools.

The Supreme Court then embarked on a three-part test in examining the policy's validity. First, the Court noted that student athletes have a lesser expectation of privacy than their peers who are not athletes. The Court indicated that this distinction stemmed from the communal of nature dressing, undressing, and showering in locker rooms, and the Court asserted that student athletes voluntarily subject themselves to a greater degree of regulation as well. The Court was satisfied that the policy was constitutional because student athletes expected intrusion on their normal rights to privacy.

Second, the Supreme Court observed that since there were sufficient safeguards in place to protect students' legitimate privacy interests, the policy did not violate their Fourth Amendment rights. Third, the Supreme Court was of the opinion that in light of the board's wish to deter drug use by student athletes, as well as to prevent harm to them, it articulated an important interest. As such, since the testing policy was an effective means of curbing drug use among students in general and student athletes in particular, the Court concluded that it passed constitutional muster.

Justice Ginsburg, in a concurring opinion, viewed *Acton* as a very narrow decision, applicable only to those students who volunteer to participate in interscholastic sports. She further asserted that random drug testing of all children who were compelled to attend public schools would be unconstitutional since they cannot avoid doing so.

Justice O'Connor dissented on the basis that the suspicionless testing required by the policy was unreasonable in light of the board's evidence. Instead, she suggested that the record demonstrated that suspicion-based drug testing of students who engaged in disruptive behavior consistent with drug use would have been more effective

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See also *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls;* Drug Testing of Students; In Loco Parentis

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Video Surveillance

Video surveillance is the use of video cameras to transmit signals to a specific, limited set of television monitors exclusively for the purpose of surveillance. Traditionally, video surveillance camera systems were used in locations where security is necessary, including airports, banks, and military installations. During the 1980s, video surveillance cameras were first placed on school buses as a deterrent to prevent vandalism and avoid litigation with parents. The installation of video camera surveillance systems has become one of the more controversial trends in monitoring school security. A primary legal concern of the use of video surveillance cameras in schools is balancing concerns for school safety with Fourth Amendment rights related to student, teacher, and staff privacy.

The Fourth Amendment of the U.S. Constitution protects individuals against unreasonable searches and seizures as well as unlawful invasions into an individual's privacy. In *New Jersey v. T. L. O.* (1985), the U.S. Supreme Court ruled that a search in the school environment is deemed reasonable only if that search is both justified at its inception and reasonably related in scope to the circumstances that originally justified the search.

Video Surveillance in the School Setting

In addition to monitoring student behavior, the use of video camera surveillance technology is increasingly being used by school officials to assist in the evaluation of teacher and school staff job performance. In *Roberts v. Houston Independent School District* (1990), for example, an appellate court in Texas ruled that school officials did not violate a dismissed teacher's expectation of privacy by videotaping her classroom teaching performance. In general, the videotaping of a teacher's classroom teaching is legally permissible when used as an assessment tool in evaluating teaching performance.

In another case, *Crist v. Alpine Union School District* (2005), an appellate court in California found that officials did not violate the privacy rights of a school employee when they secretly placed video cameras in a shared office space among three employees. The cameras were placed secretly in the office in an effort to acquire visual evidence that one of the school employees was gaining unauthorized computer access. Here, the court held that the camera surveillance was permissible because school board officials had a legitimate reason for using the video surveillance that outweighed the employees' privacy rights.

Video Surveillance With Audio Capacity

Collecting audio data is generally prohibited under Title I of the Electronic Communications Privacy Act (2002). However, "silent video surveillance," or video surveillance without sound, is not covered under Title I of the act. Given recent technological advances in video surveillance, most modern video cameras have a zoom function that is often used as a substitute for audio communications.

Video Surveillance as an Educational Record

Under the Family Educational Rights and Privacy Act (FERPA), parents or legal guardians have the legal right to "inspect and review the educational records of their children." FERPA defines an educational record as "those records, files, documents, and other material which contain information directly related to a student."

Pursuant to FERPA, parents and legal guardians are usually legally entitled to access to videotapes of their children taken in a school setting. Even so, FERPA identifies five exceptions to the definition of

educational records. Consequently, parents and legal guardians are usually not entitled to videotapes of their children of the following types:

- Records maintained by supervisory personnel
- Records maintained by administrative personnel
- Records maintained by instructional personnel
- Records maintained by a physician, psychiatrist, psychologist, or other recognized professionals
- Records maintained by law enforcement officers if the videotaping was conducted for law enforcement purposes

In most instances, the use of video surveillance without audio capabilities in public places, including schools, does not violate any constitutional principles, nor does it violate existing federal regulations, state statutes, or labor laws. Nevertheless, school officials need to be aware of the following guidelines when implementing a legally compliant video surveillance system:

1. The costs of implementing a video surveillance system can be high, and school officials need to weigh these costs against expected benefits.
2. Video surveillance cameras may be placed only in designated public or common areas of the school, such as school hallways, libraries, gymnasiums, cafeterias, and school parking lots. Under no circumstances may video surveillance cameras be placed in private areas, including school bathrooms, gym locker rooms, or student or staff lockers where individuals have a legally protected "reasonable expectation of privacy" under the Fourth Amendment.
3. Officials need to notify the general public through the use of prominent signs regarding the location of video surveillance cameras.
4. Officials should not record audio conversations on the video camera surveillance system. This is not only a potential violation of an individual's right to privacy under the Fourth Amendment but also a violation of federal law under Title I of the Electronic Communications Privacy Act.
5. Officials need to comply with FERPA. Under most circumstances, parents or legal guardians are entitled to access videotapes of their children taken in the school environment unless the videotapes are indispensable to the health and safety of a student or group of students in the school.

Legal scholars predict that an increasing number of Fourth Amendment legal challenges will require balancing the emerging uses of surveillance technologies with individual and workplace privacy and security. While privacy interests exist for students, teachers, and staff in the school environment, they are limited, even compared with other common public places, such as the workplace. These limitations in privacy explain the permissibility of video surveillance in many instances in schools.

Kevin P. Brady

See also Family Educational Rights and Privacy Act

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Village of Arlington Heights v. Metropolitan Housing Development Corp.

At issue in *Village of Arlington Heights v. Metropolitan Housing Development Corp.* (1977) was whether the Village of Arlington Heights ("The Village") was motivated by racial discrimination when it denied the Metropolitan Housing

Development Corporation's (MHDC) request to rezone a 15-acre parcel of land from single-family to multiple-family classification. MHDC, a nonprofit developer, planned to build 190 racially integrated, clustered units for low- and moderate-income tenants. When The Village denied MHDC's request for rezoning, MHDC brought suit alleging racial discrimination.

As the plaintiff, MHDC had the burden of proving that the decision of The Village officials to deny the rezoning request was motivated by an intention to discriminate. The Supreme Court found that MHDC did not fulfill that burden. Instead, the Court found that discriminatory purposes were not motivating factors in The Village's denial of MHDC's request.

Arlington Heights is one of the earliest cases involving an official action that, while appearing neutral in its nature, disadvantaged racial minorities. The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution provides that "no state shall . . . deny to any person within its jurisdiction the equal protection of the laws." Previously, in *Washington v. Davis* (1976), the Supreme Court decided that an official action would not be found unconstitutional only because a racially disproportionate impact resulted. In *Arlington Heights,* the Court more specifically addressed the issue of proof and whether an Equal Protection Clause violation requires purposeful discrimination or solely a disproportionate, or "disparate," impact on a group of people.

Even though the Supreme Court ruled that a disparate impact alone is insufficient to prove a violation of the Equal Protection Clause, an unequal impact on any group may provide a starting point. The Court noted that a clear pattern of disproportionate impact, which can be explained only by discriminatory motivations, can become apparent even if a statute is neutral in its explicit language. The Court added that the impact of an official action may be so clearly discriminatory as to allow no other explanation other than it was adopted for discriminatory, and therefore unconstitutional, purposes. This inquiry into the motivating factor, the Court maintained, includes the circumstantial and direct evidence of the intent or purpose of the action and can include a clear pattern unexplainable on grounds other than race; historical background, especially if it reveals official actions taken for invidious purposes; departures from the normal procedural sequence; and legislative or administrative history.

More specifically, the Court was of the opinion that looking to legislative or administrative history, such as contemporary statements made by members of the decision-making body and meeting minutes or reports, may reveal a proof of discriminatory motivating purpose. After considering these factors, in *Arlington Heights,* the Court agreed that there were acceptable reasons, other than discriminatory intent, for denying MHDC's zoning request.

Arlington Heights is most often cited for its importance with regard to claims involving the Equal Protection Clause and evaluating whether a discriminatory purpose was a motivating factor for a piece of legislation, a judicial order, or an official action. Supporters of the Supreme Court's decision in *Arlington Heights* contend that the Equal Protection Clause was intended to guarantee equal opportunities, not equal outcomes. Therefore, supporters assert that the focus should not be on trying to fix every racially disproportionate effect, but should focus only on remedying intentional intolerance.

Such an approach can be applied to public school policies that result in racial disparities. For example, in legislation such as No Child Left Behind (2002), it is apparent that closing the achievement gap among various subgroups of students is a national priority. No Child Left Behind requires states to set achievement standards, and student performance is measured through the use of standardized testing. Even so, controversy has arisen because various subgroups of students perform significantly lower than the general student population when taking both these standardized tests and other examinations.

Viewed in the light of *Arlington Heights,* as long as there are acceptable reasons to administer examinations other than intending to discriminate against a cultural, linguistic, ethnic, or socioeconomic group, the examinations can be considered constitutional, regardless of whether a specific group of students

performs disproportionately in comparison to test takers.

Jennifer M. Hesch

See also Disparate Impact; Equal Protection Analysis; No Child Left Behind Act

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Virtual Schools

Virtual schools is the term used to describe schools that deliver instruction predominantly or exclusively through computer programs accessible via the Internet. Unlike traditional brick-and-mortar schools, virtual schools may have no physical place called "school," but create educational communities by linking students with teachers and classmates through the Internet. In virtual schools, students remain in their homes under the supervision of their parents, attending classes by means of their computers. In addition, virtual schools are referred to as "cyber schools," "online schools," "e-schools" and "Web-based schools." This entry looks at their development and related controversies.

Historical Background

As technology advanced, it is not surprising that computer-based learning began to be explored. Initially, virtual schools were used to help students obtain course work that was not available in their home schools. For example, if students at rural schools had wished to take advanced mathematics courses that were unavailable in their local schools, their boards may have been able to provide them by means of online courses offered by other school systems, their states, or institutions of higher learning. This type of virtual learning remains popular today. In fact, a 2005 report for the National Center for Education Statistics said that asynchronous Internet-based courses were the most prevalent form of distance education used by urban and suburban school systems during the 2002–2003 school year.

In light of the success of course-by-course offerings, eventually, educators began to create whole "schools" that employed similar technologies. In fact, in 2004, the Education Commission of the States reported that the state educational agencies in 15 states operated some form of virtual schools.

Proponents of virtual schools note that in addition to offering flexible and individually tailored educational options, these schools provide an avenue to bring education to students for whom traditional class attendance may not have been possible, such as for students who are homebound due to illnesses, living in remote locations, or sentenced to juvenile or adult detention facilities. Some also note that virtual schools' attractiveness to students who are home-schooled allows states to bring children and families that exited the public education system back under state monitoring and support.

At the same time, virtual schools have been created as public charter schools. According to the Center for Education Reform's 2005 report, more than 80 virtual charter schools currently operate throughout the United States. While 40 states allow the authorization of charter schools, state charter statutes vary as to whether or not virtual schools are allowed under their provisions. For instance, some charter school laws preclude "home schools" as an option, and some of these states, though not all, view virtual schools as "home schools."

Related Controversies

Questions regarding whether virtual schools and home schools are synonymous or distinctive prompted considerable litigation in Pennsylvania. Courts there eventually determined that the two were

separate entities and that although the charter school statute prohibited "home schools," virtual schools were permitted. Moreover, the litigation in Pennsylvania considered issues related to funding, oversight, and special education delivery. As a result, the Pennsylvania legislature amended the commonwealth's charter school law in 2002 to regulate this form of charter school. Now, only commonwealth officials may authorize virtual charter schools, describing requirements related to equipment and disclosure of operational practices; and statutory provisions limit their number, requiring that the schools' administrative offices be physically located in Pennsylvania.

Controversy about virtual charter schools has also occurred in California and Wisconsin. California, like Pennsylvania, amended its charter school law to place more explicit restrictions on virtual charter schools. When concerns arose that charter school operators were inappropriately profiting from virtual education, California instituted requirements that its virtual charter schools submit to independent audits and demonstrate that at least 50% of the funds received are used for direct costs of instruction. Schools unable to verify that level of expenditure face a reduction in state funds.

In Wisconsin, the state teachers union filed two suits challenging virtual charter schools. In the first claim, the union argued that since state statutes set geographical boundaries related to charter schools, it was improper for such schools to have enrolled students from distances through the statewide open-enrollment program. The court disagreed, finding in favor of the school board that operated the virtual charter. Current pending litigation raises a second challenge to virtual charter schools. The teachers' union alleges that such virtual schools should not be permitted to operate not only because they employ teachers who are not qualified but also because parents primarily have oversight over children during instructional time. No ruling has yet been made in this case.

As these examples illustrate, even though virtual schools appear to be growing in prevalence and popularity, they are not without controversy. These controversies seem to relate to three primary issues: concerns as to whether the instruction virtual schools provide is sufficiently similar to traditional schooling to satisfy states' definitions of "schools," worries about funding and the for-profit nature of some virtual education providers, and concerns about the ability of virtual schools to enroll students without regard to geographical boundaries and whether sufficient oversight of the educational programming of children can occur under those conditions.

Julie F. Mead

See also Charter Schools; Distance Learning; Homeschooling

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Voting Rights Act

The Voting Rights Act was signed into law on August 6, 1965, during an era of rampant disenfranchisement of minorities, to enforce the Fifteenth Amendment to the U.S. Constitution. While the Fifteenth Amendment to the Constitution, ratified in 1870, already prohibited the denial or abridgment of the right to vote on account of color, race, or previous condition of servitude, various states circumvented its enforcement through such mechanisms as literacy tests, poll taxes, and gerrymandering.

There are two key sections of the Voting Rights Act: Section 2, which mostly tracks the language of the Fifteenth Amendment, and Section 5, which applies only to specified jurisdictions. While Section 2 is a permanent provision of the act, Section 5 must be

renewed; in addition, while Section 2 addresses the impact of current voting practices on minority voting rights, Section 5 covers the impact of new voting practices on minority voting rights.

Section 2

Section 2 of the Voting Rights Act states as follows:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in the denial or abridgement of the right of any citizen of the United States to vote on account of race or color. (42 U.S.C. §1973(a))

The Supreme Court's interpretation of Section 2 in *Mobile v. Bolden* (1980) as forbidding only voting practices founded on the "intent to discriminate" prompted Congress in 1982 to amend Section 2 to cover acts with discriminatory effect, not just intentionally discriminatory acts. In *Chisom v. Roemer* (1991), the Court described the 1982 amendment aptly: "Certain practices and procedures that result in the denial or abridgement of the right to vote are forbidden [under the Voting Rights Act] even though the absence of proof of discriminatory intent protects them from Constitutional challenge" (pp. 383–384).

In *Thornburg v. Gingles* (1986), in which a group of Black citizens sought to establish discrimination as a result of a White majority voting bloc, the Supreme Court set forth three requirements for minority groups seeking to establish a prima facie case under Section 2: (1) There must be a group that is sufficiently large and geographically insular enough to constitute a majority; (2) the group must be politically cohesive in support of its candidate(s); and (3) the majority must generally vote as a bloc so that it can usually defeat the preferred candidate of the minority group.

Further, the Supreme Court held that once the three requirements are established, the "totality of the circumstances" must be examined in order to determine whether there is a discriminatory practice. A nonexhaustive list of factors to be considered includes the extent of any history of discrimination in the state or political subdivision that has impacted the minority group's rights to register, vote, and participate in the democratic process; the extent to which voting in elections of the state or subdivision is racially polarized; the extent to which the state or political subdivision has voting practices or procedures that may lead to discrimination against minority groups; the extent to which minority groups suffer discrimination in education, employment, and health, hindering their ability to effectively take part in the political process; the extent of overt or covert racial undertones in political campaigns; the extent to which members of the minority group have been elected to public office in the state or political subdivision; whether there is significant unresponsiveness by elected officials to the needs of members of the minority group; and whether the policy underlying the voting practice or procedure is tenuous.

Section 5

Section 5 of the Voting Rights Act was renewed in July 2006 for 25 years with great bipartisan support. Since its enactment in 1965, it has been amended at various times and renewed four times, to provide remedies for minorities in states or political subdivisions with histories of discrimination. Those jurisdictions currently within the coverage of Section 5 include Alabama; Alaska; Arizona; parts of California and Florida; Georgia; parts of Michigan, New Hampshire, New York, North Carolina, South Dakota, and Virginia; Louisiana; Mississippi; South Carolina; and Texas. These jurisdictions must seek advance clearance from the Civil Rights Division of the Justice Department or the U.S. District Court for the District of Columbia before or immediately after making amendments to their election laws or procedures. The clearance must be sought to establish that the purpose or effect of the change in law, practice, or procedure is not the denial or abridgment of the right to vote on the basis of race, color, or language minority.

The Justice Department or the District Court for the District of Columbia must use a "nonretrogression" test in order to determine whether clearance should be granted. This test provides that to pass muster, those jurisdictions within the coverage of Section 5 have to "ensure that no voting procedure

changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise" (*Beer v. United States,* 1976, p. 141). The U.S. Supreme Court has held that the essence of Section 5 is not to maximize the voting strength of minorities, but rather to prevent retrogression.

Jurisdictions covered by Section 5 could get a declaratory judgment so as to get out of the section's coverage by establishing that within the 10-year period immediately preceding the action for declaratory judgment (a) there is no test or device being used in the state or political subdivision to deny or abridge the right to vote on the basis of race, color, and language; (b) no final judgment or consent decree has established denials or abridgment of the right to vote on the basis of race, color, and language within the jurisdiction, and no action is pending seeking to establish same; and (3) Section 5 has been complied with.

Unlike Section 2, where discriminatory effect suffices, parties who bring a case against a jurisdiction under Section 5 must establish that the change in election law or procedure has a discriminatory purpose. In essence, a violation of Section 2 is not necessarily a violation of Section 5 for the covered jurisdictions; even though a showing of a discriminatory result may suffice under Section 2, it can serve only as relevant evidence, not conclusive evidence, of discriminatory purpose required under Section 5.

Critics argue that Section 5 singles out specific southern states and that a number of the states included within Section 5's coverage no longer have a history of discrimination. Such criticism has persistently plagued Section 5 since 1970, when the Nixon administration campaigned to repeal it, but the Democratic majority in the Congress fought successfully against the repeal campaign. The renewal of Section 5 in 2006 enjoyed wide bipartisan support, to the surprise of critics.

Joseph Oluwole

See also *Brown v. Board of Education of Topeka;* Civil Rights Movement; Fourteenth Amendment; National Association for the Advancement of Colored People (NAACP)

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VOUCHERS

Publicly funded voucher policies are now established in jurisdictions throughout the United States, but the number of students receiving such vouchers remains very small. For the 2006–2007 school year, fewer than 57,000 vouchers were granted for all programs combined. This entry describes these policies, their effects, and their current legal status.

Each jurisdiction's voucher policy has its own unique characteristics, in terms of the targeted population and in terms of eligible private schools. In Florida, Georgia, and Utah, vouchers are available only for students receiving special education. In Arizona, voucher plans cover special education students as well as students in foster care. In Cleveland and Washington, D.C., voucher eligibility is limited to low-income students, and the same is true of Milwaukee's voucher program, the oldest and largest in the nation. In addition, a new statewide voucher program in Ohio targets students in schools under "academic watch" or designated as failing. Maine and Vermont have, for more than a century, allowed students in rural areas without public schools to use vouchers to attend nonreligious private schools. In addition, five states have "tuition tax credit vouchers" (see "Tuition Tax Credits" entry in this encyclopedia), which mirror conventional vouchers in most relevant aspects.

In 2002, when the U.S. Supreme Court upheld the constitutionality of Cleveland's voucher plan in *Zelman v. Simmons-Harris* (2002), the program at issue was one of only five publicly funded voucher plans in the nation; the other plans operated in Florida, Milwaukee, Maine, and Vermont. Many observers expected that *Zelman*'s lowering of the federal legal hurdle for vouchers would prompt the adoption of voucher policies in many more jurisdictions. In

fact, only a limited expansion has thus far occurred. Voucher policies of one form or another have since become law in Colorado; Washington, D.C.; Arizona; Ohio; and Utah. As noted below, Colorado's law was thereafter found in violation of its state constitution, as was one of Florida's two voucher policies. Utah's 2007 voucher law was immediately withdrawn by voters, although an older plan for special education students remains.

Research on the effects of vouchers has explored several important policy issues. Regarding achievement, nonrobust findings of small and isolated gains have been reported for the privately funded voucher plan in New York City and the publicly funded voucher plan in Milwaukee. Overall, however, research has failed to associate these choice policies with increases in student achievement.

Regarding segregation, studies have tended to show that low-income students of color are well represented among voucher recipients, due to the fact that the largest existing voucher policies are means tested (i.e., recipient families must be lower income). However, parents of voucher students tend to have higher educational levels than other parents in their communities because choice programs select for parental involvement—a factor highly correlated with parental education.

Market principles suggest that voucher policies will generate responses by public schools that compete for the same students but those responses will not necessarily be focused on core educational concerns, such as curricular innovation. Instead, these responses may focus on marketing and promotion, and they may be targeted only at select, desired students. Overall, the evidence does not convincingly show substantial positive or negative public school effects of competition.

The legality of vouchers is now primarily a state court matter. Federal court challenges can still be pursued but will be governed by the *Zelman* precedent, meaning that the voucher policy will likely be upheld if it is structured so that the state funding makes its way to private, religious schools only through the intervening choices of parents. Challenges based on state constitutions, however, may have a greater chance of success. The Colorado Supreme Court, for example, stuck down a voucher law in *Owens v. Colorado Congress of Parents* (2004) because it did not leave local school districts with substantial control over students instructed at those districts' expense. Similarly, the Florida Supreme Court struck down a voucher law in *Bush v. Holmes* (2006) because it impaired the state's ability to provide a single system of free public schools.

Other states may find that voucher laws run afoul of constitutional restrictions on education funding. Only 3 state constitutions (Louisiana, Maine, and North Carolina) include no such restrictions. The remaining 47 constitutions include one or both of two types of restrictions. Twenty-nine states prevent their governments from compelling individuals to financially support a church. Thirty-seven states prohibit the use of public funds to aid private, religious institutions (so-called Blaine Amendments). Even though these restrictions are often strongly worded, several state courts, including the court in Wisconsin's *Jackson v. Benson* (1998), which upheld the Milwaukee voucher plan, have interpreted them to require little or no more than the federal Establishment Clause. That is, under both the U.S. and the Wisconsin constitutions, voucher policies are allowed because aid is provided in a neutral and indirect way.

Most likely, state courts will vary considerably in how they interpret these provisions in their constitutions, with a resulting patchwork of voucher legality.

Kevin G. Welner

See also School Choice; State Aid and the Establishment Clause; Tuition Tax Credits; *Zelman v. Simmons-Harris*

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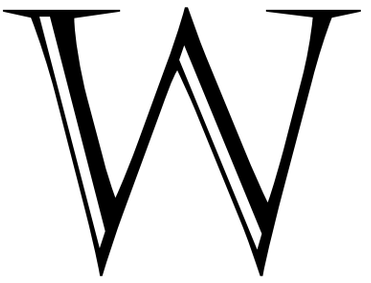

Wallace v. Jaffree

At issue in *Wallace v. Jaffree* (1985) was whether a statute from Alabama could authorize a 1-minute period of silence in all public schools for meditation or voluntary prayer. The U.S. Supreme Court held that this law violated the First Amendment's Establishment Clause.

The original complaint, which did not mention the Alabama statute, alleged that the plaintiff brought the action to seek a declaratory judgment and an injunction restraining the defendants—members of the Mobile County School Board, various school officials, and the minor plaintiffs' three teachers—from maintaining or allowing the practice of regular religious prayer services or other forms of religious observances in the Mobile County Public Schools. The complaint alleged that this practice was in violation of the First Amendment, made applicable to states by the Fourteenth Amendment to the U.S. Constitution. The complaint further alleged that two of the petitioner's minor children had been subjected to various acts of religious indoctrination since the start of the 1981–1982 school year; that their teachers led their classes in saying certain daily prayers in unison; that the complainant's children were ostracized from their classmates if they did not participate in the daily prayers; and that the petitioner, Mr. Jaffree, repeatedly and unsuccessfully requested that the religious activities be stopped. The prime sponsor of the Alabama statute, State Senator Donald G. Holmes, admitted that his introduction of the statute at issue was an initial step toward his hope of returning voluntary prayer to the public schools in Alabama.

On its ruling, the U.S. Supreme Court stressed the fact that the initial ruling in the dispute, in a federal trial court in Alabama, mistakenly concluded that the Establishment Clause did not prohibit state officials from establishing a religion and that the Eleventh Circuit correctly reversed this misinterpretation. In rendering its judgment, the Court applied the so-called *Lemon* test in evaluating whether the statute violated the Establishment Clause. In *Lemon v. Kurtzman* (1971), the Court held that, first, a statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and, finally, a statute must not foster an excessive government entanglement with religion. The Court ruled that no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose.

In applying the *Lemon* test, the Supreme Court found that the enactment of the statute was not motivated by any clearly secular purpose. In fact, the Court specified that the statute did not have a secular purpose. The Court decided that the legislature had enacted the statute for the sole purpose of endorsing school prayer at the start of every school day, in violation of the established principle of government neutrality toward religion. Taking all of this into consideration, the Court struck the statute down not because it coerced students to participate in prayer,

but insofar as the manner of its enactment conveyed a message of state-sponsored approval of prayer activities in public schools.

Wallace v. Jaffree is most often cited for its importance with regard to the body of law stating that public school administrators, teachers, students, and parents may neither mandate nor organize prayer at any time during school activities and events. Yet *Wallace* is perhaps of even greater significance to First Amendment precedent due to the Court's insistence that the freedom stipulated in the First Amendment embraces the right to choose to follow any religious faith, or none at all. Accordingly, school officials may not indoctrinate students into a particular religion or into any religious activity at all because children have the right to practice any religion they choose, or no religion at all.

Malila N. Robinson

See also First Amendment; Fourteenth Amendment; *Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Public Schools; State Aid and the Establishment Clause

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Walz v. Tax Commission of the City of New York

The precedent set in *Walz v. Tax Commission of the City of New York* (1970) is one of a constellation of opinions guiding judicial interpretation of the Establishment Clause of the First Amendment to the U.S. Constitution. The Establishment Clause refers to the maxim that governmental bodies "shall make no law respecting an establishment of religion." This provision and the First Amendment clause guaranteeing the right to exercise religion without governmental interference, the Free Exercise Clause, form the foundation for religious liberty in the United States. What actions result in the "establishment" of religion has engendered significant judicial interpretation during American history. *Walz* is a significant Supreme Court case, although it originated outside of education and contributed to current judicial interpretations of the First Amendment religion clauses.

Facts of the Case

The plaintiff in *Walz* took exception to a New York statute that granted tax exemptions to churches and other religious institutions. Religious groups were just one of a series of named beneficiaries of the exemption, which also applied to hospitals, libraries, historical societies, and patriotic groups, to name a few. The plaintiff argued that the exemptions provided to the religious institutions amounted to a requirement that he indirectly contribute to the religious groups, thereby violating his rights under the Establishment Clause.

After all three levels of the New York state courts upheld the statute's constitutionality, the plaintiff appealed to the U.S. Supreme Court. In turn, the Court agreed that the statute did not violate the Establishment Clause.

The Court's Ruling

Building on its opinion in *Everson v. Board of Education of Ewing Township* (1947), the Supreme Court considered the nature of the benefit afforded the religious groups that the statute aided. In a fashion similar to the transportation provided to children who attend religiously affiliated nonpublic schools in *Everson,* the Court viewed the tax exemption as a neutral state benefit that was available to a broad class of recipients without regard to religion. As such, the Court reasoned that such exemptions do not result in sponsorship or support of religion.

The Court next addressed whether the tax exemption would have resulted in excessive government entanglement with religion. In concluding that it did not, the Court explained that collecting taxes from churches would more likely have led to governmental entanglement with religion, while tax exemptions actually worked to create a separation by limiting the fiscal relationship between church and state, thereby insulating one from the other.

Finally, the Court engaged in a discussion of the purpose of the tax exemptions, observing that just as there was no sponsorship in the statute, likewise it could not discern any hostility to religion in the tax exemptions. The Court concluded its analysis by pointing out that while the Establishment Clause limited governmental involvement with religion, it did not require an absolute absence of contact between church and state.

Walz is an important Establishment Clause case that is most notable for its influence on the Supreme Court a year later, in the seminal case of *Lemon v. Kurtzman* (1971). In adding the excessive entanglement prong from *Walz* to the purpose-and-effect test that it created in *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963), the Court created the oft-cited *Lemon* test, which requires that any policy or practice satisfy three criteria in order comport with the Establishment Clause: that the policy or practice (1) stems from a legitimate secular purpose (2) with a primary effect that neither advances nor inhibits religion nor (3) results in the excessive entanglement between government and religion. While the *Lemon* test has been the source of much discussion and speculation as to its ongoing vitality, it remains a guiding framework for Establishment Clause jurisprudence and, as such, continues the impact of *Walz.*

Julie F. Mead

See also *Abington Township School District v. Schempp* and *Murray v. Curlett; Everson v. Board of Education of Ewing Township; Lemon v. Kurtzman;* State Aid and the Establishment Clause

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Warren, Earl (1891–1974)

Chief Justice Earl Warren served on the U.S. Supreme Court from 1953 to 1969. Many legal analysts consider him to be the greatest chief justice of the 20th century. Warren's friend and colleague, Justice William Brennan, referred to him as "Super Chief." His influence on American jurisprudence was monumental, especially in the areas of civil rights and liberties. Warren will be forever known as the author of the Court's landmark decision in *Brown v. Board of Education of Topeka* (1954), in which it struck down the doctrine of "separate but equal" in public education. His admirers praise him for his commitment to the goals of protecting individual rights and liberties and promoting racial and political equality, while his critics assert that he was an unbridled judicial activist, creating new law by judicial fiat, substituting his own personal policy preferences and those of the Court for that of popularly elected legislatures.

Early Years

Warren was born in Los Angeles, California, on March 19, 1891, to Scandinavian immigrant parents. Shortly after his birth, his father, who was employed by the Southern Pacific Railroad, moved the family to Bakersfield, California. There, as a young man, Warren witnessed a city that was at the time best known for being vice ridden and for its corrupt city government. As he grew older, he worked for the railroad during summer vacations and saw firsthand the plight of the working poor and racial prejudice against Asian workers. These childhood experiences helped shape Warren's later views of the role of law and government in addressing societal ills.

Warren attended the University of California, Berkeley, from 1909 to 1914, earning his undergraduate and Juris Doctorate degrees. After brief stints working for an oil company and then a law firm, he enlisted in the U.S. Army during World War I, serving from 1917 to 1918, with the rank of first lieutenant; he never left the United States and did not engage in actual combat. After being discharged from the military, Warren worked in 1919 as clerk of the California State Assembly Judicial Committee. In 1920, he became deputy city attorney for Oakland and deputy district attorney for Alameda County; and in 1925, the same year he married his Swedish immigrant wife, Nina, he became district attorney for the county. The couple would have six children.

Some of Warren's detractors questioned his legal background. However, he was an experienced, aggressive, and successful prosecutor, never having had a conviction overturned. During his career, he professionalized the district attorney's office, and although he was regarded as a tough-on-crime prosecutor, he was also fair-minded about the rights of the accused and saw to it that indigents had public defenders. In 1932, Warren was voted the best prosecutor in the country.

Rise to the Bench

Warren, a Republican, was elected attorney general of California in 1938 and governor in 1942. In what is often viewed as a blemish on his record as a civil libertarian, while serving as governor he supported the internment of California's Japanese and Japanese American populations during World War II. Warren was so popular as governor that he won the Republican, Democratic, and Progressive primaries during his reelection campaign in 1946. After a failed bid for the vice presidency of the United States, as Thomas Dewey's running mate against Harry Truman in 1948, Warren became a national figure and a possible candidate for the 1952 Republican presidential nomination. At the national convention, seeing that he could not win the nomination over Dwight Eisenhower, he put his full support behind Eisenhower.

For his efforts in helping Eisenhower be elected as president, it seems that Warren was promised the first vacancy on the U.S. Supreme Court. The vacancy occurred in 1953, with the death of Chief Justice Fred M. Vinson. Eisenhower nominated Warren to fill the position of chief justice as a recess appointment in September 1953. The full Senate approved Warren's appointment in March 1954 by a voice vote.

Although many historians doubt that Eisenhower ever claimed that appointing Warren was his biggest mistake, he did prove to be more liberal than the president had expected. As chief justice, Warren led the Court through one of the most tumultuous periods in American history and used its decisions in an attempt to change society. The changes, especially those relating to race-based segregation, prayer in school, and the rights of accused criminals, upset critics enough that Warren faced demonstrations calling for his impeachment.

In addition, President Lyndon Johnson named Justice Warren to head what became known as the "Warren Commission," investigating the assassination of President John F. Kennedy. Although Warren was reluctant to accept the position, Johnson convinced him that it was for the good of the nation. The Warren Commission came to what is still considered by many to be a controversial conclusion that the shooter, Lee Harvey Oswald, acted alone.

Leading the Court

When Warren took his seat on the bench, he joined a Supreme Court that was divided along ideological lines and dominated by strong-willed personalities such as Hugo Black and William O. Douglas on the left and Robert Jackson and Felix Frankfurter on the right. Forging working coalitions among this group of contentious individuals would be a formidable task, challenging Warren's political as well as legal skills. His leadership ability was soon tried by a dispute that had carried over from the previous term and was in need of reargument: *Brown v. Board of Education of Topeka* (1954).

The Brown *Decision*

In *Brown,* the Court was asked to reconsider its prior ruling in *Plessy v. Ferguson* (1896), which

upheld the constitutionality of the doctrine of "separate but equal" on public railway accommodations. Through force of conviction and personality, Warren accomplished the seemingly impossible task of carving out a unanimous judgment, reasoning that public schools segregated along racial lines were inherently unequal, in violation of the Fourteenth Amendment's Equal Protection Clause.

Most commentators praise *Brown* as a hallmark of justice, promoting fairness and equality for all Americans regardless of race. Critics, though, point out that Warren's opinion was based more on sociology and psychology than law, and not necessarily grounded in tight legal reasoning. In *Bolling v. Sharpe* (1954), writing for a still unanimous Court, Warren followed the logic of *Brown* in finding that racial discrimination in the public schools of the District of Columbia violated the Due Process Clause of the Fifth Amendment.

As widely accepted as *Brown* is today, it sparked controversy and, in some instances, open defiance, especially in the South. Enunciating a legal principle of racial equality was one thing, but implementing and enforcing it was another. Realizing that implementation would be difficult and could not occur overnight, the Court in *Brown v. Board of Education of Topeka II* (1955), in another unanimous opinion written by Justice Warren, announced that state and local officials should proceed with "all deliberate speed" in desegregating public schools. *Brown II* was meant to calm opposition, but in setting forth the responsibility of local federal trial courts for supervising its implementation of *Brown,* the justices placed federal courts in the role of arbiter of the nature and pace of school desegregation for the next 50 years.

Perhaps the greatest early challenge to *Brown* came in Arkansas, where the governor and state legislature refused to comply, asserting that the state had the authority to determine the constitutionality of the law and that the Supreme Court's decision was not legally binding. Rejecting this theory of "interposition," Warren secured a unanimous judgment in *Cooper v. Aaron* (1958), asserting in the strongest terms since *Marbury v. Madison* (1803) and *McCulloch v. Maryland* (1819) the supremacy of the federal judiciary in expounding the meaning of the Constitution.

Prayer in Schools

Equally controversial and perhaps initially even more unpopular than the Warren Court's desegregation opinions were its rulings involving prayer in public schools. In *Engel v. Vitale* (1962), the Supreme Court, with Chief Justice Warren joining the majority, decided that a purportedly nondenominational prayer composed by the New York State Board of Regents and recited by students at the beginning of each school day was an unconstitutional violation of the First Amendment's Establishment Clause.

The next year, in *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963), the Court, with Warren again joining the majority, struck down the practice of beginning the school day with reading from the Bible and reciting the "Lord's Prayer" as unconstitutional. Severely criticized and misunderstood by much of the American public, these two cases prohibiting state-sponsored and teacher-led prayers in public schools provided a major impetus in the movement to impeach Warren.

Two of the most significant legal developments of Chief Justice Warren's jurisprudence were his broad interpretation of rights enumerated in the Bill of Rights and the extension of most of these constitutional protections to the states as well as the federal government. On a case-by-case basis, the Warren Court gradually "incorporated" under the Fourteenth Amendment Due Process Clause most of the provisions of the Bill of Rights and applied them to the states. This extension of protection of individual rights and liberties to actions by state and local government officials, such as school boards, teachers, and administrators, greatly expanded and enhanced the role of federal courts.

Defending Rights

Warren's most famous case in the area of criminal procedure, conceding that it did not have a direct impact on education, was in *Miranda v. Arizona* (1966), in which he authored the opinion of the Supreme Court in spelling out the rights of the accused, such as the right to remain silent and the right to an attorney in situations involving custodial interrogations by the police. Most Americans are familiar with the "Miranda warnings." Hailed by many as a check on abuse by the

police and prosecutors of civil liberties, others criticized *Miranda* as "coddling" criminals and being "soft on crime."

The Warren Court placed further restrictions on law enforcement in the case of *Mapp v. Ohio* (1961), in which it highlighted the "exclusionary rule" and the principle that evidence that is gathered illegally may not be used against the defendant in court. Of significance to school-aged children, in *In re Gault* (1967), the Court maintained that juveniles accused of felonies must be accorded many of the same due process rights as adults. While the Court's judgment was condemned at the time, many law enforcement officials now recognize that the process of criminal investigation and interrogation is fairer because of this and other Warren Court rulings.

During Warren's tenure as chief justice, the Supreme Court expanded the First Amendment freedom of speech rights of students and teachers. In *Tinker v. Des Moines Independent Community School District* (1969), in which students were suspended for wearing black armbands protesting the war in Vietnam, the Court specified that students and teachers did not "shed their rights to freedom of speech or expression at the schoolhouse gate" (p. 506). In *Pickering v. Board of Education of Township High School District 205, Will County* (1968), in which a teacher was dismissed for writing a letter to the local paper criticizing the administration and its handling of school funds, the Court was of the view that teachers' free speech rights were constitutionally protected when making statements on matters of public concern.

Justice Warren was generally supportive of the right of freedom of speech. In the most prominent free speech case that the Warren Court resolved, *New York Times v. Sullivan* (1964), the Court declared that speech critical of public officials could not be libelous unless made with actual "malice," meaning that it was knowingly false or made with reckless disregard for the truth. However, there were limits on Warren's toleration for dissent. In *United States v. O'Brien* (1968), he authored the Court's opinion ruling that "draft card burning" in violation of the Selective Service Act was not a constitutionally protected form of symbolic speech.

Other Rulings

In an area indirectly affecting education, the Warren Court revolutionized the process of drawing up legislative districts in *Baker v. Carr* (1962), explaining that while issues of malapportionment were not nonjusticiable "political questions," best left to state legislatures, potential violations of the guarantees of equal protection of the law under the Fourteenth Amendment meant that it could intervene. In its analysis, the Supreme Court acknowledged that state gerrymandering of legislative and school district boundary lines had often been employed as a tool to preserve segregation.

In *Reynolds v. Simms* (1964), Warren authored the opinion of the Court in adopting the principle of "one person, one vote," a case that ultimately impacts school board elections. The Court indicated that not only congressional but also state legislative districts should be apportioned on the basis of population rather than geography. Warren considered the legislative apportionment decisions to be the most significant rulings of his career, ensuring fairness in representation and preventing the dilution of votes. Yet many critics viewed theses cases as infringing state sovereignty, unjustified legal intrusions by the federal courts into what are essentially questions of state and local politics.

The Legacy

In 1968, Warren informed President Lyndon Johnson of his decision to retire from the Supreme Court, hoping that he would be replaced by a successor who shared his judicial philosophy. Johnson nominated Justice Abe Fortas as Warren's replacement. Insofar as Johnson was considered to be a "lame duck," Senate Republicans preferred to hold the appointment over, waiting to see the outcome of the 1968 presidential elections. The Fortas confirmation hearings were acrimonious, with many of the complaints against Fortas being thinly veiled criticisms of the Warren Court. Eventually, facing allegations of off-the-Court ethical violations and charges of conflict of interest, Fortas withdrew his name from consideration. Richard Nixon, the newly elected president, named Warren Burger to fill the vacancy of chief justice. In 1969, Warren resigned from the Court. He died on July 9, 1974.

Chief Justice Warren led the Court through force of personality and great social and political skills. He made no pretense of being a legal scholar, and his opinions were not always carefully crafted. Warren, unlike his successors Chief Justices Warren Burger and William Rehnquist, seldom assigned the writing of the Court's opinion to himself. He preferred to establish the legal and policy tone, leaving the drafting of opinions to more intellectual colleagues such as Justices Hugo Black and William Brennan.

Warren formed an especially close working relationship with Justice Brennan, who shared both his judicial temperament and philosophy. In fact, Warren and Brennan often met to discuss cases before conferences. According to one analyst, Melvin Urofsky, they brought the perfect combination of political and intellectual gifts to the Court, with Brennan drafting legally rigorous opinions such as *Baker v. Carr,* which gelled with Warren's philosophical beliefs.

Warren left a lasting legacy and deeply influenced the course of American law. He fundamentally altered the role of the federal judiciary in the political and legal process, establishing the courts as institutions with the responsibility for protecting the rights of those whom he considered to be victims of the system and rendered powerless. Under Warren's leadership, all levels of government and other branches of the federal government were subjected to closer judicial scrutiny. His judicial activism was praised by liberals for bringing fairness and justice to the American system of government. However, liberals would not always constitute a majority of the Supreme Court.

In recent years, more conservative justices, who would probably argue that they engaged in a return to the status quo ante, used Warren's activist approach in support of policy and legal positions opposed to those of Warren. Still, Warren's most basic judgments regarding racial desegregation, prayer in public schools, rights of the accused, and legislative apportionment, though modified to some extent by the Court, have not been overruled. Warren's ability to lead a divisive Court on a new path in an era of great social and political upheaval earns him the distinction of being ranked as one its greatest chief justices.

Michael Yates and Randy L. Christian

See also *Abington Township School District v. Schempp* and *Murray v. Curlett*; Bill of Rights; *Bolling v. Sharpe; Brown v. Board of Education of Topeka; Cooper v. Aaron;* Fourteenth Amendment; *In re Gault;* Juvenile Courts; *Pickering v. Board of Education of Township High School District 205, Will County; Plessy v. Ferguson;* Prayer in Public Schools; U.S. Supreme Court Cases in Education; Warren Court

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Warren Court

Under the leadership Chief Justice Earl Warren, the U.S. Supreme Court engaged in judicial activism aimed at expanding civil rights. Hailed for his leadership in school desegregation, while vilified by diehard opponents,

Warren and the activist Court he shaped and led left a lasting legacy to the nation. He was committed to individual freedom, human rights, the First and Fourteenth Amendments, and Fourteenth Amendment due process and equal protection rights, and his leadership resulted in expanded social consciousness on freedom, civil rights, and human dignity. Warren also left an indelible mark on education and society, beginning with *Brown v. Board of Education of Topeka* (1954). While the issues that the Warren Court faced continue to be debated by succeeding courts, the framework for human rights was written in the opinions penned during its tenure. President Jimmy Carter posthumously awarded Warren the Presidential Medal of Freedom in 1981.

The *Brown* Decision

Shortly after his appointment as Chief Justice, Warren led a Bench of strong-willed, divided jurists to repudiate the 1896 *Plessy v. Ferguson* doctrine of "separate but equal" that led to segregation of races in public schools. *Brown v. Board of Education of Topeka* (1954), or *"Brown I,"* was a landmark opinion in correcting historical racial injustice in public schools.

Warren was a results-oriented jurist who often left the legal writing and articulation to the expertise of Associate Justices Black and Brennan. At the same time, Warren had a political touch, as reflected by his using fairness and justice to encourage his judicial colleagues to set aside their limited views of the Supreme Court's role.

As author of the Supreme Court's unanimous decision in *Brown I,* Warren asked whether segregation of children in public schools solely on the basis of race deprives them of equal educational opportunities. In answering his own question, Warren indicated that segregation causes children to experience feelings of inferiority, while retarding their social and intellectual development. He added that in the field of public education, the notion of "separate but equal" has no place, insofar as separate educational facilities are inherently unequal.

In 1955, in *Brown v. Board of Education of Topeka II,* under Warren's guidance, the justices delegated the job of carrying out desegregation with "all deliberate speed" to federal trial courts. Still, it took time to implement desegregation fully, and the issue still confronts society.

Reactions to *Brown I* and *II* were formidable, especially in the American South. Disputes over the integration of Little Rock, Arkansas, eventually led President Eisenhower to call out federal troops to ensure safety of African American students entering Central High School. Further, the Supreme Court had to intervene in that dispute, in *Cooper v. Aaron* (1958). Other states supported private schools and in some cases closed public schools for short periods of time in order to avoid desegregation. Consequently, signs posted throughout the South and elsewhere called for Warren's impeachment.

The Chief Justice

Throughout his 16 years as chief justice, from 1953 to 1969, Warren led the Supreme Court to expand social and economic justice in the nation. Born in Los Angeles to Norwegian and Swedish immigrants, he attended the University of California, Berkeley, receiving his law degree in 1914. Warren had a unique ability to unite people.

Warren had a number of political positions before becoming governor of California. On most issues, he was a conservative Republican, tough on crime, a business supporter, and a persistent prosecutor. Influenced by patriotism of his era, he supported the decision, which he later regretted, to intern Japanese Americans during World War II.

In 1946, in a state that allowed individuals to run in any primary, Warren won the Republican, Democratic, and Progressive primary elections, running unopposed for governor in his first of three terms. As governor of California, Warren stood behind the faculty of the University of California during loyalty oath controversies in 1949 and 1950. He supported constitutional rights and principles of faculty academic freedom, defending the faculty from press attacks during political turmoil when Governor Ronald Reagan dismissed university President Clark Kerr. Warren ran as vice presidential candidate with Thomas E. Dewey of New York in 1948.

The death of Chief Justice Fred Vinson, on September 8, 1953, led to an opening for the position.

President Dwight Eisenhower appointed Warren to the Supreme Court, though he was troubled by Warren's social activism. In fact, Eisenhower is reported to have regarded his appointment of Warren as one of the biggest mistakes of his presidency.

Through political prowess and focusing on practical issues, Warren brought an often brilliant but divisive Supreme Court to consensus. Justices William O. Douglas, Felix Frankfurter, Hugo L. Black, Harold H. Burton, Tom C. Clark, Stanley Reed, Sherman Minton, and Robert H. Jackson made up the Warren Court in the early years of his service. There were seven Democrats and one Republican. Justices Jackson and Frankfurter advocated judicial restraint, while Justices Black and Douglas tended toward activism. Before Warren, the Vinson Court had been deeply divided.

Warren matured as a justice and moved the Supreme Court toward unanimity, especially in *Brown,* in framing issues in terms of individual rights and human dignity. Eighteen judges, including Brennan and Marshall, served on the high court during Warren's 16-year tenure. Warren's charismatic leadership led to a more unified court.

Other Education Rulings

In other education cases, the Warren Court touched off a firestorm of controversy in ruling that denominational prayers in public schools, in whatever form they took, were unconstitutional. In *Engel v. Vitale* (1962), the Court was of the opinion that the recitation of prayer in public schools was inconsistent with the Establishment Clause of the constitution. A year later, the Court struck down prayer and Bible reading in public schools in the companion cases of *Abington Township School District v. Schempp* and *Murray v. Curlett* (1963).

The Warren Court also upheld individual freedom of association. For example, in *Shelton v. Tucker* (1960), the Supreme Court pointed out that placing restrictions on the associational rights of teachers deprived educators of their rights to personal, associational, and academic liberty, which are protected by the Fourteenth Amendment. Moreover, the Warren Court was generally opposed to loyalty oath requirements for educators that emerged in response to fears of communism. As such, in *Sweezy v. New Hampshire* (1957), the Court maintained that teachers must have academic freedom to inquire, study, and evaluate their subject matter in an atmosphere free of suspicion and distrust. Warren's opinion on behalf of the Court in *Sweezy* made it clear that every citizen has a right to engage in political expression and association, rights protected by the First Amendment and the Bill of Rights.

James Van Patten

See also *Abington Township School District v. Schempp* and *Murray v. Curlett; Brown v. Board of Education of Topeka; Brown v. Board of Education* and Equal Educational Opportunities; *Cooper v. Aaron*; *Engel v. Vitale;* Fourteenth Amendment

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Plessy v. Ferguson, 163 U.S. 537 (1896).

Shelton v. Tucker, 364 U.S. 479 (1960).

Sweezy v. New Hampshire, 354 U.S. 234 (1957).

Web Sites, Student

As the Internet has grown, situations in which students have been disciplined for the content of their personal Web sites have increased. Disciplining students for Web pages is a subset of disciplining students for out-of-school conduct. Students have constitutional rights, but these rights are not coextensive with the rights of adults. Also, schools have much

greater latitude in disciplining students for at-school conduct than they have for off-campus conduct.

Most school boards now require students and/or their parents to sign acceptable use agreements. When students using school computers violate the terms and conditions of such agreements, they can be disciplined by school officials. Students may maintain Web sites that are purely personal, or they may host blogging sites that allow others to post comments. In general, students may not invoke their free speech rights when they create sites that defame others, contain obscenity, harass others, intentionally inflict emotional distress, violate copyrights, or invade the privacy of others. Students who have blogging sites may have additional legal considerations. This entry reviews legal cases related to student use of Web sites.

Free Speech

With a few notable exceptions, courts have come down on the side of the speech rights of students. Many of the disputes have been resolved out of court. Reported settlements on cases can be very expensive. Courts are reluctant to expand the authority of school officials to control off-campus conduct of students. In fact, educators fail in their attempts to impose discipline unless they can show the existence of a true threat and/or material and substantial disruption of school or interference with the rights of others. Courts will apply community standards when it comes to obscenity.

Buessink v. Woodland R-IV School District (1998) involved a Web site in which a student used vulgar language that was directed toward teachers, the principal, and the school's home page. After a friend saw the Web site at the plaintiff student's home, the student reported it to a teacher, who allowed other students to view the site. The court issued an injunction in favor of the student because there was no substantial disruption of school.

In *Killion v. Franklin Regional School District* (2001), a student wrote an e-mail that lampooned the school's athletic director, including comments about the teacher's eating habits and the size of his genitalia. The speech caused no disruption at school. A federal trial court decided that school officials did not have the authority to regulate such speech just because they disliked what the student had to say. In addition, the court was of the view that school officials have much less authority to limit lewd and vulgar speech when it occurs outside of a school setting.

Coy v. Board of Education of North Canton City Schools (2002) raises an issue that commonly appears in these cases, namely, whether school disciplinary policies are vague and overbroad. Often, courts will find that the use of imprecise terms and definitions restricts the free speech rights of students. At trial, students must seek to show that they were disciplined for the content of their speech. At the same time, boards must attempt to prove that they disciplined students for breaches of acceptable use policy because they accessed a home page from a school computer.

Determining Threat

Legally, there are requirements for what constitutes a threat. For speech to constitute a threat, it must be communicated by the person making the threat. Next, a reasonable person would have to perceive the speech to be a threat. Finally, a reasonable person would have to believe that the person making the threat was capable of following through on it. Other people also look to see how the threat was perceived by the object of the threat. In one such case, *Latour v. Riverside Beaver School District* (2005), a federal trial court concluded that the rap songs on a student's Web site did not constitute a threat.

In *Emmett v. Kent School District, No. 415* (2000), when a student created a Web site that contained the mock obituaries of peers, the court held that the board could not discipline the student. The court explained that the Web site, having been designed and maintained out of school, did not create any threat of substantial disruption in the school and that the obituaries did not pose a threat to any students.

At issue in *Mahaffey ex rel. Mahaffey v. Aldrich* (2002) was a student's urging others to stab someone and then throw the victim over a cliff. A federal trial court pointed out that the statements did not constitute a threat and that the school policies were overbroad.

J. S. v. Bethlehem Area School District (2000) may be an anomaly. The court decided that school officials could take disciplinary action after a teacher targeted

by the student's home Web site had to take a medical leave of absence. The court determined that no true threat existed; however, the student had accessed the Web site from a school computer, and this opened the door for disciplinary action. The speech on the Web site had disrupted the school under the analysis introduced in *Tinker v. Des Moines Independent Community School District* (1969). Further, in *Bethel School District 403 v. Fraser* (1986), the court concluded that the speech was vulgar and obscene; therefore, it had undermined the school's ability to inculcate civility.

It is incumbent on school officials to know when they can and cannot regulate the off-campus speech of students. As the Internet and student use of computers and other devices for electronic communications continue to grow, one can expect that litigation in this contentious area will continue.

J. Patrick Mahon

See also Bullying; Children's Internet Protection Act; Digital Millennium Copyright Act; Technology and the Law; *Tinker v. Des Moines Independent Community School District*

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Mahaffey ex rel. Mahaffey v. Aldrich, 236 F. Supp.2d 779 (E.D. Mich. 2002).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

Web Sites, Use by School Districts and Boards

Web sites are a useful part of the Internet that can facilitate many of the information-sharing responsibilities of school boards and their staffs. Individual schools within systems often have at least one Web page; there may also be Web sites for entire districts that link to the Web sites of individual schools. Individual school Web sites are usually managed by teachers who have some expertise in technology. Administering duties are sometimes shared with students as part of computer and/or design classes. It is not uncommon for students to be given space to construct and maintain personal Web sites on school Web sites. While districtwide sites usually have Web site administrators who are dedicated to that task, this can vary depending on the size of a school system and its needs.

School boards typically use Web sites to share schedules; minutes from meetings; contact information of staff, including e-mail addresses; mission statements; staff bios, and other information. However, because Web sites are a part of the Internet, important legal issues can quickly arise that might catch unsuspecting school officials unprepared. Some of the Web site challenges in school settings include the scope of copyright protection, privacy issues, employee use, and Web site security. Boards can take preventive stands on these issues by first auditing their sites and then creating Web site construction policies. One way to address these issues is to conduct Web page legal audits. Tomas Lipinski, a noted authority on copyright law, refers to an audit as a series of cautions prompted by developing law or a checklist that school Web site content creators can use to audit their sites. Although an audit is not to be interpreted as legal advice, it can provide educational leaders with some basic knowledge that can reduce or prevent missteps.

Copyright does apply in cyberspace. As such, Professor Lipinski, among others, cautions district

officials to check to see whether sites contain copyrighted work of students, staff, or the general public. In *Marcus v. Rowley* (1983), a teacher in California successfully sued a colleague for copyright infringement after the latter created an activity packet based primarily on her work. While the dispute dealt with printed hard copy rather than the Internet, it admonishes those with questions about fair use to start by considering four things: purpose, nature, amount, and market. Is the purpose of the use of the work nonprofit educational or commercial? The nature of the work is also important because fictional and poetic pieces that are not published tend to get more protection; the amount used comes into play, and this should be small relative to the size to the full work. Rowley, the defendant, used too much of the plaintiff Marcus's work. Further, the end user must consider whether the use of the material damaged a market for the author of the work.

Educators should ask such questions before they post the work of others on their own or district Web sites. Students may be inclined to post work of others that they like, such as lyrics to music, poems, or even literary works, and some staff members post their personal work. School board officials should be careful how they manage copyrighted work because they can be liable for the actions of their employees.

Another issue is the use of trademarks, which includes characters and logos. Even though logos tend to be popular with staff and students, school boards should avoid using them to make their sites more attractive and prohibit their use on district Web sites. A related question here is whether a logo is being used in an inconsistent manner with school product endorsement. Professor Abra Feuerstein, an expert in school governance issues, pointed out that more individual schools and systems are entering into endorsement deals with businesses in which, for example, in exchange for providing funds to buy large items such as scoreboards, businesses are allowed to put their names on the boards. Using a competitor's logo and displaying it prominently may violate a contract with one of these businesses and lead to legal issues for a district.

School boards should also include some text on links to commercial sites or social networking sites in their Web site construction policies. Social networking sites such as MySpace and Facebook are becoming increasingly popular with students. Unfortunately, though, they are also sometimes used for bullying and intimidation. School board policies would thus be wise to prohibit links to the sites.

In addition to these issues, school boards must be aware that sites and their content can be violated by hackers. One such incident occurred in New Jersey in 2000, when a hacker known as "Protokol" altered the content of a site on the anniversary of the Columbine, Colorado, school shootings and posted some terror-filled messages threatening to bomb the school. A 2002 account of the incident by J. D. Abolins, a computer expert in privacy and security issues, says the hacker added and replaced text, including this disturbing message: "Tuesday, May 2nd Columbine Relived!!!!!" Even though the site was restored the next day and no one was hurt at the school, it did cause a scare and raised the question about school Web site security. In response, U.S. Senator Robert Torricelli proposed the School Website Protection Act, federal legislation that sought to criminalize the activity of hackers. Torricelli's bill was criticized as being too broad because it criminalized protected activity, among other things. The bill failed to survive challenges in the Senate Judiciary Committee in 2001. Others advocated for education as a more viable approach to the problem.

Many schools and boards have now added a copyright notice to protect the work of their sites; it is worth noting that it is a good idea to have one, along with a privacy policy, as part of sites. Lipinski acknowledges that student privacy is not new, but the way it is viewed in the context of school Web sites is relatively new. This approach stems from the fact that information on the Web is truly global and can be used to exploit children. When it comes to student personal information, this is cause for caution for school officials. The Family Educational Rights and Privacy Act (FERPA) stipulates that federal funds may be withdrawn from educational agencies if they disseminate student information to third parties without permission of parents and eligible students. There are exceptions, such as directory information, but educators must give parents notice of the categories it wishes to make public. Schools should be especially vigilant in this area and must take precautions when releasing student information into that medium. Lipinski argues

that parental notice and permission should be sought before any personal identifying information of students is posted on the school's Web site.

School officials should seriously consider conducting an audit and then creating a Web site construction policy as advocated here. While policies cannot end the risk of all litigation, they should help to put students and staff on notice and provide them with some safety guidelines when constructing school-related Web sites.

Mark A. Gooden

See also Acceptable Use Policies; Copyright; Cyberbullying; Electronic Communication; Family Educational Rights and Privacy Act; Technology and the Law

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West Virginia State Board of Education v. Barnette

At issue in *West Virginia State Board of Education v. Barnette* (1943) was whether a school board could compel students to participate in the salute to the American flag or be disciplined if they refused to do so for religious reasons. Students who were Jehovah's Witnesses and their parents challenged a school policy on the basis that their religious beliefs prohibited them from recognizing or bowing down to any graven image. The plaintiffs filed suit due to their refusal to salute because they considered the flag to be a "graven image" within this religious precept. The Supreme Court decided that the state was acting unconstitutionally in a manner at odds with the Bill of Rights, in a case that continues to have influence today.

The Court's Ruling

Barnette arose amid controversy that had occurred in other states and shortly after the U.S. Supreme Court ruled in *Minersville School District v. Gobitis* (1940) that students were not free to excuse themselves from taking part in the flag salute. In *Barnette,* a local school board in West Virginia, enacted a policy compelling students to participate in the flag salute or be subjected to discipline. The local board policy was consistent with a mandate of West Virginia's legislature. At that time, the state legislature amended its laws to require that all schools conduct courses of instruction for the purpose of teaching, fostering, and perpetuating the ideals, principles, and spirit of Americanism and government.

On further review of an order enjoining the enforcement of the policy, the Supreme Court affirmed in favor of the plaintiffs. In reviewing the disputed policy, the Court held that the issue in *Barnette* was no less than a collision between individual rights conferred in the First Amendment's freedom of religion clauses and the rights of states to determine rules for their citizens. The Court found that while the state has the power to regulate public education, if its authority conflicts with an individual's religious views that are protected by the First Amendment, the constitutional rights apply to the states through the Fourteenth Amendment and protect citizens against such state action.

The Court found that fundamental rights such as those to life, liberty, and property as well as to freedom of religion, worship, and speech may not be submitted to a vote, nor can they be dependent on

elections. The Court reasoned that one of the purposes of the Bill of Rights, which included all of these protections, was to separate specified rights from political controversy and place them beyond the reach of majorities and governmental officials. While states have important legitimate functions related to educating the young for citizenship, the Court was of the opinion that states cannot infringe on individual rights provided by the Bill of Rights.

The Supreme Court thus concluded that when the school board sought to compel students to salute the flag in contravention of their religious beliefs, it acted in a manner that contradicted the spirit and purpose of the First Amendment. As a result of *Barnette,* many school boards now make saluting the flag optional for students who believe that doing so violates their religion, and schools may not discipline them for acting in accordance with their beliefs.

Continuing Impact

When placing *Barnette* in the larger context, it becomes clear that issues related to the flag salute, the Pledge of Allegiance, and other nationalistic ceremonies are often proscribed in the context of national sentiment fostering patriotism in schools. Often, the rationales for having flag salute policies have related to encouraging national unity, educating children about government, informing students about citizenship, and furthering national loyalty to the United States.

While *Barnette* remains the law of the land, issues related to the flag salute and Pledge of Allegiance continue to surface. For example, in *Elk Grove Unified School District v. Newdow* (2004), the Supreme Court sidestepped the issue of whether an atheist noncustodial father could prohibit his daughter from reciting the Pledge of Allegiance because he objected to the words "under God." The Court noted that the noncustodial father could not challenge a local board policy because he lacked standing to sue. On remand, a federal trial court in California largely followed an earlier order of the Ninth Circuit in directing school officials not to allow the of Allegiance (*Newdow v. Congress of U.S.,* 2005).

Amid a national surge of patriotism following the terrorist attacks on the United States on September 11, 2001, many school boards have reinstated the daily Pledge of Allegiance and flag salute. Consistent with *Barnette,* school boards make the flag salute optional and without disciplinary consequences for students who refuse to participate for religious reasons.

Barnette stands as precedent for school boards on the issue of state action and efforts of the majority to use the machinery of the state to overcome individual constitutional rights. *Barnette* is thus often cited in cases involving Bible reading, prayer in public schools, and other disputes related to protecting student rights against encroachment by officials in public school. In sum, *Barnette* continues to guide school boards and officials on how to resolve conflicts when their policies intrude on the individual constitutional rights of students to the free exercise of religion.

Vivian Hopp Gordon

See also Bill of Rights; *Elk Grove Unified School District v. Newdow;* First Amendment; *Minersville School District v. Gobitis;* Pledge of Allegiance; Prayer in Public Schools; Religious Activities in Public Schools; State Aid and the Establishment Clause

Legal Citations

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Wheeler v. Barrera

At issue in *Wheeler v. Barrera* (1975) was whether the parents of educationally deprived children who attended nonpublic schools were entitled to equitable relief regarding the distribution of federal funds for Title I programs in public and nonpublic schools. Title I of the Elementary and Secondary Education Act of 1965 was the first law to authorize federal funding of programs for educationally deprived children in both public and nonpublic schools. Title I's implementing regulations define *educationally deprived children* as

those, including students with disabilities, who need special assistance as a result of poverty, neglect, delinquency, or cultural or linguistic isolation from the community at large in order to attain the educational level appropriate for their ages (45 CFR § 116.1 (i)).

While enacting President Lyndon Johnson's Great Society legislative package, Congress recognized that educationally deprived children attend nonpublic as well as public schools. Accordingly, Title I benefits were extended to eligible students in both types of schools.

Ultimately, the U.S. Supreme Court ruled that the plaintiffs were entitled to relief because of the failure of local and state officials to provide comparable Title I services for public and nonpublic school students. However, at the same time, the Court did not specify any particular form of service or accommodation to which parents were entitled. In summarizing its opinion, the Court emphasized that development of a plan to implement needed Title I services was the responsibility of state and local educational leaders, not the federal courts.

Facts of the Case

Parents of children attending nonpublic schools in Kansas City, Missouri, brought a class action suit, alleging that state school officials arbitrarily and illegally approved campus-based Title I programs for eligible public school children, such as the use of federally funded teachers during regular school hours, while depriving children in nonpublic schools of comparable services. Prior to *Wheeler v. Barrera,* the prevailing practice in Missouri was to provide comparable equipment, materials, and supplies to eligible students in nonpublic schools but to exclude providing federally funded teachers and support personnel on the campuses of nonpublic schools.

Among other things, the parents claimed that campus-based programs had to be provided for eligible children in nonpublic schools if such programs were routinely offered in the public schools. The plaintiff parents also claimed that Missouri's constitutional provisions prohibiting the use of public funds in nonpublic schools did not apply to Title I. The defendants countered that the parents' requests exceeded Title I requirements and that Title I programs on nonpublic school campuses violated First Amendment provisions mandating separation of church and state.

Initially, a federal trial court denied relief and dismissed the case. On further review, the Eighth Circuit reversed, ruling that state officials had, in fact, violated Title I's dictates, which required them to provide comparable services to all children who were educationally deprived. In addition, the court found that if Title I programs were provided on public school campuses, officials had to offer comparable programs for children who attended nonpublic schools. The court added that the Missouri law barring use of public funds to support operations in nonpublic schools did not apply to Title I programs. Finally, the court declined to address the petitioners' (state officials') concerns about violating the Establishment Clause, because they had not implemented a formal plan for Title I instruction on nonpublic school campuses at the time. The petitioners sought further review, and the Supreme Court granted certiorari.

The Court Ruling

After reviewing the facts, the Supreme Court agreed that the parents and their children were due relief because of the failure of local and state officials to ensure the delivery of comparable services under Title I to their schools. However, the Court also decided that the plaintiffs were not entitled to any particular form of service because it was the responsibility of state and local officials, not the federal courts, to formulate suitable plans for relief. According to the Court, Title I clearly declared that state constitutional spending limitations could not be preempted as a condition of accepting federal funds. To this end, the Court determined that the Eighth Circuit had erred in ruling that federal law superceded state law in the authorization and expenditure of Title I funds. The Court emphasized that Title I did not call for identical services for educationally deprived children in public and nonpublic schools; instead, the Court explained that the law obligated state agencies to provide comparable services and that officials had various options in complying with this requirement.

In the end, the Supreme Court reasoned that public officials can provide on-campus Title I instruction for children in nonpublic schools. Yet the Court was of the opinion that if state officials choose not to use that method or if state law prohibits them from doing so, they have three alternatives: develop and implement plans that do not utilize Title I instruction on campuses of nonpublic schools but satisfy the act's comparability requirement; develop and implement a plan that eliminates on-campus instruction on all campuses and that uses other means, such as summer programs or neutral sites, to carry out congressional intent; or choose not to participate at all in the Title I program.

In light of *Wheeler v. Barrera,* government officials have administered Title I programs and services based on the three-pronged model that the Court suggested. In *Agostini v. Felton* (1997), the Court essentially affirmed *Wheeler* by upholding a public school board's assignment of publicly paid Title I teachers to inner-city, religiously affiliated nonpublic schools.

Robert C. Cloud

See also *Agostini v. Felton;* School Board Policy

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White Flight

Generally, "White flight" refers to the withdrawal of Whites from desegregating institutions, such as schools, school systems, or residential communities, due to the consideration and implementation of school desegregation plans. The concept of White flight is controversial because the loss of White students in school systems is fairly easy to document, whereas the reasons for their departures are not generally easy to identify or isolate. This entry reviews the phenomenon and scholarly discussion about its causes.

Early Research

During the 1960s and 1970s, city school systems in particular lost a large percentage of White students. According to researchers, the primary reason for White flight was dissatisfaction with the prospect of busing (Armor 1995; Coleman, Kelly, & Moore, 1975). The opposition of urban White families to school desegregation and busing motivated them to escape to private and/or religious schools or move to the suburbs.

At the same time, advocates of desegregation viewed the loss in White enrollments as being due to historical trends of suburbanization and demographic factors, especially the drop in the White birthrate (Orfield & Eaton, 1996; Pettigrew & Green, 1976). In a series of point-counterpoint academic articles, these researchers battled over the causes of declines in enrollment. While the researchers never agreed on the precise causes of White Flight, they did agree that metropolitan plans for school desegregation offered the best hope of minimizing White Flight because they included the White suburbs.

One study of school desegregation reported racial enrollment trends from 1968 to 1973 in the 67 largest central-city school districts in the nation (Coleman et al., 1975). The report concluded that Whites fled central cities not only for demographic reasons, such as the percentage of Blacks and size of school systems, but also due to school desegregation plans. As part of the process, White parents expressed concerns about declining educational quality, racial conflict, violence, value conflicts, and general disruption in the desegregation process. This study generated a host of follow-up analyses, including critical analyses that were summarized elsewhere (Robin & Bosco, 1976).

More Recent Studies

A great deal of quantitative empirical research on White Flight has taken place since the mid-1970s. One type of analysis, called "no-show" analysis, compares actual White enrollment, after the implementation of desegregation plans, to projected White enrollment. For example, one study of school desegregation litigation reported that the "no-show" rates were 45% in Boston, 42% in Savannah-Chatham County, 52% in Baton Rouge, and 56% in California,

where Whites were assigned to formerly minority schools (Rossell, 1997). Put another way, this indicates that about half of Whites who were assigned to "Black" schools did not remain in public school systems immediately after the implementation of desegregation plans. The reports concluded that the percentage of minority students, not whether a plan involved metropolitan areas or urban districts, was the major factor affecting the extent of White Flight.

Analyzing a national probability sample of 600 school systems, another study found that school systems that had mandatory school desegregation plans lost one-third more White students than those that never had plans (Rossell & Armor, 1996). In addition, the study reported that districts with voluntary-only plans experienced less than 3% White enrollment loss, a rate that is not statistically significant. Similarly, the study noted that controlled-choice plans had enrollment loss almost as high as mandatory plans.

Still other researchers questioned whether "flight" should be characterized as simply "White" or as "middle class," because it may also include the Black middle class. This approach tries to explain why many Whites may flee school desegregation, when in surveys they indicate support for the principle of school desegregation. Various theories for this contradiction have been offered, including symbolic racism. While Whites have increasingly accepted the principle of desegregation, many White parents do not want to send their children to schools with a majority of Black students.

In another study, respondents in national surveys were asked whether Black and White students should attend the same or separate schools. In 1942, about one-third of the White respondents answered "same schools." This percentage has increased over time from 50% in 1956, to 75% in 1970, to 90% in 1980 (Armor, 1995). This study revealed that surveys in the 1990s in individual cities could identify fewer than 5% of White parents who selected the segregated-schools option. In like fashion, the study asked respondents whether they would object to sending their children to schools in which various percentages of Black children were enrolled. The percentage of Whites not objecting to sending their children to schools in which half of the students were White and half were Black increased from 50% to over 75% from 1958 to 1983. The percentage of Whites not objecting to sending their children to majority Black schools rose from low-30s percentiles to the high 30s. In the eyes of many White parents, majority Black schools are not desegregated, regardless of the racial balance in the systems.

No Consensus

The passage of more than three decades since the original social science reports on White Flight has not led to consensus on its causes. If anything, one summary of the literature on White flight (Orfield & Eaton, 1996) offers a counterpoint to another (Rossell & Armor, 1996). The first study (Orfield & Eaton) argued that since Whites abandoned cities that did not have desegregation orders, such as Atlanta, New York, Chicago, and Houston, one cannot view school desegregation orders as the basis of flight. However, this same study accepts the notion that some school desegregation plans are more likely to accelerate flight than others, with metropolitan school desegregation plans as the most stable. A later statistical reanalysis of that data indicated that voluntary plans produced less White flight than mandatory plans (Rossell, 1997), regardless of whether they were metropolitan in scope.

Paul Green

See also *Brown v. Board of Education of Topeka* and Equal Educational Opportunities; Dual and Unitary Systems; Segregation, De Facto; Segregation, De Jure

Further Readings

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Widmar v. Vincent

Widmar v. Vincent (1981) was the first Supreme Court decision to grant free speech protection to religious expression at an educational institution. In *Widmar,* the Court recognized that the Free Speech Clause provided a new and powerful counterweight to the Establishment Clause, requiring analysis of speech content. *Widmar* put public universities on notice that if they wanted to open their campuses to student expression but close them to religious expression, they must do so according to the requirements of the Free Speech Clause. This entry looks at the case, the ruling, and its impact.

Facts of the Case

In *Widmar,* a university-recognized student religious group (Cornerstone) challenged the University of Missouri at Kansas City's (UMKC) refusal to permit the organization to meet on university premises. For 4 years prior to filing a suit against UKMC, Cornerstone had sought unsuccessfully to gather on university premises, each year being rejected because of a UKMC board of curator's policy prohibiting the use of university buildings or grounds "for purposes of religious worship or religious teaching" (*Widmar,* p. 265). The student members of Cornerstone challenged UKMC's policy as violating their rights to free exercise of religion, equal protection, and freedom of speech under the First and Fourteenth Amendments to the Constitution.

A federal trial court in Missouri rejected the plaintiffs' claim, finding that their religious speech was entitled to less protection than other types of expression. The Eighth Circuit Court reversed, holding that "the Establishment Clause does not bar a policy of equal access" (*Widmar,* p. 266). On further review, the U.S. Supreme Court affirmed the judgment of the Eighth Circuit.

The Court's Ruling

In a broad rejection of UMKC's policy, the Supreme Court observed that the public university had created a forum generally open for use by student groups. Having done so, the Court reasoned that "the Constitution forbids a State to enforce certain exclusions from a forum generally open to the public, even if it was not required to create the forum in the first place" (*Widmar,* p. 267). The Court specifically found that generally open forums to engage in religious worship and discussion, as desired by student groups, were "forms of speech and association protected by the First Amendment" (p. 269). As a result, the Court maintained that the university's policy could survive constitutional scrutiny only if it "serve[d] a compelling state interest and . . . [was] narrowly drawn to achieve that end" (p. 270). The Court categorically rejected the university's compelling interest based on its interpretation of the Establishment Clause as requiring a "strict separation of church and State" (p. 270).

Analyzing UMKC's policy under the *Lemon v. Kurtzman* (1971) three-part test, the Court found that the university's open forum for student groups satisfied both the first (secular purpose) and third (no excessive entanglement) parts. Concerning the second part (effects) of the test, the Court that determined that "an important index of secular effect" (*Widmar,* p. 274) was the university's having created an open forum and extending the benefits of such a forum to a broad spectrum of groups.

In addition, the Court pointed out that the Free Speech Clause further restricted the university's compelling interest. The Court limited its holding to "content-based exclusion of religious speech" (*Widmar,* p. 276) and did not extend its rationale to "the capacity of the University to establish reasonable time, place, and manner regulations" (p. 277). To date, the Supreme Court has failed to indicate whether an educational institution's avoidance of an Establishment Clause violation will constitute a compelling interest to justify treating religious expression differently.

The Congress essentially extended *Widmar* to public secondary schools in enacting the Equal Access Act, which permits student-sponsored, noncurriculum groups to meet during noninstructional hours. Further, *Widmar* was a landmark case that set the scene 12 years later for *Lamb's Chapel v. Center Moriches Union Free School District* (1993), wherein the Supreme Court, in a rare unanimous decision, extended free speech protection for religious expression to the K–12 education level.

Until *Widmar,* the Court repeatedly invoked the *Lemon* test during the 1970s in concluding that state support for religious schools violated one or more of the tests (*Meek v. Pittenger,* 1975). *Widmar* represented a new genre of religion cases that did not fit the fact pattern that had characterized cases in the 1970s.

Ralph D. Mawdsley

See also *Board of Education of Westside Community Schools v. Mergens;* Equal Access Act; *Lamb's Chapel v. Center Moriches Union Free School District; Lemon v. Kurtzman;* Prayer in Public Schools; Religious Activities in Public Schools

Legal Citations

Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Meek v. Pittenger, 421 U.S. 349 (1975).
Widmar v. Vincent, 454 U.S. 263 (1981).

Winkelman ex rel. Winkelman v. Parma City School District

The Individuals with Disabilities Education Act (IDEA) (2005) contains an extensive set of procedural due process safeguards for parents and their children. Yet the IDEA was unclear about the rights of nonattorney parents of students with disabilities who wished to file suit on behalf of their children. Consequently, there was a split among the federal circuits over whether nonattorney parents could intervene on behalf of their children in disputes with their school boards over the delivery of a free appropriate public education (FAPE), which culminated in the Supreme Court's hearing an appeal in such a dispute, *Winkelman ex rel. Winkelman v. Parma City School District* (2007).

Winkelman began when parents in Ohio sued local school board officials in a fight over the educational placement of their son, who had autism spectrum disorder. After a federal trial court and the Sixth Circuit agreed that the board provided the child with a FAPE, the latter added that the IDEA did not permit the nonattorney parents to represent their son in judicial actions. The Supreme Court agreed to hear an appeal in order to resolve the dispute among the circuits.

As author of the Supreme Court's opinion in its 7-to-4 judgment, Justice Kennedy, joined by Chief Justice Roberts and Justices Stevens, Souter, Ginsburg, Breyer, and Alito, reversed in favor of the parents. In noting that the dispute was governed by the IDEA, Kennedy maintained that the IDEA allows parents to participate in developing the individualized education programs (IEPs) of their children and in dispute resolution procedures under which they can recover attorney fees if they prevail in litigation. As such, Kennedy viewed the IDEA as permitting parents to exercise their own rights once administrative proceedings are completed.

Kennedy indicated that unless the Court treated the word *rights* in the IDEA as referring both to parents and children, the law would not have made sense, since it presumably conferred such rights on parents. He thought that despite congressional unwillingness to address the issue explicitly, nothing in the law limited his view that the IDEA was supposed to grant parents independent, enforceable rights over the education of their children. Moreover, Kennedy pointed to language in the IDEA that allows parents to serve on the IEP teams of their children and to challenge their adequacy. According to Kennedy, the IDEA granted parents their own interest in its dispute resolution procedures because such an approach was consistent with the law's overall intent.

Justice Kennedy disagreed with the board's reliance on the Supreme Court's holding in *Arlington Central School District Board of Education v. Murphy* (2006). In *Arlington,* the Court interpreted the IDEA, which was enacted pursuant to the authority of Congress under the Spending Clause, in Article I,

Section 8, of the U.S. Constitution, as requiring "clear notice" before imposing new obligations on states and local school boards. Kennedy rejected the board's assertion that *Arlington* required Spending Clause legislation such as the IDEA to provide clear, unambiguous notice in refusing to permit parents to be reimbursed for the costs of fees for expert witnesses and consultants. In deciding that *Winkelman* did not impose extra substantive obligations on states, Kennedy determined that his rationale did not impact basic monetary recovery under the IDEA.

As to the school board's final contention that the Court's judgment would have increased the costs to states by requiring them to respond to litigation by nonattorney parents, Kennedy remarked that such an approach did not involve the Spending Clause. He also responded that states and local boards would not be defenseless in the face of increased cases since the IDEA permits courts to award attorney fees to prevailing educational agencies if, for example, parents needlessly increase the cost of litigation. Kennedy thus remanded for further consideration as to whether school officials provided the child with a FAPE.

Justice Scalia's dissent, which was joined by Justice Thomas, conceded that the IDEA confers some independently enforceable rights on parents. Even so, he observed that the Court went too far in creating a new set of parental rights, because there was no justification for its rationale in the IDEA. Rather, Scalia agreed with the board that by allowing nonattorney parents to represent themselves in challenges over the placements of their children, the Court opened the door to litigation that would unnecessarily tax the resources of school systems as they seek to defend themselves from baseless claims.

Charles J. Russo

See also Attorney Fees; Free Appropriate Public Education; Least Restrictive Environment

Legal Citations

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006).

Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

Winkelman ex rel. Winkelman v. Parma City School District, 127 S. Ct. 1994 (2007).

Wisconsin v. Yoder

Wisconsin v. Yoder (1972) was the third of three significant Supreme Court cases, following *Meyer v. Nebraska* (1923) and *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary* (1925), that upheld the Fourteenth Amendment right of parents to direct the education of their children. However, because states had been made subject to the Free Exercise Clause of the First Amendment in *Cantwell v. Connecticut,* in 1940, *Yoder* also raised a free exercise claim. This entry looks at the case and the decision.

Facts of the Case

Yoder involved a criminal truancy charge against two Amish fathers who refused to enroll their children in public schools after they had completed the eighth grade in a one-room Amish school. The state of Wisconsin required, pursuant to its compulsory attendance law, that parents enroll their children in school between the ages of 7 and 16. In other words, this law would have required Amish children who had completed eighth grade at age 13 or 14 to attend public school until they reached the age of 16.

The fathers were found guilty of truancy, and each was fined $5. The Supreme Court of Wisconsin reversed the convictions, finding the application of the truancy law to the Amish to constitute a violation of the First Amendment's free exercise of religion provision.

The Court's Ruling

In a thorough and carefully reasoned opinion that explicated in a comprehensive manner the religious beliefs of the Amish, the U.S. Supreme Court upheld the decision of the state supreme court. In sum, the Court found three centuries of Amish religious beliefs and practice to be "inseparable and interdependent" (*Yoder,* p. 215). The Court was duly impressed with the Amish "life style [that had] not altered in fundamentals

for centuries" (p. 217). The Court found the following conclusion inescapable:

> [That] secondary schooling, by exposing Amish children to worldly influences in terms of attitudes, goals, and values contrary to beliefs, and by substantially interfering with the religious development of the Amish child and his integration into the way of life of the Amish faith community at the crucial adolescent stage of development, [would] contravene the basic religious tenets and practice of the Amish faith, both as to the parent and the child. (p. 218)

According to the Court, to compel Amish children to enroll in public high schools past the eighth grade would have mandated that they "either abandon belief and be assimilated into society at large, or be forced to migrate to some other and more tolerant region" (*Yoder,* p. 218).

The Court rejected the state of Wisconsin's argument that "its interest in its system of compulsory education is so compelling that even the established religious practices of the Amish must give way" (*Yoder,* p. 221), finding instead that the absence of 1 or 2 additional years of education would neither make the children burdens on society nor impair their health or safety. During these 1 or 2 years, the Amish children were not inactive, and the Court remarked favorably on "the adequacy of the Amish alternative mode of continuing informal vocational education" (p. 235) on their farms.

Although the Supreme Court upheld the Amish way of life against a state compulsory attendance challenge, it was careful to explain that since only the parents' religious rights were litigated in *Yoder,* no one had determined what the rights of the Amish children might have been had they wanted to enroll in a public high school. In his dissent, Justice Douglas pointedly observed as follows:

> It is the student's judgment, not his parents', that is essential if we are to give full meaning to what we have said about the Bill of Rights and of the right of students to be masters of their own destiny. (*Yoder,* p. 245)

To date, no court has taken on the challenge of addressing a direct challenge between parents' and children's rights. The closest that courts have come is reflected in *Circle Schools v. Pappert* (2004), in which the Third Circuit upheld a student's free expression right to challenge a state Pledge of Allegiance statute, while rejecting the parents' claim based on their right to direct the education of their children. This parental right grounded in *Meyer* and *Pierce* is an entrenched judicial tradition in the United States, and although students in public schools have constitutional rights pursuant to *Tinker v. Des Moines Independent Community School District* (1969), courts have not yet been disposed to use student rights as a vehicle to detract from the rights of parents.

Ralph D. Mawdsley

See also *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary; Tinker v. Des Moines Independent Community School District*

Legal Citations

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Circle Schools v. Pappert, 381 F.3d 172 (3d Cir. 2004).
Meyer v. Nebraska, 262 U. S. 390 (1923).
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

Wolman v. Walter

At issue in *Wolman v. Walter* (1977) was a challenge to a statute from Ohio that provided a variety of types of aid to nonpublic, mostly religiously affiliated schools and their students; more specifically, 691 of the 720 charted nonpublic schools were religiously based. Among the benefits in dispute were textbooks for subjects in secular instruction, standardized testing and scoring services, diagnostic speech and hearing services, remedial services, an array of instructional materials, and the use of school buses for field trips for nonpublic school students. In the initial round of litigation, a federal trial court upheld the statute against all challenges.

On further review, a fractured U.S. Supreme Court, in a majority opinion by Justice Blackmun that resulted in six additional opinions from the justices, partially upheld the statute's constitutionality, relying largely on the *Lemon v. Kurtzman* (1971) test. Based on its own earlier decisions in *Board of Education v. Allen* (1968) and *Meek v. Pittenger* (1975), the Court allowed the state to provide textbooks for use in instruction in secular subjects. Further, to the extent that the law simply reimbursed the nonpublic schools for costs associated with keeping records required by state law and did not pay them for creating or scoring the tests or for costs associated with their being administered, Blackmun upheld the law's constitutionality. He was satisfied that the statute passed the *Lemon* test, because it included appropriate safeguards to make certain that public money was not diverted for the religious purposes of the schools.

Justice Blackmun next wrote that since providing diagnostic services on-site in the nonpublic schools did not create an impermissible risk of fostering ideological views, there was no need for state officials to engage in such excessive surveillance, as this would have created an impermissible entanglement between church and state. He added that providing health services to the students in the nonpublic schools did not have the primary effect of aiding religion. Blackmun found that there was little or no educational content, insofar as diagnosticians had limited contact with children, and so there was minimal risk that they would transmit their religious perspectives to students.

As to therapeutic, guidance, and remedial services, however, including those rendered in mobile units, Justice Blackmun was of the opinion that they could be offered only at sites that were not physically or educationally identified with the nonpublic schools, in order to avoid having the impermissible effect of advancing religion. By taking such an approach—having the services provided by employees of the public schools—he thought there was no risk of excessive entanglement.

Turning to the instructional materials, Justice Blackmun noted that the statute provided items such as projectors, tape recorders, record players, maps and globes, and science kits. Yet even though he acknowledged that the loans of instructional materials and equipment was ostensibly limited to neutral and secular items, he struck down this part of the statute because he feared that this arrangement had the inescapably primary effect of providing a direct and substantial advancement of sectarian education. Blackmun expanded his analysis by observing that since it was impossible to separate the secular educational function of the schools from their religious goals, the law was unconstitutional.

As to the statute's final provision, the use of public school buses for field trips, Justice Blackmun decided that this, too, was unconstitutional. He declared that this part of the law was unacceptable because officials in the nonpublic schools had the ability to control the timing and frequency of the field trips, meaning that the schools, rather than the students, were the recipients of the aid to further their religious goals. According to Blackmun, the close supervision that public school officials would have had to provide to ensure that the field trips were of a secular nature meant that there would have been excessive entanglement between the religious schools and the state, in violation of the *Lemon* test.

Wolman's viability is questionable in light of the Supreme Court's plurality judgment (less than the required five justices joined the opinion to make it binding precedent) in *Mitchell v. Helms* (2000). In *Mitchell,* a dispute from Louisiana, the Court upheld the constitutionality of a federal law that permits the loans of instructional materials, including library books, computers, television sets, tape recorders, and maps, to religiously affiliated, nonpublic schools. Although the plurality explicitly reversed those parts of *Wolman* that were inconsistent with its judgment in *Mitchell,* since the ruling was a plurality, the status of such loans remains uncertain.

C. Daniel Raisch

See also *Board of Education v. Allen; Lemon v. Kurtzman; Meek v. Pittenger; Mitchell v. Helms;* State Aid and the Establishment Clause

Legal Citations

Board of Education v. Allen, 392 U.S. 236 (1968).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Meek v. Pittenger, 421 U.S. 349 (1975).

Mitchell v. Helms, 530 U.S. 793 (2000), *reh'g denied*, 530 U.S. 1296 (2000), *on remand sub nom. Helms v. Picard,* 229 F.3d 467 (5th Cir. 2000).
Wolman v. Walter, 433 U.S. 229 (1977).

WOOD V. STRICKLAND

At issue in *Wood v. Strickland* (1975) was whether school board members could be sued for monetary damages in the context of school discipline and, if so, under what conditions they may be financially liable. In *Wood,* the U.S. Supreme Court found that board members may be sued for monetary damages in school disciplinary proceedings under civil rights law, particularly 42 U.S. Code, Section 1983, but only under specified conditions.

The Basic Ruling

As a case of first impression, *Wood* focused on the procedural due process rights of students in Arkansas who were subjected to long-term suspensions for the use of alcoholic beverages at school. On further review of a judgment of the Eighth Circuit, which indicated that board members may be liable for depriving students of their rights, the Supreme Court reversed and remanded for further factual determinations.

In its analysis, the Supreme Court observed that school board members must be afforded some degree of financial immunity when administering student discipline, since doing so would enable them to act in the best interests of school communities without intimidation or fear of senseless litigation. The Court reasoned that in order to create safe school environments that are maximally conducive to learning, school board members and, by extension, other educational officials must be afforded the authority to administer discipline without tentativeness.

At the same time, the Supreme Court ruled that school board members do not have complete immunity because under certain conditions, they can be monetarily liable in school disciplinary proceedings. The Court was of the opinion that if school board members arbitrarily violate students' federal rights or act with malicious intent in denying their rights or cause them other injuries, they can be financially liable. Consistent with the need for school officials to exercise appropriate judgment and discretion in school disciplinary proceedings, the Court softened the impact of its ruling in specifying that students can recover damages only when school board members "acted with such an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot reasonably be characterized as being in good faith" (*Wood,* p. 322). The Supreme Court remanded the dispute to the Eighth Circuit, which returned the case to the trial court for further consideration based on its determination that school officials violated the students' rights to due process.

Impact of the Ruling

Wood is perhaps best known as setting a qualified immunity standard for educational officials, including school board members, meaning that they have a high degree of, but not complete immunity from, financial liability for their official actions. At the heart of its analysis, the Court recognized that in the history of public education, the administration of school discipline can be characterized as highly controversial, particularly in light of the inherent risk that suspension and expulsion pose to the protected liberties of students. Based on these risks and the frequent litigation associated with school discipline, *Wood* continues to provide some degree of clarity on the degree to which school officials may be liable for their actions.

Other courts frequently cite *Wood* for setting criteria by which board members and other school officials should be judged pursuant to the qualified immunity standard. Prior to *Wood,* lower courts differed on whether to apply subjective or objective criteria in deciding the question of financial damages. Using subjective criteria, school officials would have to act with malice or ill will toward students. On the other hand, pursuant to objective criteria, educators could be liable financially if they knew or should have known that their actions violated students' federally protected rights, regardless of whether they acted with malice or ill will.

In *Wood,* the Supreme Court explained that the appropriate standard for judging the actions of school

board members and other educational official should contain elements of both: Officials can be liable even absent proof of malice or ill will, but "good faith" errors in the administration of discipline do not constitute a basis for such liability.

In later cases, the Supreme Court provided additional clarity on the extent to which plaintiffs can recover damages from school officials, for example, in *Carey v. Piphus* (1978); the Court also removed the subjective criterion from consideration in the nonschool case of *Harlow v. Fitzgerald* (1982). In general, though, *Wood* set an enduring precedent that school officials have a great deal of latitude and protection from financial liability in the administration of school discipline. Even so, it is worth recalling that since the latitude and protection that educators enjoy is not absolute, they can be liable for intentionally violating the federally protected rights of students if they act with deliberate indifference to allegations of which they were aware.

M. Karega Rausch

See also *Carey v. Piphus;* Civil Rights Act of 1871 (Section 1983); Immunity; School Boards

Legal Citations

Carey v. Piphus, 435 U.S. 247 (1978).
Harlow v. Fitzgerald, 457 U.S. 800 (1982).
Wood v. Strickland, 420 U.S. 308 (1975), *on remand, sub nom. Strickland v. Inlow*, 519 F.2d 744 (8th Cir. 1975).

Wygant v. Jackson Board of Education

Wygant v. Jackson Board of Education (1986) addressed Equal Protection Clause jurisprudence concerning the use of racial classifications as applied to public school teachers who lose their jobs as part of an agreed-on reduction in force. In *Wygant,* a plurality of the Supreme Court agreed that it is necessary to apply strict scrutiny even when integration, not segregation, is the state's goal and that general concerns about societal discrimination are an insufficient ground for employing racial classifications. As specifically applied to education, *Wygant* is also cited as a dismissal of a "role model" theory as justification for race-conscious practices. Most recently, *Wygant* was cited for these propositions in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007).

Facts of the Case

Wygant involved a dispute over the application of the reduction-in-force, or layoff, provision of a collective bargaining agreement between the teachers' union and the Jackson (Michigan) Board of Education. According to the provision, "At no time will there be a greater percentage of minority personnel laid off than the current percentage of minority personnel employed at the time of the layoff" (*Wygant,* p. 270).

The facts revealed that the district had a history of racial tensions, although there was never a judicial declaration that the board engaged in discriminatory hiring practices. The provision was adopted as a necessary complement to the affirmative action hiring practices that the board adopted to create an integrated workforce.

In *Wygant,* the nonminority teachers who were affected by the layoffs challenged the provision as an improper use of a racial classification under the Equal Protection Clause and Title VII. A federal trial court dismissed most claims but ruled that the practice survived equal protection review. The Sixth Circuit affirmed that the school board had sufficiently justified the preferences used as necessary to redress societal discrimination in seeking to provide role models for minority students.

The Court Ruling

A sharply divided U.S. Supreme Court reversed in favor of the teachers. In a plurality, the justices found that since strict scrutiny applied, it was necessary to examine the facts in order to evaluate whether the school board's use of the racial classification was necessary and narrowly tailored to achieve a compelling state interest. In deciding that the provision failed both parts of the test, Justice Powell first explained, in perhaps the most cited quotation from the decision,

that "societal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy" (*Wygant,* p. 276).

At the same time, the plurality reasoned that the burden that the teachers who were released had suffered was too great to bear in furtherance of such a general goal. In contrast, the justices maintained that hiring preferences did not create the same effect and any burden was "diffused" among applicants generally.

Justice O'Connor, although agreeing with the outcome, wrote separately to express her view that the lower courts erred by not examining the propriety of the hiring goal. As such, she indicated that the school board's goal was improper because the number of minority teachers was tied to the number of minority students, when it should have been connected to the number of minority teachers available in the hiring pool. Justice White also concurred but wrote a short one-paragraph concurrence. He expressed his view that any policy that dismissed White teachers in order to add Black teachers should have been impermissible regardless of justification.

Justice Marshall penned a dissent in which he argued that the dispute should have been remanded because the trial court had not sufficiently explored the factual record. In addition, he thought that since the school board and the teachers' union voluntarily agreed to do so, they should have been permitted to adopt provisions that had the effect of preserving the benefits gained through preferential hiring practices. Justice Stevens filed a separate dissent, in which he asserted that the Court focused too heavily on the remedial justifications for the preferences that were used, while not sufficiently considering the prospective goals that the school board may have had in educating children for the future.

Julie F. Mead

See also Affirmative Action; Collective Bargaining; Due Process Rights: Teacher Dismissal; Equal Protection Analysis; Fourteenth Amendment; Reduction in Force; Title VII

Further Readings

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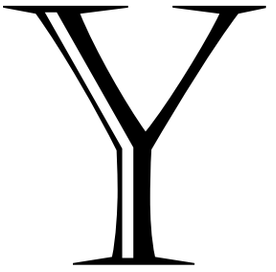
Legal Citations

Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).

Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).



Year-Round Schools

As the majority of American students are dusting off their backpacks, listening to their "iPods," and thinking about a new school year, others have been sitting in classes for much of the summer. It is not that these students have to go to summer school. Rather, they attend schools that have moved to a year-round schedule, another example of a reform that reflects how boards and legislatures are exercising their legal control over public education. This entry reviews the history of year-round education and considers the advantages and disadvantages of such a schedule.

The term *year-round schooling* is misleading in that it suggests an end to summer traditions such as summer camps or beach vacations. In reality, students in most U.S. year-round school systems spend about the same amount of days in class as peers in traditional calendar schools. The major difference is that calendars are arranged differently, with smaller, more frequent breaks. Year-round education essentially involves the reorganization of traditional school calendars so that long summer vacations are replaced by several smaller breaks, evenly spaced throughout the year.

Historical Background

Beliefs to the contrary notwithstanding, year-round schooling does not necessarily mean less vacation time for students and staff. The traditional school year calendar, with its early morning start times and 10- to 15-week summer breaks, was designed when most American families were earning a living by farming or running family businesses. At the time, school calendars revolved around the planting, cultivating, and harvesting of crops and working for the family farm or business so that children could be home to help during the busiest summer months. Schools retained this agrarian calendar after farming declined and the nation became more industrial, in part because it was difficult to conduct classes during the hot summer months without air-conditioning.

Beginning with *Stuart v. School District No. 1 of Village of Kalamazoo* (1874), the American legal system has recognized that local school boards, in addition to state legislatures, have the authority to engage in new educational initiatives. American schools began experimenting with a switch to year-round schedules on a larger scale during the early 1900s, and the idea began to take root in the 1970s and 1980s as studies demonstrated that American students were not scoring well on national and international tests.

According to the National Association for Year-Round Education (NAYRE), the trend is growing; more than 3,000 schools had year-round education programs during the 2006–2007 academic year. Previously, NAYRE reported that the number of year-round schools in the United States increased from just over 400 in the late 1980s to 2,880 during the 1999–2000 school year. While this represents less

than 4% of all schools, it is 4 times the number of students in year-round schools only a few years ago.

Advantages

Interest in implementing year-round schools can be attributed to three acknowledged advantages of such a calendar: increased student achievement; greater satisfaction among parents, teachers, and students; and cost savings. The first two are often mentioned in conjunction with all year-round schools, while cost savings are typically associated only with multitrack, year-round schools, as they can help postpone the need to build new schools in areas experiencing significant population growth.

Year-round schooling became popular because some educational leaders believe that the practice can enhance student and teacher performance. One idea is that if students and teachers are refreshed by more frequent breaks, they are less likely to burn out as easily. Some teachers also complain that on traditional schedules, too much time is spent reviewing in the fall after many students have forgotten what they learned the previous year. Further, many English as a Second Language (ESL) children fall behind because they are not exposed to English during the long summer breaks. Also, students requiring academic intervention do not have to wait to go to summer school to get help. Instead, they can attend enrichment/remedial classes earlier in the year, to catch problems more quickly. Thus, year-round schooling is designed to alleviate these concerns.

Supporters say year-round systems improve academic performance. They point to Japan, where student scores are higher than those in the United States and children attend classes 220 days a year on average, as opposed to 180 days in U.S. schools. Even so, debate remains.

When many school systems in Texas adopted year-round calendars in the 1990s, nearly half switched back. School officials made the change back because insofar as the program did not improve academic performance substantially, they were unable to win the cooperation of parents. Put another way, educators found it simply too hard to fight tradition. Conversely, the Oxnard, California, district has a long record of successful year-round schooling, having done so since 1979. Further, a 9-year analysis of Oxnard revealed that student test scores improved significantly without changing the basic education program.

Of course, academic performance is not the only concern of school boards. By switching to a year-round schedule on a multitrack system, with several groups of students rotating, some overcrowded districts have avoided the expense of building new schools, even with increased maintenance costs and higher pay for teachers factored in the totals. In addition, moving to year-around may require legal changes, as boards may be required to bargain with the unions of their employees over various aspects of schedule changes, especially with regard to such key issues as providing transportation.

Disadvantages

Critics challenge the idea that year-round schedules improve grades and have raised other concerns. Especially for multitrack districts, they maintain that scheduling issues can harm families. For example, a family with children in different schools operating on different tracks could have a tough time scheduling day care or family vacations. Another problematic area is that sports teams in competing districts could have different schedules, so athletes may have games scheduled during breaks. It is difficult for everyone to coordinate practice times when some students participate in sports in multitrack schools while other team members follow different tracks. In an attempt to offset difficulties of this type, supporters of year-round schools recommend single-track systems as much as possible, urging that all schools in a district try to adhere to the same schedule.

Many school boards adopted year-round schooling only in the elementary schools, since most students have more complicated schedules as they get older. Also, educators have discovered that older students have a harder time adjusting to such a radical change, since they are accustomed to long summer breaks. In addition, many high school students worry that they would not be able to obtain summer jobs to earn income to make ends meet or to afford extra things such as clothing or car payments.

Year-round schooling continues to be controversial in most districts, even as school systems from New

York to Los Angeles have experimented with new calendars in the hope of making positive changes to improve student performance. It is difficult to project whether the idea will become more popular in the long term, as parents and administrators try to devise the best solution.

What the Research Says

Research has addressed the issue of the quality of time as it relates to student learning. Research on time on task and academic learning time have focused on the relationship between the amount of time students spend engaged in academic activities and how much they learn. Studies in this area have demonstrated that simply exposing students to classrooms and teachers is not sufficient to affect learning, implying that the educational quality of the activities and interactions that occur in those settings mediates the relationship between time and learning.

Reviews of the existing literature on year-round education generally agree that the outcomes are at least as positive as (or better than) those achieved under the traditional school calendar. However, the number of quality studies conducted and published in this area is limited.

Although researchers have not adequately addressed the reasons to explain why achievement may be slightly higher in year-round schools, one possibility is that this approach can use breaks to provide remediation and enrichment activities, thereby increasing students' exposure to curricula. Another possible explanation comes from a body of research that points toward a decline in achievement during the long summer vacations associated with the traditional school calendar. Year-round advocates claim that dividing the long summer vacation period into smaller pieces helps alleviate some of the academic loss that occurs over the summer in traditional school programs.

At least one study reported that while students who attend year-round schools may give up a few days of vacation, they gain a small advantage over their counterparts who take 10- to 15-week traditional breaks. Another study found that students lose on average 1 month of learning over a long summer break. Students in year-round schools tend to lose only about half that much, thereby lending support to those who say that evenly spaced vacations are better for students. At the same time, researchers caution that proponents of year-round schooling should not be too extravagant in their claims: Schedules do help achievement, but the studies supporting year-round schooling contain flaws and note that the impact of schedules is not large.

C. Daniel Raisch

See also Compulsory Attendance; School-Based Decision Making; School Choice; Transportation, Students' Rights to

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Z

Zelman v. Simmons-Harris

At issue in *Zelman v. Simmons Harris* (2002) was the constitutionality of a program from Ohio that provided educational vouchers for children from poor families. Reversing earlier judgments to the contrary, the U.S. Supreme Court upheld the constitutionality of the program because it offered aid pursuant to neutral secular criteria that neither favored nor disfavored religion, was available to religious and secular beneficiaries, and was available to parents based on their own independent, private choices.

Background of the Case

The Supreme Court has generally interpreted the Establishment Clause of the First Amendment to the U.S. Constitution as preventing direct governmental funding of religious institutions. However, the government can provide indirect aid in a variety of ways. For instance, taxpayers can take deductions for donations to churches, and church property is tax-exempt. The federal courts, therefore, have long struggled to draw a line with regard to the types of public financial assistance that may be provided for K–12 education in religiously affiliated nonpublic schools. A key case in this area is *Zelman v. Simmons-Harris* (2002), wherein the Supreme Court upheld the Ohio Pilot Scholarship Program, a plan that provides vouchers for students from low-income families in Cleveland.

School voucher policies had been a point of academic debate ever since Milton Friedman put forward the concept of universal vouchers in 1955. Actual public voucher plans have been much less ambitious than Friedman proposed and have targeted needy students. In addition to Cleveland's plan, vouchers now exist in Milwaukee and Washington, D.C. (benefiting low-income families), as well as Florida and Utah (benefiting special-needs children). Arizona, Florida, Iowa, and Pennsylvania also have policies akin to vouchers, but implemented through a tax credit mechanism. All of these policies are effectively insulated from federal constitutional challenges due to *Zelman.*

When considering Establishment Clause issues, the predominant approach of the current Supreme Court focuses on the idea of governmental neutrality. Under this type of analysis, the Establishment Clause prohibits the government from acting nonneutrally; by preferring one religion over another; or by promotion of, or hostility to, religion generally.

The Court, applying this neutrality approach, allowed states to provide aid in supplying nonreligious textbooks for students in religiously affiliated nonpublic schools (*Meek v. Pittenger,* 1975); reimbursement to religious schools for the grading of tests that were prepared, mandated, and administered by the state (*Committee for Public Education & Religious Liberty v. Regan,* 1980); parental tax deductions for school expenses, including tuition (*Mueller v. Allen,* 1983); a sign language interpreter for a deaf

student who attended a Roman Catholic high school (*Zobrest v. Catalina Foothills School District,* 1993); reading teachers for low-performing students eligible for Title I services, including for children who attended religious schools (*Agostini v. Felton,* 1997); and computers for students in religious and public schools (*Mitchell v. Helms,* 2000).

As applied by the majority in *Zelman,* the neutrality principle concerned the evenhandedness of the state's distribution of public funding in the voucher program. In so finding, the Court relied on the tenet it enunciated in *Everson v. Board of Education of Ewing Township* (1947), distinguishing between direct aid to religious institutions and indirect aid as part of a neutrally applied program whereby funding makes its way to religious institutions only through intervening choices of parents or other third parties.

The Court's Ruling

In *Zelman,* the Supreme Court stressed that the parents in Cleveland had a variety of nonreligious choices, including choices among public schools. Accordingly, the Court characterized the funding through the Cleveland voucher plan as offered to a broad class of citizens, not just to those seeking religious options. Further, the Court noted that parents could voluntarily choose among a selection of religious schools and some nonreligious private schools that participated in the program. For these reasons, the Court held that the program was neutral toward religion.

Even though the Supreme Court devoted considerable space to pointing out educational difficulties facing students in Cleveland's public schools, its eventual legal reasoning did not appear to rest on these troubles. Put another way, *Zelman*'s value as precedent appears to extend to laws providing vouchers to students in academically high-achieving school systems as well as struggling districts.

The Supreme Court's interpretation of the Establishment Clause remains in flux. Even so, it is likely that for the foreseeable future a majority of justices will continue to view government neutrality toward religion as the Court's guiding principle, at least in cases involving vouchers. Policymakers designing such plans should thus have approximate guidelines concerning how to craft statutes that can pass constitutional muster. Plans that grant benefits to students in religiously affiliated nonpublic schools beyond those available to their peers in public schools or otherwise favor religious institutions are likely to fall outside of these guidelines. Conversely, courts are likely to uphold plans that extend benefits to students in religiously affiliated nonpublic schools that are also offered to their peers in public schools. Advocates on both sides of the issue will, nonetheless, have plenty of room for argument concerning where on this continuum any given voucher or tax credit policy happens to fall.

Kevin G. Welner

See also *Agostini v. Felton; Everson v. Board of Education of the Ewing Township; Meek v. Pittenger; Mitchell v. Helms; Mueller v. Allen;* State Aid and the Establishment Clause; Tuition Tax Credits; Vouchers; *Zobrest v. Catalina Foothills School District*

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Zelman v. Simmons-Harris (Excerpts)

In Zelman v. Simmons-Harris, *the Supreme Court extended the boundaries of permissible state aid under the Establishment Clause in upholding a voucher program that allowed poor students to attend religiously affiliated nonpublic schools.*

Supreme Court of the United States

ZELMAN

v.

SIMMONS-HARRIS

536 U.S. 639.

Argued Feb. 20, 2002.

Decided June 27, 2002.

Chief Justice REHNQUIST delivered the opinion of the Court.

The State of Ohio has established a pilot program designed to provide educational choices to families with children who reside in the Cleveland City School District. The question presented is whether this program offends the Establishment Clause of the United States Constitution. We hold that it does not.

There are more than 75,000 children enrolled in the Cleveland City School District. The majority of these children are from low-income and minority families. Few of these families enjoy the means to send their children to any school other than an inner-city public school. For more than a generation, however, Cleveland's public schools have been among the worst performing public schools in the Nation. In 1995, a Federal District Court declared a "crisis of magnitude" and placed the entire Cleveland school district under state control. Shortly thereafter, the state auditor found that Cleveland's public schools were in the midst of a "crisis that is perhaps unprecedented in the history of American education." The district had failed to meet any of the 18 state standards for minimal acceptable performance. . . .

It is against this backdrop that Ohio enacted, among other initiatives, its Pilot Project Scholarship Program. The program provides financial assistance to families in any Ohio school district that is or has been "under federal court order requiring supervision and operational management of the district by the state superintendent." Cleveland is the only Ohio school district to fall within that category.

The program provides two basic kinds of assistance to parents of children in a covered district. First, the program provides tuition aid for students in kindergarten through third grade, expanding each year through eighth grade, to attend a participating public or private school of their parent's choosing. Second, the program provides tutorial aid for students who choose to remain enrolled in public school.

The tuition aid portion of the program is designed to provide educational choices to parents who reside in a covered district. Any private school, whether religious or nonreligious, may participate in the program and accept program students so long as the school is located within the boundaries of a covered district and meets statewide educational standards. Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to "advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion." Any public school located in a school district adjacent to the covered district may also participate in the program. Adjacent public schools are eligible to receive a $2,250 tuition grant for each program student accepted in addition to the full amount of per-pupil state funding attributable to each additional student. All participating schools, whether public or private, are required to accept students in accordance with rules and procedures established by the state superintendent.

Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to $2,250. For these lowest income families, participating private schools may not charge a parental copayment greater than $250. For all other families, the program pays 75% of tuition costs, up to $1,875, with no copayment cap. These families receive tuition aid only if the number of available scholarships exceeds the number of low-income children who choose to participate. Where tuition aid is spent depends solely upon where parents who receive tuition aid choose to enroll their child. If parents choose a private school, checks are made payable to the parents who then endorse the checks over to the chosen school. . .

The tutorial aid portion of the program provides tutorial assistance through grants to any student in a covered district who chooses to remain in public school. Parents arrange for registered tutors to provide assistance to their children and then submit bills for those services

to the State for payment. Students from low-income families receive 90% of the amount charged for such assistance up to $360. All other students receive 75% of that amount. The number of tutorial assistance grants offered to students in a covered district must equal the number of tuition aid scholarships provided to students enrolled at participating private or adjacent public schools.

The program has been in operation within the Cleveland City School District since the 1996–1997 school year. In the 1999–2000 school year, 56 private schools participated in the program, 46 (or 82%) of which had a religious affiliation. None of the public schools in districts adjacent to Cleveland have elected to participate. More than 3,700 students participated in the scholarship program, most of whom (96%) enrolled in religiously affiliated schools. Sixty percent of these students were from families at or below the poverty line. In the 1998–1999 school year, approximately 1,400 Cleveland public school students received tutorial aid. This number was expected to double during the 1999–2000 school year.

The program is part of a broader undertaking by the State to enhance the educational options of Cleveland's schoolchildren in response to the 1995 takeover. That undertaking includes programs governing community and magnet schools. Community schools are funded under state law but are run by their own school boards, not by local school districts. . These schools enjoy academic independence to hire their own teachers and to determine their own curriculum. They can have no religious affiliation and are required to accept students by lottery. During the 1999–2000 school year, there were 10 startup community schools in the Cleveland City School District with more than 1,900 students enrolled. For each child enrolled in a community school, the school receives state funding of $4,518, twice the funding a participating program school may receive.

Magnet schools are public schools operated by a local school board that emphasize a particular subject area, teaching method, or service to students. For each student enrolled in a magnet school, the school district receives $7,746, including state funding of $4,167, the same amount received per student enrolled at a traditional public school. As of 1999, parents in Cleveland were able to choose from among 23 magnet schools, which together enrolled more than 13,000 students in kindergarten through eighth grade. These schools provide specialized teaching methods, such as Montessori, or a particularized curriculum focus, such as foreign language, computers, or the arts.

In 1996, respondents, a group of Ohio taxpayers, challenged the Ohio program in state court on state and federal grounds. The Ohio Supreme Court rejected respondents' federal claims, but held that the enactment of the program violated certain procedural requirements of the Ohio Constitution. The state legislature immediately cured this defect, leaving the basic provisions discussed above intact.

In July 1999, respondents filed this action in United States District Court, seeking to enjoin the reenacted program on the ground that it violated the Establishment Clause of the United States Constitution. In August 1999, the District Court issued a preliminary injunction barring further implementation of the program which we stayed pending review by the Court of Appeals. In December 1999, the District Court granted summary judgment for respondents. In December 2000, a divided panel of the Court of Appeals affirmed the judgment of the District Court, finding that the program had the "primary effect" of advancing religion in violation of the Establishment Clause. The Court of Appeals stayed its mandate pending disposition in this Court. We granted certiorari and now reverse the Court of Appeals.

The Establishment Clause of the First Amendment, applied to the States through the Fourteenth Amendment, prevents a State from enacting laws that have the "purpose" or "effect" of advancing or inhibiting religion. There is no dispute that the program challenged here was enacted for the valid secular purpose of providing educational assistance to poor children in a demonstrably failing public school system. Thus, the question presented is whether the Ohio program nonetheless has the forbidden "effect" of advancing or inhibiting religion.

To answer that question, our decisions have drawn a consistent distinction between government programs that provide aid directly to religious schools, and programs of true private choice, in which government aid reaches religious schools only as a result of the genuine and independent choices of private individuals. While our jurisprudence with respect to the constitutionality of direct aid programs has "changed significantly" over the past two decades, our jurisprudence with respect to true private choice programs has remained consistent and unbroken. Three times we have confronted Establishment Clause challenges to neutral government programs that provide aid directly to a broad class of individuals,

who, in turn, direct the aid to religious schools or institutions of their own choosing. Three times we have rejected such challenges.

In *Mueller v. Allen*, we rejected an Establishment Clause challenge to a Minnesota program authorizing tax deductions for various educational expenses, including private school tuition costs, even though the great majority of the program's beneficiaries (96%) were parents of children in religious schools. . . .

That the program was one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools, was sufficient for the program to survive scrutiny under the Establishment Clause.

In *Witters* [*v. Washington Department of Services for the Blind*], we used identical reasoning to reject an Establishment Clause challenge to a vocational scholarship program that provided tuition aid to a student studying at a religious institution to become a pastor. . . .

. . . .

Finally, in *Zobrest v.* [*Catalina Foothills School District*], we applied *Mueller* and *Witters* to reject an Establishment Clause challenge to a federal program that permitted sign-language interpreters to assist deaf children enrolled in religious schools. . . . Looking once again to the challenged program as a whole, we observed that the program "distributes benefits neutrally to any child qualifying as 'disabled.' Its "primary beneficiaries," we said, were "disabled children, not sectarian schools."

. . . .

Mueller, Witters, and *Zobrest* thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits. . . .

We believe that the program challenged here is a program of true private choice, consistent with *Mueller, Witters,* and *Zobrest,* and thus constitutional. As was true in those cases, the Ohio program is neutral in all respects toward religion. It is part of a general and multifaceted undertaking by the State of Ohio to provide educational opportunities to the children of a failed school district. It confers educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.,* any parent of a school-age child who resides in the Cleveland City School District. The program permits the participation of *all* schools within the district, religious or nonreligious. Adjacent public schools also may participate and have a financial incentive to do so. Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.

There are no "financial incentive[s]" that "ske[w]" the program toward religious schools. Such incentives "[are] not present . . . where the aid is allocated on the basis of neutral, secular criteria that neither favor nor disfavor religion, and is made available to both religious and secular beneficiaries on a nondiscriminatory basis." The program here in fact creates financial *dis*incentives for religious schools, with private schools receiving only half the government assistance given to community schools and one-third the assistance given to magnet schools. Adjacent public schools, should any choose to accept program students, are also eligible to receive two to three times the state funding of a private religious school. Families too have a financial disincentive to choose a private religious school over other schools. Parents that choose to participate in the scholarship program and then to enroll their children in a private school (religious or nonreligious) must copay a portion of the school's tuition. Families that choose a community school, magnet school, or traditional public school pay nothing. Although such features of the program are not necessary to its constitutionality, they clearly dispel the claim that the program "creates . . . financial incentive[s] for parents to choose a sectarian school."

Respondents suggest that even without a financial incentive for parents to choose a religious school, the program creates a "public perception that the State is endorsing religious practices and beliefs." But we have repeatedly recognized that no reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement. The

argument is particularly misplaced here since "the reasonable observer in the endorsement inquiry must be deemed aware" of the "history and context" underlying a challenged program. Any objective observer familiar with the full history and context of the Ohio program would reasonably view it as one aspect of a broader undertaking to assist poor children in failed schools, not as an endorsement of religious schooling in general.

There also is no evidence that the program fails to provide genuine opportunities for Cleveland parents to select secular educational options for their school-age children. Cleveland schoolchildren enjoy a range of educational choices: They may remain in public school as before, remain in public school with publicly funded tutoring aid, obtain a scholarship and choose a religious school, obtain a scholarship and choose a nonreligious private school, enroll in a community school, or enroll in a magnet school. That 46 of the 56 private schools now participating in the program are religious schools does not condemn it as a violation of the Establishment Clause. The Establishment Clause question is whether Ohio is coercing parents into sending their children to religious schools, and that question must be answered by evaluating *all* options Ohio provides Cleveland schoolchildren, only one of which is to obtain a program scholarship and then choose a religious school.

Justice SOUTER speculates that because more private religious schools currently participate in the program, the program itself must somehow discourage the participation of private nonreligious schools. But Cleveland's preponderance of religiously affiliated private schools certainly did not arise as a result of the program; it is a phenomenon common to many American cities. Indeed, by all accounts the program has captured a remarkable cross-section of private schools, religious and nonreligious. It is true that 82% of Cleveland's participating private schools are religious schools, but it is also true that 81% of private schools in Ohio are religious schools. To attribute constitutional significance to this figure, moreover, would lead to the absurd result that a neutral school-choice program might be permissible in some parts of Ohio, such as Columbus, where a lower percentage of private schools are religious schools, Likewise, an identical private choice program might be constitutional in some States, such as Maine or Utah, where less than 45% of private schools are religious schools, but not in other States, such as Nebraska or Kansas, where over 90% of private schools are religious schools.

Respondents and Justice SOUTER claim that even if we do not focus on the number of participating schools that are religious schools, we should attach constitutional significance to the fact that 96% of scholarship recipients have enrolled in religious schools. They claim that this alone proves parents lack genuine choice, even if no parent has ever said so. We need not consider this argument in detail, since it was flatly rejected in *Mueller,* where we found it irrelevant that 96% of parents taking deductions for tuition expenses paid tuition at religious schools. Indeed, we have recently found it irrelevant even to the constitutionality of a direct aid program that a vast majority of program benefits went to religious schools. The constitutionality of a neutral educational aid program simply does not turn on whether and why, in a particular area, at a particular time, most private schools are run by religious organizations, or most recipients choose to use the aid at a religious school. As we said in *Mueller,* "[s]uch an approach would scarcely provide the certainty that this field stands in need of, nor can we perceive principled standards by which such statistical evidence might be evaluated."

This point is aptly illustrated here. The 96% figure upon which respondents and Justice SOUTER rely discounts entirely (1) the more than 1,900 Cleveland children enrolled in alternative community schools, (2) the more than 13,000 children enrolled in alternative magnet schools, and (3) the more than 1,400 children enrolled in traditional public schools with tutorial assistance. Including some or all of these children in the denominator of children enrolled in nontraditional schools during the 1999–2000 school year drops the percentage enrolled in religious schools from 96% to under 20%. The 96% figure also represents but a snapshot of one particular school year. In the 1997–1998 school year, by contrast, only 78% of scholarship recipients attended religious schools. The difference was attributable to two private nonreligious schools that had accepted 15% of all scholarship students electing instead to register as community schools, in light of larger per-pupil funding for community schools and the uncertain future of the scholarship program generated by this litigation. Many of the students enrolled in these schools as scholarship students remained enrolled as community school students, thus demonstrating the arbitrariness of counting one type of school but not the other to assess primary effect. In spite of repeated questioning from the Court at oral argument, respondents offered no convincing justification for their approach, which relies entirely on such arbitrary classifications.

Respondents finally claim that we should look to *Committee for Public Ed. & Religious Liberty v. Nyquist* to decide these cases. We disagree for two reasons. First, the program in *Nyquist* was quite different from the program challenged here. *Nyquist* involved a New York program that gave a package of benefits exclusively to private schools and the parents of private school enrollees. Although the program was enacted for ostensibly secular purposes, we found that its "function" was "unmistakably to provide desired financial support for nonpublic, sectarian institutions." Its genesis, we said, was that private religious schools faced "increasingly grave fiscal problems." The program thus provided direct money grants to religious schools. It provided tax benefits "unrelated to the amount of money actually expended by any parent on tuition," ensuring a windfall to parents of children in religious schools. It similarly provided tuition reimbursements designed explicitly to "offe[r] . . . an incentive to parents to send their children to sectarian schools." Indeed, the program flatly prohibited the participation of any public school, or parent of any public school enrollee. Ohio's program shares none of these features.

Second, were there any doubt that the program challenged in *Nyquist* is far removed from the program challenged here, we expressly reserved judgment with respect to "a case involving some form of public assistance (*e.g.,* scholarships) made available generally without regard to the sectarian-nonsectarian, or public-nonpublic nature of the institution benefited." That, of course, is the very question now before us, and it has since been answered, first in *Mueller,* then in *Witters,* and again in *Zobrest.* To the extent the scope of *Nyquist* has remained an open question in light of these later decisions, we now hold that *Nyquist* does not govern neutral educational assistance programs that, like the program here, offer aid directly to a broad class of individual recipients defined without regard to religion.

In sum, the Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. In keeping with an unbroken line of decisions rejecting challenges to similar programs, we hold that the program does not offend the Establishment Clause.

The judgment of the Court of Appeals is *reversed.*

It is so ordered.

Citation: *Zelman v. Simmons-Harris,* 536 U.S. 639 (2002).

Zero Reject

Zero reject is one of the key principles of the Individuals with Disabilities Education Improvement Act (IDEA), originally known as the Education for All Handicapped Children Act. IDEA requires states, through local educational agencies or school boards, to locate, evaluate, and serve all eligible students with disabilities aged 3 to 21. Zero reject mandates that school officials cannot exclude any students with disabilities from a free appropriate public education in the least restrictive environment. Pursuant to the contents of their individualized education programs, students with disabilities must be served at no cost to their families despite the nature or severity of their conditions or the potential of educational benefit. Further, school boards cannot cease services to students due to their expulsions, incarcerations, hospitalizations, or parental placement in nonpublic schools (although there are significant limitations when dealing with religious institutions). This entry describes how the principle developed and how it is applied.

Background

Prior to the enactment of a federal special education law in 1975, over 1 million children with disabilities were excluded from public schools or served inadequately. While many states attempted to serve students with mild disabilities, officials regularly denied services to those who had severe and multiple impairments. School codes often permitted the exclusion of students who were deemed "uneducable or untrainable," those who were judged as unable to benefit from further education, or those who did not have a mental age of a 5-year-old.

Officials in public schools often turned away students who were not yet toilet trained, and children were routinely placed on waiting lists or told to return when they could observe additional progress. In response to this widespread exclusion, the zero reject principle of the IDEA mandated that local educational agencies provide educations for every student with a disability, without conditions or exceptions. Even though the term *zero reject* is not used in the language of the IDEA, the concept is clearly embedded in the federal law as clarified by case law.

The seminal case involving zero reject arose in New Hampshire, where a local school board sought to stop paying expenses associated with providing services for a student in a residential facility who suffered from multiple profound disabilities. The board maintained that it should not have to pay for all of the child's expenses, because most had little, or nothing, to do with education. The board also believed that the child did not qualify for special education due to his inability to benefit from instruction and his limited learning capacity.

Reversing in favor of the student in *Timothy W. v. Rochester, New Hampshire, School District* (1989), the First Circuit clarified the reach of the concept of zero reject in ruling that that the severity of the student's handicapping conditions did not justify the denial of services. The court emphasized that the zero reject principle ensured that a student's potential for educational benefit could not be a prerequisite for enrollment or receipt of services.

Practice

As reflected by the principle of zero reject, the severity of students' disabilities simply cannot be a consideration for exclusion or the denial of services. Accordingly, all eligible students with disabilities must continue to receive services regardless of where they are placed. In fact, the denial of services to students with disabilities who have been expelled or are placed in any of the other array of settings is in direct violation of the zero reject principle.

The zero reject principle includes an additional responsibility for educational agencies under the IDEA's "Child Find" provisions. Child Find is an ongoing process that requires educational officials to provide public awareness campaigns and free referral and evaluation services to help identify young children with disabilities. Child Find services often develop and distribute information to the public that describes special education services, provides information for families concerned about their children's development, and assists families in accessing resources. The IDEA mandates this comprehensive Child Find system to ensure that all children who are in need of special education services are located, evaluated, identified, and served. In addition, the Child Find process requires states to report an accurate child count to the federal government each year that is consistent with the IDEA's principle of zero reject.

Kara Hume

See also Disabled Persons, Rights of; Free Appropriate Public Education; Inclusion; Individualized Education Program (IEP); Least Restrictive Environment

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Zero Tolerance

Zero tolerance policies have been established in virtually all schools in the United States. These policies originated in the Gun-Free Schools Act of 1994, which was established to further the goal of making schools safe—violence- and drug-free—under the Goals 2000: Educate America Act of 1994. According to the Gun-Free Schools Act, any school receiving funds under the Elementary and Secondary Schools

Act of 1965 must establish a zero tolerance policy for firearm weapons. Such policies, however, have been expanded to include drugs as well as some kinds of behavior. This entry discusses the policies, summarizes some related legal cases, and offers some assessments of effectiveness.

What Zero Tolerance Policies Say

When instituting zero tolerance policies, states expanded their scope to include all weapons. In addition, states included illegal drugs in their zero tolerance policies in an attempt to ensure that schools remain drug free. Further, many local school boards extended their zero tolerance policies to include look-alike drugs and weapons, as well as items that can be construed as weapons. After the shootings at Columbine High School, in Colorado, in 1999, many boards enacted zero tolerance policies for bullying and weaponless fights. Finally, many boards established zero tolerance policies for threatening language.

Controversy has surrounded zero tolerance policies from the start, not only because of their increasing scope but also because they carry punishments that range from short-term suspensions to permanent expulsions from school. Consequently, zero tolerance policies have raised various issues dealing with the due process rights of students.

In *Goss v. Lopez* (1975), the U.S. Supreme Court provided some guidance for due process in cases of short-term suspensions, 10 days or less. The Court ruled that since education can be an important property interest, it is covered by substantive due process, especially for exclusions of 10 days or more, even though it did not address these long-term exclusions.

In other words, especially when dealing with zero tolerance, before educators can deprive students of their right to schooling, officials must prove the existence of a compelling state interest while providing them with fair procedures. In *Goss,* the Supreme Court recognized that maintaining disciplined and orderly learning environments is a compelling state interest. Yet to balance this governmental need with students' property interests, the Court pointed out that students have the right to due process in school discipline cases. To this end, the *Goss* Court indicated that procedural due process in school cases minimally must include oral or written notification of the specific violation(s) and the intended punishment, an opportunity to dispute the charges before a fair and impartial third-party decision maker, and an explanation of the evidence based on the record on which the charges are based.

The Court also explained that long-term suspensions may require more formal due process procedures but, again, did not offer guidance for these longer exclusions. Of course, the difficulty with zero tolerance policies is that they often do not provide many of these safeguards. To date, though, the Court has not addressed either zero tolerance policy or any long-term suspension case.

Limits Set by Courts

Courts have usually, but not always, ruled that zero tolerance policies are constitutional because they relate to schools' interest in maintaining safe and orderly learning environments. Even so, in addition to the due process issues raised by the punishments imposed under zero tolerance policies, concerns arise over issues of knowledge and intent. More specifically, controversies have arisen surrounding whether students can be suspended or expelled if they either did not know that they possessed items of contraband under zero tolerance policies or had no intention of using these objects. In litigation involving challenges to zero tolerance policies, as reflected by the following two cases, the courts sometimes reach divergent outcomes, based on unique factual circumstances, in addressing myriad legal questions under zero tolerance policies.

Seal v. Morgan (2000) involved a suspension of a student after school officials discovered a knife in the glove compartment of his vehicle. The facts reflected both that the knife did not belong to the student and that he was unaware that it was there. In ordering the student's reinstatement, the Sixth Circuit reasoned that suspending or expelling an otherwise innocent student for possessing a weapon that he did not know that he possessed did not rationally relate to any legitimate state interest.

In criticizing the underlying policy, the court made two important observations. First, the court remarked

that the student could not possibly have harmed others with the weapon because he was unaware that it was in his possession. Second, because the student had no knowledge that he possessed the weapon, the court posited that he had no intent to violate the policy.

Ratner v. Loudoun County Public Schools (2001) concerned the suspension of a student after officials found a knife in his locker. The student explained to officials that he took the knife from a friend at school when she told him about the knife and said she intended to kill herself with it. The student maintained that he never intended to harm anyone with the knife and planned to tell both his parents and the parents of his friend after school.

In its analysis, the court focused on whether the student was aware of the policy and whether his actions violated it. The court was of the opinion that although the student's intention was to prevent his friend's suicide, he did knowingly violate the zero tolerance policy. The court thus concluded that since school officials provided the student with due process, they had the authority to suspend him from school.

Are Zero Tolerance Policies Effective?

The controversy surrounding zero tolerance policies also includes concerns over their efficacy, centering on two main issues. First, critics point out that school-associated deaths, which zero tolerance policies were meant to address, are relatively rare. Second, critics also note that in the 7 years after these policies were introduced, research data showed no significant effect of zero tolerance policies in reducing school violence.

At the same time, opponents criticize zero tolerance policies for being unfair and contrary to the developmental needs of children. Moreover, as minority and special needs students are disproportionately affected, questions can be raised as to whether zero tolerance policies violate students' rights to equal educational opportunity. A final concern about zero tolerance policies is that they have a tendency to criminalize children and their behavior.

In sum, it is clear that school officials need and parents support policies that afford them the opportunity to keep schools as safe and orderly learning environments. Yet it is not evident that zero tolerance policies have, or are able to have, accomplished their stated goal of helping to ensure school safety.

Patricia A. L. Ehrensal

See also *Goss v. Lopez*

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Seal v. Morgan, 229 F.3d 567 (6th Cir. 2000).

Zobrest v. Catalina Foothills School District

In *Zobrest v. Catalina Foothills School District* (1993), the U.S. Supreme Court found that under the Individuals with Disabilities Education Act (IDEA), a school board was required to provide the on-site services of a sign language interpreter to a hearing-impaired student in a private religious school. This entry describes the case and the Court's ruling.

Facts of the Case

The controversy in *Zobrest* began when the parents of a profoundly deaf student who attended a religious

school asked officials on their local public school board to supply their son with a sign language interpreter for all of his classes, under the IDEA. After obtaining an opinion from the county attorney, the board refused that request but offered to provide a sign language interpreter within the public schools.

After the parents filed suit, the federal trial court in Arizona held that furnishing a sign language interpreter would have violated the First Amendment because the interpreter would have had the effect of promoting religious development at government expense. According to stipulations made by the parties, the interpreter would have been called on to interpret religious doctrine, since religious themes permeated classroom instruction.

A divided Ninth Circuit affirmed that providing a sign language interpreter would have violated the First Amendment because doing so failed the second part of the Supreme Court's test in *Lemon v. Kurtzman* (1971). The court decided that the interpreter would have been the instrumentality conveying the religious message and that by placing the interpreter in the religious school, the local board would have created the appearance that it was jointly sponsoring the school's activities. The court pointed out that while denying the interpreter placed a burden on the parents' free exercise rights, this burden was justified by a compelling state interest. The court explained that the government had a compelling state interest in ensuring that the First Amendment was not violated and there were no less restrictive means of accomplishing that goal.

The Court's Ruling

On further review, in a 5-to-4 decision, the Supreme Court reversed in favor of the parents. Chief Justice Rehnquist authored the majority's opinion, in which he ruled that the service of a sign language interpreter in this case was part of a general government program that distributed benefits neutrally to any child who qualified as disabled under the IDEA, without regard to whether the school attended was sectarian or nonsectarian, public or private. Rehnquist added that by giving the parents the freedom of choice to select a school, the IDEA ensured that a government-paid interpreter would be present in a parochial school only as a result of the parents' private decision.

Rehnquist thus determined that the IDEA did not create any financial incentive for parents to choose a religious school and the interpreter's presence there could not be attributed to state decision making. The only economic benefit the religious school might have received would have been indirect, the chief justice wrote, and that would have occurred only if the school made a profit on each student, if the student would not have attended the school without the interpreter, and if the student's seat would have remained unfilled. Rehnquist reasoned that the provision of the interpreter would not have relieved the religious school of any costs that it would otherwise have borne. Rehnquist decided that aiding this student and his parents did not amount to a direct subsidy of the religious school because he, not the school, was the primary beneficiary of the IDEA. Further, Rehnquist was convinced that the task of a sign language interpreter was different from that of a teacher or guidance counselor insofar as a sign language interpreter would not add or subtract from the pervasively sectarian environment in which the student's parents had chosen to place him.

Justice Blackmun, in a dissenting opinion, indicated that the school board argued that the IDEA did not require it to furnish an interpreter at a private school as long as special education services were made available at a public school and that the IDEA's regulations prohibited the use of federal funds for religious worship, instruction, and proselytization. Blackmun believed that the case should have been vacated and remanded for decisions on those issues.

Moreover, Justice Blackmun remarked that a state-employed sign language interpreter would have been required to communicate the religious material in the religious and secular classes the student attended at the religious school. In an environment so pervaded by religious discussions, Blackmun was convinced that the interpreter's every gesture would have been infused with religious significance so that the sign language interpreter would serve as a conduit for the student's religious education, assisting the school in its mission of religious indoctrination.

Zobrest is significant because it signaled the beginning of the revitalization of the Child Benefit Test by

allowing the on-site delivery of services for a student who attended a religiously affiliated, nonpublic school. As such, it set the stage for further rulings that allow public school districts to provide some educational services to students who attend sectarian schools. Specifically, 4 years after *Zobrest,* in *Agostini v. Felton* (1997), the Court made it clear that Title I remedial services could be provided on the premises of religiously affiliated nonpublic schools.

Allan G. Osborne, Jr.

See also *Agostini v. Felton;* Child Benefit Test; Disabled Persons, Rights of; *Lemon v. Kurtzman;* State Aid and the Establishment Clause

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Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

Zorach v. Clauson

In the 1952 case of *Zorach v. Clauson,* the U.S. Supreme Court upheld the practice of *released time,* whereby public school officials dismissed students during the school day so that they could go to other locations to participate in religious study off campus. In a 6-to-3 decision, the Court affirmed that school officials can accommodate a parental desire to have their children released from public school classes for the purpose of attending religious education classes.

Facts of the Case

Zorach involved a challenge to the constitutionality of a program in New York City that allowed its public schools to release students during the school day so that they could leave school grounds and participate in religious instruction and services at religious centers. Students could be released only with the written consent of their parents. Students who were not released remained in their classrooms. Unlike the practice that the Courts struck down as unconstitutional 4 years earlier, in *Illinois ex rel. McCollum v. Board of Education* (1948), the program did not involve the use of public funds or the use of public facilities.

Even so, a group of city taxpayers and residents filed suit, challenging the constitutionality of the law that allowed for the released-time program. The plaintiffs alleged that the program was unconstitutional because the weight and influence of the public schools were put behind religious instruction, public school teachers policed the program by keeping tabs on students who were released, all classroom activities came to a halt when students were released for religious instruction, and the schools provided a crutch for the churches to lean on for support of their religious training. Without the cooperation of the schools, the plaintiffs argued, the program would have been ineffective.

The initial suit was filed in state courts. Having lost there, the plaintiffs in *Zorach* appealed to the Supreme Court. On further review, the Supreme Court affirmed that the program was constitutional.

The Court's Ruling

Justice Douglas, writing the majority opinion, ruled that it took "obtuse" reasoning to inject any issue of the free exercise of religion into this case insofar as no one was forced to attend the religious classes and no one brought religious exercises or instruction into the public school classrooms. Rather, Douglas pointed out that the decision of whether students attended religious classes was up to them and their parents. The majority saw no evidence to support the contention that coercion was used to get public school students into religious classrooms.

According to Justice Douglas, in passing the law, the City of New York did not violate the Establishment Clause of the First Amendment. In fact, he offered that condemning the released-time law would have pressed the concept of separation of church and state to an extreme level. Instead, Douglas concluded that there was no constitutional requirement for government to be hostile to religion. In *Zorach,* he concluded that all the schools did was to accommodate their schedules to a program of external religious instruction.

Justice Black, in a dissenting opinion, asserted that the sole question before the Court was whether the state could use its compulsory education laws to help religious sects get attendees for their religious instruction classes. Black argued that the state made religious sects beneficiaries of its power to compel students to attend secular schools by manipulating compulsory education laws to help those sects get students. In another dissent, Justice Frankfurter added that there was all the difference in the world between letting students out of school and letting some students out of school to attend religious classes. As Frankfurter saw it, formalized religious instruction was substituted for other school activities, which those who did not participate in religious classes were required to attend.

In a more recent iteration of this issue, the Second Circuit rejected a challenge that a mother filed on behalf of her children (*Pierce ex rel. Pierce v. Sullivan West Central School District,* 2004). The court affirmed that New York's continuation of the program was acceptable because it passed Establishment Clause analysis insofar as it did not use public funds or on-site religious instruction, it was voluntary, and school officials did not coerce or pressure nonparticipants to engage in the activities.

Allan G. Osborne, Jr.

See also *Illinois ex rel. McCollum v. Board of Education;* Prayer in Public Schools; Released Time; Religious Activities in Public Schools

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Zorach v. Clauson, 343 U.S. 306 (1952).

Zorach v. Clauson (Excerpts)

In Zorach v. Clauson, *the Supreme Court upheld the practice of releasing students from their classes in public schools so that they could attend religious instruction on the basis that doing so accommodated the religious wishes of their parents.*

Supreme Court of the United States

ZORACH et al.

v.

CLAUSON et al.

343 U.S. 306

Argued Jan. 31 and Feb. 1, 1952.

Decided April 28, 1952.

Mr. Justice DOUGLAS delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This 'released time' program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case

is therefore unlike *McCollum v. Board of Education,* which involved a 'released time' program from Illinois. In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise.

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the McCollum case. Their argument, stated elaborately in various ways, reduces itself to this: the weight and influence of the school is put behind a program for religious instruction; public school teachers police it, keeping tab on students who are released; the classroom activities come to a halt while the students who are released for religious instruction are on leave; the school is a crutch on which the churches are leaning for support in their religious training; without the cooperation of the schools this 'released time' program, like the one in the McCollum case, would be futile and ineffective. The New York Court of Appeals sustained the law against this claim of unconstitutionality. The case is here on appeal.

The briefs and arguments are replete with data bearing on the merits of this type of 'released time' program. Views pro and con are expressed, based on practical experience with these programs and with their implications. We do not stop to summarize these materials nor to burden the opinion with an analysis of them. For they involve considerations not germane to the narrow constitutional issue presented. They largely concern the wisdom of the system, its efficiency from an educational point of view, and the political considerations which have motivated its adoption or rejection in some communities. Those matters are of no concern here, since our problem reduces itself to whether New York by this system has either prohibited the 'free exercise' of religion or has made a law 'respecting an establishment of religion' within the meaning of the First Amendment.

It takes obtuse reasoning to inject any issue of the 'free exercise' of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the 'free exercise' of religion and 'an establishment of religion' within the meaning of the First Amendment.

The only allegation in the complaint that bears on the issue is that the operation of the program 'has resulted and inevitably results in the exercise of pressure and coercion upon parents and children to secure attendance by the children for religious instruction.' But this charge does not even implicate the school authorities. The New York Court of Appeals was therefore generous in labeling it a 'conclusory' allegation. Since the allegation did not implicate the school authorities in the use of coercion, there is no basis for holding that the New York Court of Appeals under the guise of local practice defeated a federal right in the manner condemned by *Brown v. Western R. Co. of Alabama* and related cases.

Moreover, apart from that claim of coercion, we do not see how New York by this type of 'released time' program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment. There cannot be the slightest doubt that the First Amendment reflects the philosophy that Church and State should be separated. And so far as interference with the 'free exercise' of religion and an 'establishment' of religion are concerned, the separation must be complete and unequivocal. The First Amendment within the scope of its coverage permits no exception; the prohibition is absolute. The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be

aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; 'so help me God' in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: 'God save the United States and this Honorable Court.'

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects. A Catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony. In each case the teacher requires parental consent in writing. In each case the teacher, in order to make sure the student is not a truant, goes further and requires a report from the priest, the rabbi, or the minister. The teacher in other words cooperates in a religious program to the extent of making it possible for her students to participate in it. Whether she does it occasionally for a few students, regularly for one, or pursuant to a systematized program designed to further the religious needs of all the students does not alter the character of the act.

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

This program may be unwise and improvident from an educational or a community viewpoint. That appeal is made to us on a theory, previously advanced, that each case must be decided on the basis of 'our own prepossessions.' Our individual preferences, however, are not the constitutional standard. The constitutional standard is the separation of Church and State. The problem, like many problems in constitutional law, is one of degree. In the *McCollum* case the classrooms were used for religious instruction and the force of the public school was used to promote that instruction. Here, as we have said, the public schools do no more than accommodate their schedules to a program of outside religious instruction. We follow the *McCollum* case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed.

Citation: *Zorach v. Clauson,* 343 U.S. 306 (1952).

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