2

Encyclopedia of EDUCATION LAW

Charles J. Russo, J.D.
Editor

Encyclopedia of EDUCATION LAW

Editorial and Advisory Boards

Encyclopedia of EDUCATION LAW

1

Charles J. Russo
University of Dayton
Editor

SAGE
Los Angeles • London • New Delhi • Singapore

A SAGE Reference Publication

For information:

SAGE Publications, Inc.
2455 Teller Road
Thousand Oaks, California 91320
E-mail: order@sagepub.com

SAGE Publications Ltd.
1 Oliver's Yard
55 City Road
London, EC1Y 1SP
United Kingdom

SAGE Publications India Pvt. Ltd.
B 1/I 1 Mohan Cooperative Industrial Area
Mathura Road, New Delhi 110 044
India

SAGE Publications Asia-Pacific Pte. Ltd.
33 Pekin Street #02-01
Far East Square
Singapore 048763

Printed in the United States of America.

Library of Congress Cataloging-in-Publication Data

Encyclopedia of education law / editor, Charles J. Russo.
p. cm.
Includes bibliographical references and index.
ISBN 978-1-4129-4079-5 (cloth)
1. Educational law and legislation—United States—Encyclopedias. 2. Educational law and legislation—United States—Cases. 3. Educational law and legislation—United States—History. 4. Education—United States—Encyclopedias. I. Russo, Charles J.

KF4117.E53 2008
344.73′0703—dc22 2008001210

This book is printed on acid-free paper.

08 09 10 11 12 10 9 8 7 6 5 4 3 2 1

Publisher:	Rolf A. Janke
Acquisitions Editor:	Diane McDaniel
Assistant to the Publisher:	Michele Thompson
Developmental Editor:	Diana E. Axelsen
Reference Systems Manager:	Leticia Gutierrez
Production Editor:	Kate Schroeder
Copy Editors:	Carla Freeman, Cate Huisman
Typesetter:	C&M Digitals (P) Ltd.
Proofreaders:	Kevin Gleason, Penny Sippel
Indexer:	Julie Grayson
Cover Designer:	Michelle Kenny
Marketing Manager:	Amberlyn Erzinger

Contents

List of Entries

Reader's Guide

Biographies

Alito, Samuel A., Jr.
Black, Hugo L.
Brennan, William J.
Breyer, Stephen G.
Burger, Warren E.
Darrow, Clarence S.
Douglas, William O.
Frankfurter, Felix J.
Ginsburg, Ruth Bader
Jefferson, Thomas
Kennedy, Anthony M.
Marshall, John
Marshall, Thurgood
O'Connor, Sandra Day
Rehnquist, William H.
Roberts, John G., Jr.
Scalia, Antonin
Souter, David H.
Stevens, John Paul
Thomas, Clarence
Warren, Earl

Collective Bargaining

Agency Shop
Arbitration
Closed Shop
Collective Bargaining
Grievance
Impasse in Bargaining
Mediation
Open Shop
Unions

Concepts, Theories, and Legal Principles

Assault and Battery, Civil
Attorney Fees
Authority Theory
Bureaucracy
Civil Law
Civil Rights Movement
Common Law
Consent Decree
Contracts
Copyright
Critical Theory
Defamation
Deposition
Disparate Impact
Dual and Unitary Systems
Due Process
Educational Malpractice
Equal Protection Analysis
Fair Use
False Imprisonment
Federalism and the Tenth Amendment
Fraud
Hearsay
Immunity
In Loco Parentis
Intellectual Property
Interrogatory
Negligence
Parens Patriae
Precedent
Preventative Law
Regulation
Remedies, Equitable Versus Legal

Constitutional Rights and Issues

Curricular and Instructional Issues

Educational Equity

Access to Programs and Facilities
Affirmative Action
Antiharassment policies
Brown v. Board of Education of Topeka and Equal Educational Opportunities
Dual and Unitary Systems
English as a Second Language
Equal Protection Analysis
Free Speech and Expression Rights of Students
Gay Lesbian, Bisexual, and Transgendered Persons, Rights of
Gay, Lesbian and Straight Education Network (GLSEN)
Hostile Work Environment
League of United Latin American Citizens (LULAC)
Limited English Proficiency
Mexican American Legal Defense and Educational Fund (MALDEF)
National Association for the Advancement of Colored People (NAACP)
Rights of Students and School Personnel With HIV/AIDS
Segregation, De Facto
Segregation, De Jure
Sexual Harassment
Sexual Harassment, Peer-to-Peer
Sexual Harassment, Quid Pro Quo
Sexual Harassment, Same-Sex
Sexual Harassment of Students by Teachers
Sexuality Education
Sexual Orientation
Sports Programming and Scheduling
State Aid and the Establishment Clause
Thorough and Efficient Systems of Education
Title IX and Athletics
Title IX and Sexual Harassment
White Flight

Governance Issues

Catholic Schools
Charter Schools
Distance Learning
Federal Role in Education
In Loco Parentis
Nonpublic Schools
Open Meetings Laws
Open Records Laws
Parens Patriae
Right-to-Work Laws
School-Based Decision Making
School Board Policy
School Boards
School Choice
School Finance Litigation
Thorough and Efficient Systems of Education
Tuition Reimbursement
Virtual Schools
Vouchers
Web Sites, Use by School Districts and Boards

Litigation[†]

Collective Bargaining

Abood v. Detroit Board of Education
Chicago Teachers Union, Local No. 1 v. Hudson
Davenport v. Washington Education Association
National Labor Relations Board v. Catholic Bishop of Chicago

Curricular Governance Issues

Board of Education, Island Trees Union Free School District No. 26 v. Pico
Jacobson v. Commonwealth of Massachusetts
Kadrmas v. Dickinson Public Schools
Lau v. Nichols
Martinez v. Bynum

[†]The entry "U.S. Supreme Court Cases in Education" provides an overview of key decisions in education law. In addition, the encyclopedia contains 180 entries on specific cases, which are listed below according to their subject matter. Thirty-five of these are followed by entries consisting of case excerpts. To avoid excessive duplication, case excerpts are not listed in this section of the Reader's Guide. See Reader's Guide section "Primary Sources: Excerpted U.S. Supreme Court Landmark Cases" for these entries.

Desegregation and Affirmative Action

Jurisdiction of U.S. Supreme Court

Prayer and Religious Activities in Public Schools

*An asterisk indicates that the case was not a U.S. Supreme Court ruling.

Stone v. Graham
Wallace v. Jaffree
Widmar v. Vincent
Zorach v. Clauson

Religious Freedom

Cantwell v. Connecticut
City of Boerne v. Flores
Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos
Employment Division, Department of Human Resources of Oregon v. Smith
Minersville School District v. Gobitis
National Labor Relations Board v. Catholic Bishop of Chicago
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary
West Virginia State Board of Education v. Barnette
Wisconsin v. Yoder

School Finance

*Robinson v. Cahill**
*Rose v. Council for Better Education**
San Antonio Independent School District v. Rodriguez
*Serrano v. Priest**

Special Education and Rights of Disabled Persons

Alexander v. Choate
Arlington Central School District Board of Education v. Murphy
Board of Education of the Hendrick Hudson Central School District v. Rowley
Cedar Rapids Community School District v. Garret F.
Florence County School District Four v. Carter
Honig v. Doe
Irving Independent School District v. Tatro
*Mills v. Board of Education of the District of Columbia**
*Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania**
Schaffer ex rel. Schaffer v. Weast
School Board of Nassau County v. Arline
School Committee of the Town of Burlington v. Department of Education
Smith v. Robinson
Southeastern Community College v. Davis
*Timothy W. v. Rochester, New Hampshire, School District**
Wood v. Strickland

State Aid and the Establishment Clause

Agostini v. Felton
Board of Education of Kiryas Joel Village School District v. Grumet
Board of Education v. Allen
Cochran v. Louisiana State Board of Education
Committee for Public Education and Religious Liberty v. Levitt
Committee for Public Education and Religious Liberty v. Nyquist
Committee for Public Education and Religious Liberty v. Regan
Everson v. Board of Education of Ewing Township
Grand Rapids School District v. Ball
Lemon v. Kurtzman
Locke v. Davey
Meek v. Pittenger
Mitchell v. Helms
Mueller v. Allen
New York v. Cathedral Academy
Sloan v. Lemon
Walz v. Tax Commission of the City of New York
Wheeler v. Barrera
Wolman v. Walter
Zelman v. Simmons-Harris
Zobrest v. Catalina Foothills School District

Student Rights

Baker v. Owen
Bethel School District No. 403 v. Fraser
Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls
Carey v. Piphus
Davis v. Monroe County Board of Education
*Debra P. v. Turlington**
Franklin v. Gwinnett County Public Schools
Gebser v. Lago Vista Independent School District
Grove City College v. Bell
Hazelwood School District v. Kuhlmeier
*Hobson v. Hansen**
Ingraham v. Wright

Teacher Rights

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

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.

Contributors

Gadeir Abbas
Case Western School of Law

Kathryn Ahlgren
Indiana University

Jon E. Anderson
Lafollette Godfrey and Kahn

Marilyn J. Bartlett
University of South Florida

Justin M. Bathon
Indiana University

Susan C. Bon
George Mason University

Kevin P. Brady
North Carolina State University

Frank Brown
University of North Carolina at Chapel Hill

Darlene Y. Bruner
University of South Florida

Carolyn L. Carlson
University of Kansas

Bradley W. Carpenter
University of Texas at Austin

Linda Carrillo
University of Texas at San Antonio

Wendy C. Chi
University of Colorado

Randy L. Christian
Missouri Southern State University

Robert C. Cloud
Baylor University

Aaron Cooley
University of North Carolina at Chapel Hill

Deborah Curry
Millersville University

David L. Dagley
University of Alabama

Philip T. K. Daniel
Ohio State University

Todd A. DeMitchell
University of New Hampshire

Marilyn Denison
Principal, McNabb Elementary School

J. Kent Donlevy
University of Calgary

Suzanne E. Eckes
Indiana University

Stacey L. Edmonson
Sam Houston State University

Patricia A. L. Ehrensal
Temple University

Chad D. Ellis
University of Connecticut

Fenwick W. English
University of North Carolina at Chapel Hill

Scott Ellis Ferrin
Brigham Young University

Alli Fetter-Harrott
Baker & Daniels, LLP

Richard Fossey
University of North Texas

Elise M. Frattura
University of Wisconsin–Milwaukee

Lyndon G. Furst
Andrews University

Mark A. Gooden
University of Cincinnati

Vivian Hopp Gordon
Loyola University Chicago

Aimee N. Gravelle
Indiana University School of Law–Bloomington

Paul Green
University of California, Riverside

Eric M. Haas
University of Connecticut

Darol Hail
Sam Houston State University

John F. Heflin
Kent State University

Jennifer M. Hesch
Indiana University

Kara Hume
Indiana University

Rosalia Ibarrola
Burke, Williams & Sorensen

Michael J. Jernigan
University of Dayton

Doris G. Johnson
Wright State University

Brenda R. Kallio
University of North Dakota

Gary W. Kinsey
California State Polytechnic University, Pomona

Kenneth E. Lane
Southeastern Louisiana University

John A. Lanear
University of Wisconsin–Milwaukee

Jack P. Lipton
Southwestern University

Mark Littleton
Tarleton State University

Emily Wexler Love
University of Colorado at Boulder

Catherine A. Lugg
Rutgers University

Elizabeth T. Lugg
Illinois State University

Joseph P. Mahon
Board of Directors, Education Law Association

James Mawdsley
Cleveland State University

Ralph D. Mawdsley
Cleveland State University

Martha M. McCarthy
Indiana University

Stephen Richard McCullough
Deputy State Solicitor General,
Commonwealth of Virginia

Scott McLeod
Iowa State University

Laura R. McNeal
Georgia State University

Julie F. Mead
University of Wisconsin–Madison

Karen Miksch
University of Minnesota

David Mullane
Youngstown State University

Theresa A. Ochoa
Indiana University

Patrick M. O'Donnell
University of Michigan

Joseph Oluwole
Montclair State University

Allan G. Osborne, Jr.
Snug Harbor Community School

Patrick D. Pauken
Bowling Green State University

James F. Pearn, Jr.
Dunbar High School

Rachel Pereira
University of Pennsylvania

George J. Petersen
California Polytechnic State University, San Luis Obispo

A. William Place
University of Dayton

Jonathan A. Plucker
Indiana University

Jeanne M. Powers
Arizona State University

Sara E. Rabin
University of Colorado at Boulder

C. Daniel Raisch
University of Dayton

M. Karega Rausch
Indiana University

Megan L. Rehberg
University of Dayton

Augustina H. Reyes
University of Houston

Emily Richardson
Indiana University

Malila N. Robinson
Rutgers University

Janet R. Rumple
Indiana University

Charles J. Russo
University of Dayton

Lauren P. Saenz
University of Colorado

Robert J. Safransky
Nova Southeastern University

Eugenie Angele Samier
Simon Fraser University

David Schimmel
University of Massachusetts

Mandy Schrank
Education Law Association

Ralph Sharp
East Central University

Christopher D. Shaw
Attorney

Jennifer Silverstein
University of Colorado at Boulder

Amy M. Steketee
Baker & Daniels LLP

Deborah E. Stine
California State University, San Bernardino

Jeffrey C. Sun
University of North Dakota

David P. Thompson
University of Texas at San Antonio

William E. Thro
Solicitor General, Commonwealth of Virginia

Mario S. Torres, Jr.
Texas A&M University

Regina R. Umpstead
Michigan State University

Suzann VanNasdale
Indiana University

James Van Patten
Florida Atlantic University

Aimee R. Vergon
Dickinson Wright, PLLC

Charles B. Vergon
Youngstown State University

Kevin G. Welner
University of Colorado at Boulder

James P. Wilson
University of Dayton

Michael Yates
Missouri Southern State University

R. Holly Yettick
University of Colorado at Boulder

Michelle D. Young
University of Texas at Austin

Ran Zhang
Indiana University

Perry A. Zirkel
Lehigh University

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
Professor Emeritus of Educational Administration, University of Missouri, and Executive Director Emeritus, Education Law Association

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)

References

Gullatt, D. E., & Tollett, J. R. (1997). Educational law: A requisite course for preservice and inservice teacher education programs. *Journal of Teacher Education, 48*(2), 129–135.

Pohland, P. A., & Carlson, L. T. (1993). Program reform in educational administration. *UCEA Review, 34*(3), 4–9.

Acknowledgments

As with any work of this magnitude, because many people played a hand in its development, they all need to be thanked for the parts that they played in helping to make the *Encyclopedia of Education Law* a reality. I would thus like to thank people in four different groupings.

Starting with all of the wonderful professionals at Sage Publications, I must begin by thanking my acquisitions editor, Diane McDaniel, for having enough faith in me and the encyclopedia to shepherd it through the review and acceptance process. Next, I must express my deep debt of immense gratitude to my senior developmental editor, Diana E. Axelsen, whose friendship and meticulous attention to detail during our often multiple daily conversations made my job of conceptualizing the final form of, and editing, the entries in the encyclopedia so much easier. During this phase of development, there were two other professionals who also played a major role in helping to get entries accepted and moving forward: SRT coordinators Laura Notton and Leticia Gutierrez. Thanks, too, to Jacqueline Tasch, another developmental editor who did a tremendous job of getting the initially approved entries into shape to be turned over to the production editor, Kate Schroeder, who was ably assisted by two excellent copy editors, Carla Freeman and Cate Huisman, and by proofreaders Kevin Gleason and Penny Sippel. It has been a pleasure working with all of these wonderful professionals on the Sage team. Needless to say, I look forward to continuing to work together on future projects.

Second, I would like to express my gratitude to those who served on the editorial and advisory boards. The members of these boards evaluated the list of entries, suggested topics for inclusion, and thus helped the encyclopedia to take shape. In addition, they helped me to identify authors for various topics. The members of the advisory board are Dr. Frank Brown, Carey Boshamer Professor of Education, University of North Carolina at Chapel Hill; Dr. Nelda Cambron-McCabe, Miami University of Ohio; Dr. Fenwick English, R. Wendell Eaves Distinguished Professor of Educational Leadership, University of North Carolina at Chapel Hill; Dr. Ralph D. Mawdsley, Cleveland State University; Dr. Martha M. McCarthy, Chancellor's Professor, Indiana University; Dr. Allan G. Osborne, Jr., Principal, Snug Harbor Community School; Dr. Michele Young, Executive Director, University Council for Educational Administration and Associate Professor of Leadership and Policy, University of Texas at Austin; and Dr. Perry A. Zirkel, University Professor of Education and Law, Lehigh University. Also, I would like to extend a special thanks to Dr. Floyd Delon for his wonderful Foreword.

It would not have been possible to identify the encyclopedia as the peer-reviewed project that it is without the gracious assistance of the members of the editorial board: Dr. Kevin P. Brady, North Carolina State University; Dr. Suzanne Eckes, Indiana University; Dr. Catherine A. Lugg, Rutgers University; Dr. Patrick D. Pauken, Bowling Green State University; Mr. William E. Thro, Solicitor General, Commonwealth of Virginia. These dedicated professionals spent untold hours editing entries and corresponding with authors to address weaknesses or omissions in submissions, thus providing peer review for all the entries. I greatly appreciate all of the assistance that these editors provided in making useful suggestions and comments on the entries that they reviewed. All of this occurred before I made final decisions on entries.

Moreover, once these reviewers and I subjected entries to peer review, they were then read and commented on by editors at Sage.

I would be remiss if I did not thank all of the authors who gave of their expertise, time, and talent in contributing to the encyclopedia. At the outset, I solicited authors, especially for the longer anchor essays, based on their reputations and expertise. Then, as part of a general call for authors, I consulted with several of my editors to ensure that I had the best possible authors for each entry. Insofar as the encyclopedia could not have been written without the assistance of these many professionals, I offer my sincere appreciation.

At the University of Dayton, I would like to thank Dr. Thomas J. Lasley, dean, and Dr. Dan Raisch, associate dean, of the School of Education and Allied Professions for their ongoing support. I would be remiss if I did not offer special thanks to Rev. Joseph D. Massucci, my chair in the Department of Educational Leadership. The friendship and support of these friends helped to make the writing process easier. A special thanks is in order for my managing editor and assistant, Ms. Elizabeth Pearn at the University of Dayton, for her invaluable assistance in helping to get entries in, working with authors, and generally proofreading and preparing the manuscript for publication.

Finally, keeping in mind the often-cited maxim of Supreme Court Justice Joseph Story that the law "is a jealous mistress and requires a long and constant courtship," I would like to take this opportunity to express my undying love and devotion to my wife, Debbie, and our children, David (and his wife, Li Hong) and Emily. The two bright and inquisitive children that my wife, Debbie, and I raised have grown to be wonderful young adults who provide me with a constant source of inspiration, love, and joy in our lives. Last, and by no means least, as she is first, I offer my undying love and affection to my wonderful wife Debbie, because without her unconditional love and support I could have accomplished nothing, especially at those times when I have had to take time away from our family life to work on the encyclopedia and other professional responsibilities. Insofar as I am truly blessed to have such a wonderful, loving family, I dedicate this encyclopedia with all of my love in their honor.

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

Further Readings

Oakes, J. (1985). *Keeping track: How schools structure inequality.* New Haven, CT: Yale University Press.

Legal Citations

Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd, sub. nom., Smuck v. Hobson,* 408 F.2d. 175 (D.C. Circuit, 1969) (*en banc*).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975).
No Child Left Behind Act, 20 U.S. §§ 6301 *et seq*. (2002).
People Who Care v. Rockford Board of Education, 1400 *et seq*. Supp. 905, 912–13 (N.D. Ill. 1994), *aff'd in part, rev'd in part,* 111 F.3d 528 (7th Cir. 1997).
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.
Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*

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

Further Readings

Anderson, R. D. (2004). *Religion and spirituality in the public school curriculum.* New York: Peter Lang.

Marzilli, A. (2004). *Religion in the public schools.* Philadelphia: Chelsea House.

Roberts, R. R. (2002). *Whose kids are they anyway? Religion and morality in America's public schools.* Cleveland, OH: Pilgrim Press.

Legal Citations

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

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).
Hardy v. Jefferson Community College, 260 F.3d 671 (6th Cir. 2001).
In re Bernstein, 726 N.Y.S.2d 474 (N.Y. App. Div. 2001).
Lacks v. Ferguson Reorganized School District R-2, 147 F.3d 718 (8th Cir. 1998).
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).
Sterzing v. Fort Bend Independent School District, 376 F. Supp. 657 (S.D. Tex. 1972).

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

Further Readings

First, P. F. (1994). Academic sanctions: No fair? *The Education Digest, 59*(6), 17–22.

Legal Citations

Goss v. Lopez, 419 U.S. 565 (1975).
John A. Campbell v. Board of Education of the Town of New Milford, 475 A.2d 289 (Conn. 1984).
No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

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

Further Readings

Daniel, P. T. K., & Pauken, P. D. (1998). Educators' authority and students' first amendment rights on the way to using the information highway: Cyberspace and schools. *Journal of Urban and Contemporary Law, 54,* 109–155.

Daniel, P. T. K., & Pauken, P. D. (2002). The electronic media and school violence: Lessons learned and issues presented. *West's Education Law Reporter, 164,* 1–43.

Daniel, P. T. K., & Pauken, P. D. (2005). Copyright laws in the age of technology: Changes in legislation and their applicability to the K–12 environment. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 441–453). Dayton, OH: Education Law Association.

Daniel, P. T. K., & Pauken, P. D. (2005). Intellectual property. In J. Beckham & D. Dagley (Eds.), *Contemporary issues in higher education law* (pp. 347–393). Dayton, OH: Education Law Association.

Gooden, M. A. (2005). Use of technology and the Internet. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 140–159). Dayton, OH: Education Law Association.

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*

Legal Citations

Board of Education of the 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, 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

Further Readings

Kim, J. S., & Sunderman, G. (2005). Measuring academic proficiency under the No Child Left Behind Act: Implications for educational equity. *Educational Researcher, 34*(8), 3–13.

Popham, W. J. (2005). AYP wiggle room running out. *Educational Leadership, 62*(5), 28–31.

Legal Citations

No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

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

Further Readings

Daniel, P. T. K. (2003). Diversity in university admissions decisions: The continued support of *Bakke*. *Journal of Law and Education 32,* 69–78.

Daniel, P. T. K., & Timken, K. E. (1999). The rumors of my death have been exaggerated: *Hopwood's* error in "discarding" *Bakke*. *Journal of Law & Education, 28,* 391–418.

Holmes, L. (2004). Comment, After *Grutter*: Ensuring diversity in K–12 schools. *UCLA Law Review, 52,* 563, 575–585.

Sperry, D., & Daniel, P. T. K (1998). *Education law and the public schools: A compendium.* Norwood, MA: Christopher-Gordon.

Legal Citations

Cavalier v. Caddo Parish School Board, 403 F.3d 246 (5th Cir. 2005).
City of Richmond v. J. A. Croson Company, 488 U.S. 469 (1989).
Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975A-1975d, 2000a-2000h-6 (1994).
Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985).
Comfort v. Lynn School Committee, 418 F.3d 1 (1st Cir. 2005).
Gratz v. Bollinger, 539 U.S. 244 (2003).
Griggs v. Duke Power Company, 401 U.S. 424 (1971).
Grutter v. Bollinger, 288 F.3d 732 (2002), 539 U.S. 306 (2003).
Hopwood v. Texas, 78 F.3d 932 (5th Cir. 1996).
Labor Management Relations Act, 29 U.S.C. §§ 141 *et seq.*
Ledbetter v. Goodyear Tire and Rubber Company, 127 S. Ct. 2162 (2007).
McFarland v. Jefferson County Public Schools, 416 F.3d 513 (6th Cir. 2005).
Parents Involved in Community Schools v. Seattle School District No. 1, 426 F.3d 1162 (9th Cir. 2005), 127 S. Ct. 2738 (2007).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
Smith v. University of Washington Law School, 233 F.3d 1188 (9th Cir. 2000).
Title VI of the Civil Rights Act, 42 U.S.C. § 2000d.
Title VII of the Civil Rights Act, 42 U.S.C. § 2000e.
Washington v. Davis, 426 U.S. 229 (1976).
Wygant v. Jackson Board of Education, 476 U.S. 267 (1986).

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

Age Discrimination Act, 42 U.S.C. §§ 6101 *et seq.*
Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*
Civil Rights Restoration Act, 20 U.S.C. § 1681.
Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976).

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.

Paradis, L. (2003). Title II of the Americans with Disabilities Act and Section 504 of the Rehabilitation Act: Making programs, services, and activities accessible to all. *Stanford Law and Policy Review, 14,* 389–415.

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

Rehnquist, W. H. (2001). *The Supreme Court.* New York: Random House.

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

Further Readings

Huefner, D. S. (2006). *Getting comfortable with special education law: A framework for working with children with disabilities* (2nd ed.). Norwood, MA: Christopher-Gordon.

Mawdsley, R. D. (2005). Barrier-free facilities. In K. A. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 187–196). Dayton, OH: Education Law Association.

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

Ansonia Board of Education v. Philbrook, 479 U.S. 60 (1986).
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

Further Readings

Baker, T. R. (2002). Tinkering with *Tinker:* The Third Circuit's over breadth test for school anti-harassment codes. *West's Education Law Reporter, 164,* 527–549.

Legal Citations

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

Saxe v. State College Area School District, 240 F.3d 200 (3d Cir. 2001).

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

Further Readings

Brady, K. P. (2006). Bargaining. In C. J. Russo (Ed.), *The yearbook of education law: 2006* (pp. 101–110). Dayton, OH: Education Law Association.

DeMitchell, T. A., & Cobb, C. D. (2006). Teachers: Their union and their profession: A tangled relationship. *West's Education Law Reporter, 212,* 1–18.

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

Hodges, A. C. (1990). Symposium on labor arbitration thirty years after the steelworker's trilogy in the public sector. *Chicago–Kent Law Review, 66,* 631–683.

Legal Citations

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960).

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).

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

Osborne, A.G., & Russo, C. J. (2006). The Supreme Court rejects parental reimbursement for expert witness fees under the IDEA: *Arlington Central School District Board of Education*. *Education Law Reporter, 213,* 333–348.

Wasserman, L. M. (2006). Reimbursement to parents of tuition and other costs under the Individuals with Disabilities Education Improvement Act. *Saint John's Journal of Legal Commentary, 21,* 171–238.

Legal Citations

Arlington Central School District Board of Education v. Murphy, 548 U.S. 291 (2006).

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

Further Readings

Evans, B., & Eckes, S. (2006). Tort law and public schools. In C. J. Russo (Ed.), *The yearbook of education law: 2006.* (pp.142–165). Dayton, OH: Education Law Association.

Legal Citations

Boone v. Wayne Reese, 889 So. 2d 435 (La. Ct. App. 2004).
Daniels v. Lutz, 407 F. Supp. 2d 1038 (E.D. Ark. 2005).
Taylor v. Dunkirk City School District, 785 N.Y.S.2d 623 (N.Y. App. Div. 2004).
Vicky M. v. Northeastern Education Intermediate Unit 19, 486 F. Supp. 2d 437 (M.D. Pa. 2007).

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

Further Readings

Fichten, C. S., Asuncion, J. V., Barile, M., Genereux, C., Fossey, M., Judd, D., et al. (2001). Technology integration for students with disabilities: Empirically based recommendations for faculty. *Educational Research and Evaluation, 7*(2–3), 185–221.

Male, M. (2003). *Technology for inclusion: Meeting the special needs of all students.* Boston: Allyn and Bacon.

Mostert, M. (2001). Facilitated communication since 1995: A review of published studies. *Journal of Autism and Developmental Disorders, 31*(3), 287–312.

Legal Citations

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

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

Further Readings

Leubsdorf, J. (1984). Note, Toward a history of the American Rule on attorney fee recovery. *Law & Contemporary Problems, 47*(1), 9–36.

Legal Citations

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240 (1975).
Americans with Disabilities Act, 42 U.S.C. §§12101 *et seq.*
Buckhannon Board & Home Care v. West Virginia Department of Health & Human Services, 532 U.S. 598 (2001).
Christianburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978).
F. D. Rich Co. v. Industrial Lumber Co., 417 U.S. 116 (1974).
Farrar v. Hobby, 506 U.S. 103 (1992).
Hanrahan v. Hampton, 446 U.S. 754, 758 (1980) (*per curiam*).
Hensley v. Eckerhart, 461 U.S. 424 (1983).
Hewitt v. Helms, 482 U.S. 755 (1987).
Religious Freedom Restoration Act of 1993, 42 U.S.C. §2000bb.
Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. §2000cc.
Shindler v. Lamb, 211 N.Y.S.2d 762 (NY. Sup. Ct. 1959), *aff'd,* 210 N.Y.S.2d 226 (N.Y. 1961).
Smith v. Robinson, 468 U.S. 992 (1984).
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

Further Readings

Beard, J., & Pahuja, S. (Eds.). (2000). Divining the source: Law's foundation and the question of authority [Special issue]. *Australian Feminist Law Journal, 19.*

Brown, A., & Zuker, M. (2002). *Education law* (3rd ed.). Toronto, ON, CA: Carswell.

Dworkin, R. (1986). *Law's empire.* Cambridge, MA: Belknap Press.

Ford, J., Hughes, M., & Ruebain, D. (2005). *Education law and practice* (2nd ed.). Bristol, UK: Jordans.

Foster, W. (Ed.). (1994). *Education & law: Education in the era of individual rights.* Châteauguay, QC, CA: Lisbro.

Marmor, A. (2001). *Positive law and objective values.* Oxford, UK: Clarendon Press.

Minow, M. (1990). *Making all the difference: Inclusion, exclusion, and American law.* Ithaca, NY: Cornell University Press.

Raz, J. (1983). *The authority of law.* Oxford, UK: Oxford University Press.

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

Baker v. Owen, 395 F. Supp. 294 (M.D.N.C. 1975), *aff'd,* 423 U.S. 907 (1975).
Ingraham v. Wright, 430 U.S. 651 (1977).

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)

Further Readings

Crone, D. & Horner, R. (2003). *Building positive behavior support systems in schools.* New York: Guilford Press.

Drasgow, E., et al. (1999). The IDEA amendments of 1997: A school-wide model for conducting functional behavioral assessments and developing behavior intervention plans. *Education and Treatment of Children, 22,* 244–246.

Scott, T. M. (2003). Making behavior intervention planning decisions in a schoolwide system of positive behavior support. *Focus on Exceptional Children, 36,* 1–18.

Zirkel, P. A. (2006). Suspensions and expulsions of students with disabilities: The latest requirements. *West's Education Law Reporter, 214,* 445–449.

Legal Citations

Alex R. v. Forrestville Valley Community Unit School District No. 221, 375 F.3d 603 (7th Cir. 2004).

County School Board v. Palkovics, 285 F. Supp. 2d 701 (E.D. Va. 2003).

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

Further Readings

Findley, R. W. (1959). Constitutional law: Due process: Dismissal of state employees for refusal to answer questions concerning membership in communist organizations. *Michigan Law Review, 57*(3), 412–415.

Legal Citations

Adler v. Board of Education, 342 U.S. 485 (1952).
Beilan v. Board of Public Education, 257 U.S. 399 (1958).
Lerner v. Casey, 357 U.S. 468 (1958).

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

Lau v. Nichols 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).
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

Further Readings

Cooke, D. E. (1970). *America's great document—The Constitution.* New York: Hammond.

Meltzer, M. (1990). *The Bill of Rights: How we got it and what it means.* New York: Thomas Y. Crowell.

Mitchell, B., & Mitchell, L. P. (1964). *A biography of the Constitution of the United States.* New York: Oxford University Press.

Nardo, D. (1998). *The Bill of Rights.* San Diego, CA: Greenhaven Press.

O'Connor, K., & Sabato, L. J. (2006). *American government: Continuity and change.* New York: Pearson Longman.

Rutland, R. A. (1991). *The birth of the Bill of Rights: 1776–1791.* York, PA: Maple Press.

Legal Citations

Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
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).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Ingraham v. Wright, 430 U.S. 651 (1977).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Miranda v. Arizona, 384 U.S. 436 (1966).
Morse v. Frederick, 127 S. Ct. 2618 (2007).
New Jersey v. T .L .O., 469 U.S. 325 (1985).
Pickering v. Board of Education Township High School District 205, Will County, 391 U.S. 563 (1968).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
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*

Further Readings

Rabin, R. L. (1976). Job security and due process: Monitoring administrative discretion through a reasons requirement. *University of Chicago Law Review, 44*(1), 60–93.

Legal Citations

Bishop v. Wood, 426 U.S. 341 (1976).
Board of Regents v. Roth, 408 U.S. 564 (1972).
Perry v. Sindermann, 408 U.S. 593 (1972).

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*

Further Readings

Ball, H., & Black, H. L. (1966). *Cold steel warrior.* New York: Oxford University Press.

Newman, R. K. (1994). *Hugo Black: A biography.* New York: Pantheon.

Simon, J. F. (1989). *The antagonists: Hugo Black, Felix Frankfurter, and civil liberties in America.* New York: Simon & Schuster.

Stephenson, G. T. (1977). Hugo Black and the judicial revolution, by Gerald T. Dunne [Book review]. *Virginia Law Review, 63*(6), 1087–1097.

Suitts, S. (2005). *Hugo Black of Alabama: How his roots and early career shaped the great champion of the Constitution.* Winston-Salem, NC: Blair.

Legal Citations

Adamson v. California, 332 U.S. 46 (1947).

Engel v. Vitale, 370 U.S. 421 (1962).

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).

Gideon v. Wainwright, 372 U.S. 335 (1963).

Griswold v. Connecticut, 381 U.S. 479 (1965).

*Illinois ex rel. McCollum v. Board of Educ*ation, 333 U.S. 203 (1948).

New York Times Co. v. United States, 403 U.S. 713 (1971).

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

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*

Further Readings

Peltz, R. J. (2005). Pieces of *Pico:* Saving intellectual freedom in the public school library. *Brigham Young University Education and Law Journal, 2,*103–158.

Legal Citations

ACLU v. Miami-Dade County School Board, 439 F. Supp. 2d 1242 (S.D. Fla. 2006).

Board of Education, Island Trees Union Free School District v. Pico, 457 U.S. 853 (1982).

Mozert v. Hawkins County Public Schools, 579 F. Supp. 1051 (E.D. Tenn. 1984), *rev'd,* 765 F.2d 75 (6th Cir. 1985), *on remand,* 647 F. Supp. 1194 (E.D. Tenn. 1986), *rev'd,* 827 F.2d 1058 (6th Cir. 1987), *cert. denied,* 484 U.S. 1066 (1988).

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).

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995), *on remand,* 66 F.3d 217 (9th Cir. 1995).

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

. . . .

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

Bradley v. School Board of City of Richmond, 462 F.2d 1058 (4th Cir. 1972), 416 U.S. 696 (1974).
School Board, City of Richmond v. State Board of Education, 412 U.S. 92 (1973).
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

Eisler, K. I. (1993). *A justice for all: William J. Brennan, Jr., and the decisions that transformed America.* New York: Simon & Schuster.

Irons, P. (1994). *Brennan v. Rehnquist: The battle for the Constitution.* New York: Knopf.

Legal Citations

Aguilar v. Felton, 473 U.S. 402 (1985).
Baker v. Carr, 369 U.S. 186 (1962).
Board of Education, Island Trees Union Free School District No. 26 v. Pico, 457 U.S. 853 (1982).
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).
Craig v. Boren, 439 U.S. 190 (1976).
Edwards v. Aguillard, 482 U.S. 578 (1987).
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).
Grand Rapids School District v. Ball, 473 U.S. 373 (1985).
Hazelwood School District v. Kuhlmeier, 484 U.S. 280 (1988).
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).
Keyishian v. Board of Regents, 385 U.S. 589 (1967).
Metro Broadcasting v. Federal Communications Commission, 497 U.S. 547 (1990).
New York Times v. Sullivan, 376 U.S. 254 (1964).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
School Board of Nassau County v. Arline, 480 U.S. 273 1987).
Sherbert v. Verner, 374 U.S. 398 (1963).
Texas v. Johnson, 491 U.S. 397 (1989).
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

Further Readings

Breyer, S. (2005). *Active liberty: Interpreting our democratic Constitution.* New York: Knopf.

Perry, B. A. (1999). *The supremes: Essays on the current justices of the Supreme Court of the United States.* New York: Peter Lang.

Legal Citations

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

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

City of Boerne v. Flores, 521 U.S. 507 (1997).

Good News Club v. Milford Central School, 533 U.S. 98 (2001).

Gratz v. Bollinger, 539 U.S. 244 (2003).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Grutter v. Bollinger, 539 U.S. 306 (2003).

McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005).

Mitchell v. Helms, 530 U.S. 793 (2000).

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995).

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).
United States v. Lopez, 514 U.S. 549 (1995).
Van Orden v. Perry, 545 U.S. 677 (2005).
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

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

Further Readings

Tushnet, M., & Katya Lezin, K. (1991). What really happened in *Brown v. Board of Education*. *Columbia Law Review, 91,* 1867.

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).
Cumming v. County Board of Education, 175 U.S. 528 (1899).
Gong Lum v. Rice, 275 U.S. 78 (1927).
McClaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Roberts v. City of Boston, 59 Mass. 198, 5 Cush. 198 (1850).
Sweatt v. Painter, 339 U.S. 629 (1950).

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

Further Readings

Berman, D. M. (1966). *It is so ordered: The Supreme Court rules on school segregation.* New York: Norton.

Brown, F. (2004a). The first serious implementation of *Brown*: The 1964 Civil Rights Act and beyond. *Journal of Negro Education, 7*(3), 182–190.

Brown, F. (2004b). Nixon's "southern strategy" and forces against Brown. *Journal of Negro Education, 73*(3), 191–208.

Clotfelter, C. T. (2001). Are Whites still fleeing? Racial patterns and enrollment shifts in urban public schools, 1987–1996. *Journal of Policy Analysis and Management, 20*(2), 199–221.

Coons, J. E., & Sugarman, S. D. (1979). *Education by choice: The case for family control.* Berkeley: University of California Press.

Davis, A. L., & Graham, B. L. (1995). *The Supreme Court, race and civil rights.* Thousand Oaks, CA: Sage.

Davis, M. D., & Clark, H. R. (1994). *Thurgood Marshall: Warrior at the bar, rebel on the bench.* New York: Citadel Press.

Flemming, A. S. (1976). *Fulfilling the letter and spirit of the law: Desegregation of the nation's public schools.* Washington, DC: U.S. Commission on Civil Rights.

Flemming, A. S. (1974). Milliken v. Bradley: *The implications for metropolitan desegregation: Conference Before the United States Commission on Civil Rights.* Washington, DC: U.S. Commission on Civil Rights.

Harris, J. J., Russo, C. J., & Brown, F. (1997). The curious case of *Missouri v. Jenkins*: The end of the road for court-ordered desegregation? *Journal of Negro Education, 66*(1), 43–55.

Kluger, R. (1975). *Simple justice.* New York: Vintage Books.

Motley, C. B. (1998). *Equal justice under law.* New York: Farrar, Straus, and Giroux.

Ogletree, C. J., Jr. (2004). *All deliberate speed: Reflections on the first half century of* Brown v. Board of Education. New York: Norton.

Orfield, G., & Lee, C. (2004). Brown *at 50: King's dream or Plessy's nightmare?* The Civil Rights Project, Harvard University. Retrieved from http://www.civilrightsproject.harvard.edu/research/reseg04

Russo, C. J. (2004). *Brown v. Board of Education* at 50: one step forward, half a step backward? *The Journal of Negro Education, 73*(3), 174–181.

Russo, C. J., Harris, J. J., & Sandidge, R. (1994). *Brown v. Board of Education* at 40: A legal history of equal educational opportunities in American public education. *Journal of Negro Education, 63*(3), 297–309.

Russo, C. J., & Rossow, L. F. (1990). *Missouri v. Jenkins:* The desegregation battle continues. *Education Law Reporter, 62*(2), 399–407.

Russo, C. J., & Rossow, L. F. (1995). *Missouri v. Jenkins* redux: The end of the road for school desegregation or another stop on an endless journey? *Education Law Reporter, 103(1),* 1–12.

Thro, W. E. (2005). The American paradox: How constitutional values inhibit the achievement of quality education. In C. J. Russo, J. Beckmann, & J. D. Jansen, *Equal educational opportunities:* Brown v. Board of Education *at 50 and democratic South Africa at 10* (pp. 137–146). Pretoria, South Africa: Van Schaik.

Legal Citations

Belk v. Charlotte-Mecklenburg Board of Education, 233 F.3d 232 (4th Cir. 2000), *reh'g en banc,* 269 F.3d 305 (4th Cir.2001a), *reconsideration denied sub nom. Belk v. Capacchione,* 274 F.3d 814 (4th Cir. Dec 14, 2001b), *cert. denied, sub nom. Capacchione v. Charlotte-Mecklenburg Board of Education,* 535 U.S. 986 (2002).

Board of Education of the Oklahoma City Public Schools v. Dowell, 498 U.S. 237 (1991), *on remand,* 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd,* 8 F.3d 1501 (10th Cir. 1993).

Bolling v. Sharpe, 347 U.S. 497 (1954).

Briggs v. Elliot, Members of the Board of Trustees of School District No. 22, Clarendon County, 103 F. Supp. 920 (D.S.C.1952).

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954), 349 U.S. 294 (1955).

Columbus Board of Education v. Penick, 443 U.S. 449 (1979).

Crawford v. Board of Education of the City of Los Angeles, 458 U.S. 527 (1982).

Dayton Board of Education v. Brinkman II, 443 U.S. 526 (1979).

Freeman v. Pitts, 503 U.S. 467 (1992), *on remand,* 979 F.2d 1472 (11th Cir. 1992), *on remand sub nom. Mills v. Freeman,* 942 F. Supp. 1449 (N.D. Ga. 1996), *appeal after remand,* 118 F.3d 727 (11th Cir. 1997).

Goss v. Board of Education of the City of Knoxville, 373 U.S. 683 (1963).

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Griffin v. County School Board of Prince Edward County, 377 U.S. 218 (1964).

Hobson v. Hansen, 269 F. Supp. 401 (1967).

Keyes v. School District No. 1, Denver, Colorado, 418 U.S. 717 (1973).

McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

McNeese v. Board of Education, Community Unit School District 187, 373 U.S. 668 (1963).

Milliken v. Bradley, 418 U.S. 717 (1974), 433 U.S. 267 (1977).

Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938).

Missouri v. Jenkins, 495 U.S. 33 (1990), *on subsequent appeal, sub nom. Jenkins by Agyei v. State of Missouri,* 949 F.2d 1052 (8th Cir. 1991), 515 U.S. 70 (1995), *appeal after remand,* 103 F.3d 731 (8th Cir. 1997), *reh'g and suggestion for reh'g en banc denied.*

Monroe v. Board of Commissioners of the City of Jackson, 391 U.S. 450 (1968).

Parents Involved in Community Schools v. Seattle School District No.1, 127 S. Ct. 2738 (2007).

Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Raney v. Board of Education of the Gould School District, 391 U.S. 443 (1968).

Rogers v. Paul, 382 U.S. 198 (1965).

San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973).

Sipuel v. University of Oklahoma, 332 U.S. 631 (1948).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (971).

Sweatt v. Painter, 339 U.S. 629 (1950).

United States v. Scotland Neck City Board of Education, 407 U.S. 484 (1972).

Washington v. Seattle School District No. 1, 458 U.S. 457 (1982).

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

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

Further Readings

Coloroso, B. (2006). *The bully, the bullied, and the bystander.* Toronto, ON, CA: Collins.

Hart, K. (2005). Sticks and stones and shotguns at school: The ineffectiveness of Constitutional antibullying legislation as a response to school violence. *Georgia Law Review, 39,* 1109–1154.

Olweus, D. (1995). *Bullying at school: What we know and what we can do.* Cambridge, UK: Blackwell.

Legal Citations

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

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), *on remand,* 206 F.3d 1377 (11th Cir. 2000).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

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

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.

Eugenie Angele Samier

See also Disabled Persons, Rights of; Fourteenth Amendment; Sexual Harassment

Further Readings

Delaney, J. (2006). *Legal dimensions of education: Implications for teachers and administrators.* Calgary, AB, CA: Temeron Books.

Jowell, J. (1975). *Law and bureaucracy: Administrative discretion and the limits of legal action.* New York: Dunellen.

Mommsen, W. (1974). *The age of bureaucracy: Perspectives on the political sociology of Max Weber.* Oxford, UK: Blackwell.

Rizzi, B. (1984). *The bureaucratization of the world.* New York: Free Press.

Smyth, J. (Ed.). 1989. *Critical perspectives on educational leadership.* London: Falmer Press.

Weber, M. (1968). *Economy and society: An outline of interpretive sociology.* Berkeley: University of California Press.

Weick, K. (1976). Educational organizations as loosely coupled systems. *Administrative Science Quarterly, 21,* 1–9.

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

Further Readings

Maltz, E. (2000). *The chief justiceship of Warren Burger, 1969–1986.* Columbia: University of South Carolina Press.

Woodward, B., & Armstrong, S. (1979). *The brethren: Inside the Supreme Court.* New York: Simon & Schuster.

Legal Citations

Alexander v. Holmes County Board of Education, 396 U.S. 19 (1969).

Brown v. Board of Education of Topeka I, 347 U.S. 483 (1954).

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

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

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

Further Readings

Lamb, C., & Halpern, S. (1991). *The Burger court.* Urbana: University of Illinois Press.

Schwartz, H. (1987). *The Burger years.* New York: Viking Press.

Legal Citations

Aguilar v. Felton, 473 U.S. 402 (1985).

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

Bob Jones University v. United States, 461 U.S. 574 (1983).

Fullilove v. Klutznick, 448 U.S. 448 (1980).

Griggs v. Duke Power Co., 401 U.S. 424 (1971).

Irving Independent School District v. Tatro, 468 U.S. 883 (1984).

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

Lemon v. Kurtzman, 411 U.S. 192 (1973).

Milliken v. Bradley, 433 U.S. 267 (1977).

Mueller v. Allen, 463 U.S. 388 (1983).

Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
Wallace v. Jaffree, 472 U.S. 38 (1985).
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

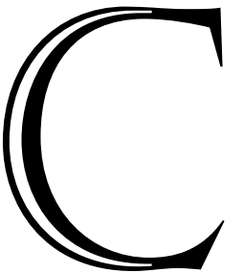
policy and the available complaint process are relevant. The Court added that the second part of the test involves an investigation into actions an employee took in notifying an employer of the unwelcome behavior, including an examination of the employee's utilization of the employer's complaint procedures.

Regina R. Umpstead

See also Civil Rights Act of 1964; Sexual Harassment; Sexual Harassment, Peer-to-Peer; Sexual Harassment, Quid Pro Quo

Legal Citations

Burlington Industries v. Ellerth, 524 U.S. 742 (1998).
Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*
Faragher v. City of Boca Raton, 524 U.S. 775 (1998).



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

Further Readings

Brown, F. A., & Zucker, M. A. (2002). *Education law* (3rd ed.). Scarborough, ON, CA: Carswell.

MacKay, A. W., & Sutherland, L. (2006). *Teachers and the law.* Toronto, ON, CA: Edmond Montgomery.

Sharpe, R. J., Swinton, K. E., & Roach, K. (2002). *The Charter of Rights and Freedoms* (2nd ed.). Toronto, ON, CA: Irwin Law.

Legal Citations

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, Chapter ll. Retrieved September 11, 2006, from http://lois.justice.gc.ca/en/charter/index.html

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

Cannon v. University of Chicago, 441 U.S. 677 (1979).
Cort v. Ash, 422 U.S. 66 (1975).
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.
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*

Legal Citations

Carey v. Piphus, 435 U.S. 247 (1978).
Wood v. Strickland, 420 U.S. 308 (1975), *on remand, sub nom. Strickland v. Inlow,* 519 F.2d 744 (8th Cir. 1975).

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

Further Readings

Buetow, H. A. (1970). *Of singular benefit: The story of Catholic education in the United States.* New York: Macmillan.

Convey, J. J. (1992). *Catholic schools make a difference: Twenty-five years of research.* Washington, DC: National Catholic Education Association.

Greeley, A. M., McGready, W. C., & McCourt, K. (1976). *Catholic schools in a declining church.* Kansas City, MO: Sheed and Ward.

McDonald, D. (2007). *United States Catholic elementary and secondary schools 2006–2007: The annual statistical report on schools, enrollment and staffing.* Washington, DC: National Catholic Education Association.

Newman, A. (2005, Feb. 10). Diocese to close 22 schools in Brooklyn and Queens. *New York Times,* p. A 23.

Zehr, M. A. (2005, Dec. 6). Evangelical Christian schools see growth. *Education Week,* pp. 1, 17.

Legal Citations

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

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

Further Readings

Osborne, A. G. (1999). Supreme Court rules that school must provide full-time nursing services for medically fragile students. *Education Law Reporter, 136,* 1–14.

Rebore D., & Zirkel P. A. (1999). The Supreme Court's latest special education ruling: A costly decision? *Education Law Reporter, 135,* 331–341.

Legal Citations

Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1999).

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

Irving Independent School District v. Tatro, 468 U.S. 883 (1984).

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

Further Readings

Eckes, S., & Rapp, K. (2006). Charter schools: Trends and implications. In E. St. John (Ed.), *Readings on education* (Vol. 19, pp. 1–26). New York: AMS Press.

Mead, J. (2003). Devilish details: Exploring features of charter school statues that blur the public/private distinction. *Harvard Journal on Legislation, 40*(2), 349–379.

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

Further Readings

Gerdy, K. (2004). Law student plagiarism: Why it happens, where it's found, and how to find it. *Brigham Young University Education and Law Journal, 2004*(2), 431–440.

McCabe, D. (2005, June). *Levels of cheating and plagiarism remain high.* Retrieved January 27, 2007, from http://www.academicintegrity.rg/cai_research.asp

Ponte, L. M. (2006). The emperor has no clothes: How digital sampling infringement cases are exposing weaknesses in traditional copyright law and the need for statutory reform. *American Business Law Journal, 43,* 515–560.

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

Further Readings

Henderson, R., Urban, W., & Wolman, P. (Eds.). (2004). *Teachers, unions and education policy. Volume 3: Retrenchment or reform?* New York: JAI Press.

Loveless, T. (Ed.). (2000). *Conflicting missions? Teachers, unions and educational reform.* Washington, DC: Brookings Institution Press.

Legal Citations

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), *on remand,* 922 F.2d 1306 (7th Cir. 1991), *cert. denied,* 501 U.S. 1230 (1991).

Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).

Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).

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

Further Readings

Fossey, R. (1993). Law, trauma, and sexual abuse: Why can't children protect themselves? *West's Education Law Reporter, 91,* 443–454.

Fossey, R., & DeMitchell, T. A. (1997). "Let the master answer": Holding schools vicariously liable when employees sexually abuse children. *Journal of Law and Education, 25,* 575–599.

Herman, J. (1992). *Trauma and recovery.* New York: Basic Books.

Horner, J. (1995). A student's right to protection from violence and sexual abuse in the school environment. *South Texas Law Review, 36,* 45–57.

Pence, D. M., & Wilson, C. A. (1994). Reporting and investigating child sexual abuse. *The Future of Children, 4*(2), 70–83.

Shakeshaft, C. (2004). *Educator sexual misconduct: A synthesis of existing literature.* Washington, DC: U.S. Department of Education.

Legal Citations

Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 *et seq.;* 42 U.S.C. §§ 5116 *et seq.*

Doe v. Taylor Independent School District, 15 F.3d 443 (5th Cir. 1994).

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

Randi W. v. Muroc Joint Unified School District, 929 P.2d 582 (Cal. 1997).

Stoneking v. Bradford Area School District, 882 F.2d 720 (3d Cir. 1989), *cert. denied,* 493 U.S. 1044 (1990).

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*

Legal Citations

Abington Township School District v. Schempp, 374 U.S. 203 (1963).
Board of Education of Central School District v. Allen, 392 U.S. 236 (1968).
Cantwell v. Connecticut, 310 U.S. 296 (1940).
Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).
Engel v. Vitale, 370 U.S. 421 (1962).
Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Minnesota Federation of Teachers v. Mammenga, 500 N.W.2d 136 (Minn. Ct. App. 1993).
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).
Mueller v. Allen, 463 U.S. 388 (1983).
Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).
Washington State Constitution, Article I, Section 11.
Witters v. State Commission for the Blind, 771 P.2d 1119 (Wash. 1989).
Witters v. Washington Department of Services for the Blind I, 474 U.S. 481 (1986).
Witters v. Washington Department of Services for the Blind II, cert. denied, 493 U.S. 850 (1989).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).

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*

Further Readings

Child Abuse and Neglect: The International Journal. Elsevier Publications.

Kempe, C. H., Silverman, F. N., Steele, B. F., Droegmueller, W., & Silver, H. K. (1962). The battered child syndrome. *Journal of the American Medical Association, 181,* 17–24.

U.S. Department of Health and Human Services, Administration on Children, Youth and Families. (2007). *Child maltreatment 2005.* Washington, DC: Author. Available from http://www.acf.hhs.gov/programs/cb/pubs/cm05/index.htm

Legal Citations

Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101 *et seq.*; 42 U.S.C §§ 5116 *et seq.*

Goss v. Lopez, 419 U.S. 565 (1975).

In re Gault, 387 U.S. 1 (1967).

Keeping Children and Families Safe Act, 42 U.S.C. §§ 5101 *et seq.*

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

Prince v. Massachusetts, 321 U.S. 158 (1944), *reh'g denied,* 321 U.S. 804 (1944).

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

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

Further Readings

American Civil Liberties Union. (n.d.). *Privacy and Technology Issues.* Retrieved from http://www.aclu.org/privacy/privacylist.cfm?c=252

American Library Association. (n.d.). *The Children's Internet Protection Act.* Retrieved November 6, 2007, from http://www.ala.org/cipa

Gooden, M. A. (2005). Use of technology and the Internet. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 140–159). Dayton, OH: Education Law Association.

Legal Citations

Children's Internet Protection Act, P.L. 106–554, 20 U.S.C. § 7001.

Miller v. California, 413 U.S. 15 (1973).

Museum and Library Services Act of 1996, 20 U.S.C. § 9101 *et seq.*, §§ 9105(a), 9107–9109.

United States et al. v. American Library Association, 539 U.S. 194 (2003).

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

Legal Citations

City of Boerne v. Flores, 521 U.S. 507 (1997).
Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1988).
Gonzales v. Centro Espirita Beneficiente Unaio Do Vegetal, No. 04–1084 (2006).

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

Further Readings

Heubert, J. (Ed.). (2000). *Law and school reform: Six strategies for promoting educational equity.* New Haven, CT: Yale University Press.

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

Further Readings

Leahy, M., & Barnes, M. (1977). Private social welfare agencies: Legal liabilities facing employees. *Public Welfare, 35*(4), 42–46.

Rice, W. E. (2000, Summer). Insurance contracts and judicial decisions over whether insurers must defend insurees that violate constitutional and civil rights: An historical and empirical review of federal and state court declaratory judgments, 1900–2000. *Tort & Insurance Law Journal, 35,* 995–1095.

Legal Citations

Civil Rights Act of 1871, 42 U.S.C. § 1983.
Monroe v. Pape, 365 U.S. 187 (1961).

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

Further Readings

Kluger, R. (1997). *Simple justice: The history of* Brown v. Board of Education *and Black America's struggle for equality.* New York: Vintage Books.

Legal Citations

Alexander v. Sandoval, 532 U.S. 275 (2001).
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).
Civil Rights Act of 1964, P. L. No. 88–352, 78 Stat. 241 (1964), codified in various sections of 42 U.S. Code § 2000.
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

Further Readings

Birnbaum, J., & Taylor, C. (1999). *Civil rights since 1987.* New York: New York University Press.

Brauer, C. M. (1977). *John F. Kennedy and the second Reconstruction.* New York: Columbia University Press.

Carr, R. K. (1947). *Federal protection of civil rights: Quest for a sword.* Ithaca, NY: Cornell University Press.

Davis, A. L., & Graham, B. L. (1995). *Supreme Court, race and law.* Thousand Oaks, CA: Sage.

Gressman, E. (1952). The unhappy history of civil rights legislation. *Michigan Law Review, 50,* 1323–1358.

Konvitz, M. R. (1961). *A century of civil rights.* New York: Columbia University Press.

Legal Citations

Baldwin v. Franks, 120 U.S. 656 (1887).
Berea College v. Commonwealth of Kentucky, 211 U.S. 45 (1908).
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).
Civil Rights Cases, 109 U.S. 3 (1883).
Cooper v. Aaron, 358 U.S. 1 (1958).
Dowell v. Board of Education of Oklahoma City, 498 U.S. 237 (1991).
Freeman v. Pitts, 498 U.S. 1081 (1992).
Gong Lum v. Rice, 275 U.S. 78 (1927).
Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964).
James v. Bowman, 190 U.S. 127 (1903).
Katzenbach v. McClung, 379 U.S. 294 (1964).
Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).
McLaurin v. Oklahoma State Regents for Higher Education, 339 U.S. 637 (1950).
Milliken v. Bradley, 418 U.S. 717 (1974).
Missouri v. Jenkins, 515 U.S. 70 (1990).
Parents Involved in Community Schools v. Seattle School District No. 1, 127 S. Ct. 2738 (2007).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).
Shelly v. Kramer, 334 U.S. 1 (1948).
Slaughterhouse Cases, 83 U.S. 36 (1873).
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).
Sweatt v. Painter, 339 U.S. 629 (1950).
United States v. Cruikshank, 92 U.S. 542 (1876).
United States v. Harris, 106 U.S. 629 (1883).
United States v. Reese, 92 U.S. 214 (1876).

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

Further Readings

Dickinson, R. J., & Schmitz, P. J. (2005). *Nonrenewing employees.* Columbus: Ohio School Boards Association.

Van Berkum, D. W., Richardson, M. D., Broe, K., & Lane, K. E. (2005). Teacher dismissal. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (pp. 289–300). Dayton, OH: Education Law Association.

Young, I. P. (2008). *The human resource function in educational administration* (9th ed.). Upper Saddle River, NJ: Pearson Prentice Hall.

Legal Citations

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

Further Readings

Brady, K. P. (2006). Bargaining. In C. J. Russo (Ed.), *The yearbook of education law: 2006* (pp. 101–110). Dayton, OH: Education Law Association.

DeMitchell, T. A., & Cobb, C. D. (2006). Teachers: Their union and their profession: A tangled relationship. *West's Education Law Reporter, 212,* 1–18.

Johnsen, J. E. (1942). *The closed shop.* New York: H.W. Wilson.

Kerchner, C., & Koppich, J. (1993). *A union of professionals: Labor relations and educational reform.* New York: Teachers College Press.

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

Cochran v. Louisiana State Board of Education, 281 U.S. 370 (1930).

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).

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

Brady, K. P. (2006). Bargaining. In C. J. Russo (Ed.), *The yearbook of education law: 2006* (pp. 101–110). Dayton, OH: Education Law Association.

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

Legal Citations

No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960).

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).

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

Brown, K. (1992). Has the Supreme Court allowed the cure for de jure segregation to replicate the disease? *Cornell Law Review, 78,* 1–83.

Jacobs, G. S. (1998). *Getting around Brown: Desegregation, development, and the Columbus Public Schools.* Columbus: Ohio State University Press.

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).
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

Further Readings

Arnheim, M. (2004). *Principles of the common law.* London: Duckworth.

Cantor, N. F. (1997). *Imagining the law.* New York: HarperCollins.

Cardozo, B. N. (1921). *The nature of the judicial process.* New Haven, CT: Yale University Press.

Holmes, O. W., Jr. (1923). *The common law.* Boston: Little, Brown.

Legal Citations

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938).

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

Legal Citations

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).
Moubry v. Independent School District No. 696, 951 F. Supp. 867 (D. Minn. 1996).
Parents of Student W. v. Puyallup School District No. 3, 31 F.3d 1489 (9th Cir. 1994).
Pihl v. Massachusetts Department of Education, 9 F.3d 184 (1st Cir. 1993).
Puffer v. Raynolds, 761 F. Supp. 838 (D. Mass. 1988).
Ridgewood Board of Education v. N.E., 172 F.3d 238 (3d Cir. 1999).
State of West Virginia ex rel. Justice v. Board of Education of the County of Monongalia, 539 S.E.2d 777 (W.Va. 2000).

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*

Further Readings

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

Kotin, L., & Aikman, W. (1980). *Legal foundations of compulsory school attendance.* New York: Kennikat Press.

White, P. (1996). *Civic virtues and public schooling, educating citizens for a democratic society.* New York: Teachers College Press.

Legal Citations

Farrington v. Tokushige, 273 U.S. 284 (1927).

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).

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

Connick v. Myers, 461 U.S. 138 (1983).
Garcetti v. Ceballos, 547 U.S. 410 (1996).
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*

Further Readings

Amaker, N. (1988). *Civil rights and the Reagan administration.* Washington, DC: Urban Institute Press.

Anderson, L. (1993). The approval and interpretation of consent decrees in civil rights class action litigation. *University of Illinois Law Review, 3,* 579–632.

Dentler, R. A., Baltzell, D. C., & Sullivan, D. J. (1983). *University on trial: The case of the University of North Carolina.* Cambridge, MA: Abt Books.

Prestage, J. J., & Prestage, J. L. (1989). The consent decree as a tool for desegregation in higher education. In W. D. Smith & D. Chunn (Eds.), *Black education: A quest for equity and excellence* (pp. 158–175). New Brunswick, NJ: Transaction.

William, T. T. (1991). Student affirmative action in higher education: Addressing under-representation. In J. Altbach & K. Lomotey (Eds.), *The racial crisis in higher education* (pp. 107–133). Albany: State University of New York Press.

Legal Citations

Adams v. Califano I, 430 F. Supp. 118 (D.C.C. 1977).

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).

Dowell v. Board of Education of Oklahoma City Public Schools, 498 U.S. 237 (1991).

Freeman v. Pitts, 498 U.S. 1081 (1992).

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

Neal v. Board of Trustees of California State Universities, 198 F.3d 763 (9th Cir. 1999).

Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania, 343 F. Supp 297 (E.D. Pa. 1972).

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*

Further Readings

Dietz, L., Gregor, R., Jacobs, A., Leming, T., Levin, J. Shampo, J., et al. (2007). *American jurisprudence, contracts* (2nd ed.). St. Paul, MN: Thomson-West.

Lord, R. A. (1990). *Williston on contracts* (4th ed.). Eagan, MN: Thomson-West.

Legal Citations

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

Perry v. Sindermann, 408 U.S. 593 (1972).

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

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).
Cooper v. Aaron, 358 U.S. 1 (1958).

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

Further Readings

Ad Hoc Committee of Educational Institutions and Organizations on the Copyright Law Revision of 1976. (1991). *Notes of Committee on the Judiciary* [House Report No. 94–176] (pp. 65–74). Retrieved January 14, 2008, from http://en.wikisource.org/wiki/Page:H.R._Rep._No._94-1476_(1976)_Page_065.djvu

Daniel, P. T. K., & Pauken, P. D. (1999). The impact of the electronic media on instructor creativity and institutional ownership within copyright law. *Education Law Reporter, 132,* 1–43.

Daniel, P. T. K., & Pauken, P. D. (2005). Copyright laws in the age of technology: Changes in legislation and their applicability to the K–12 environment. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 441–453). Dayton, OH: Education Law Association.

Daniel, P. T. K., & Pauken, P. D. (2005). Intellectual property. In J. Beckham & D. Dagley (Eds.), *Contemporary issues in higher education law* (pp. 347–393). Dayton, OH: Education Law Association.

Gasaway, L. (n.d.). *When U.S. works pass into the public domain.* Retrieved February 8, 2008, http://www.unc.edu/~unclng/public-d.htm

National Association of College Stores. (2007). *Questions and answers on copyright for the campus community.* Retrieved January 10, 2008, from http://www.nacs.org/public/copyright

Sperry, D. J., Daniel, P. T. K., Huefner, D. S., & Gee, E. G. (1998). *Education law and the public schools: A compendium* (pp. 191–203). Norwood, MA: Christopher-Gordon Publishers.

Legal Citations

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*

Further Readings

Bagley, W. (1915). *School discipline.* New York: Macmillan.
Hyman, I. (1989). *Reading, writing and the hickory stick.* Lexington, MA: D.C. Heath.
U.S. Department of Education, Office for Civil Rights. (2004). Data from elementary and secondary school civil rights survey. Available from http://www.ed.gov/about/offices/list/ocr/data.html?src+rt

Legal Citations

Baker v. Owens, 395 F. Supp. 294 (M.D.N.C 1975), *aff'd without opinion*, 423 U.S. 907 (1975).
Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).
Ingraham v. Wright, 430 U.S. 651 (1977).
Landers v. Seavers, 32 Vt. 114 (1859).
State of North Carolina v. Pendergass, 19 N.C. 365 (1837).

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

Legal Citations

Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327 (1987).
Lemon v. Kurtzman, 403 U.S. 602 (1971).

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

Legal Citations

Bustop, Inc. v. Board of Education of the City of Los Angeles, 439 U.S. 1382, 184 (1978).

Crawford v. Board of Education of the City of Los Angeles, 130 Cal. Rptr. 724 (Cal. 1976), 170 Cal. Rptr. 495 (Cal Ct. App. 1980), 458 U.S. 527 (1982).

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

Further Readings

Darwin, C. (1859). *On the origin of species by means of natural selection.* London: J. Murray.

Feldman, N. (2006). *Divided by God: America's church–state problem . . . and what we should do about it.* New York: Farrar, Straus and Giroux.

Looney, S. (2004). *Education and the legal system: A guide to understanding the law.* Columbus, OH: Pearson Education.

Stone, G., Seidman, L., Sunstein, C., Tushnet, M., & Karlan, P. *Constitutional law* (4th ed.). New York: Aspen.

Legal Citations

Edwards v. Aguillard, 482 U.S. 578 (1987).

Epperson v. State of Arkansas, 393 U.S. 97 (1968).

Kitzmiller v. Dover Area School District, 400 F. Supp. 2d 707 (M.D. Pa. 2005).

Scopes v. State of Tennessee, 289 S.W. 363 (Tenn. 1927).

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*

Further Readings

Boyle, J. (1985). The politics of reason: Critical legal theory and local social thought. *University of Pennsylvania Law Review, 133,* 685–780.

Cornell, D. (1998). At the heart of freedom: Feminism, sex, and equality. Princeton, NJ: Princeton University Press.

Habermas, J. (1996). *Between facts and norms: Contributions to a discourse theory of law and democracy.* Cambridge: MIT Press.

Kennedy, D. (1983). *Legal education and the reproduction of hierarchy: A polemic against the system.* New York: New York University Press.

Ladson-Billings, G., & Fate, W. (1995). Toward a critical race theory of education. *Teachers College Record, 97*(1), 47–68.

Parker, L., Villenas, S., & Deyhle, D. (Eds.). (1998). Special issue on critical race theory. *Qualitative Studies in Education, 11*(1).

Scheuerman, W. (1994). *Between the norm and the exception: The Frankfurt School and the rule of law.* Cambridge: MIT Press.

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. 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*

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. Board of Education, Richmond County, 175 U.S. 528 (1899).
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

Further Readings

McLeod, S. (2007, March). *Administrator's guide to cyberbullying.* Retrieved June 1, 2007 from http://www.dangerouslyirrelevant.org/2007/03/administrators_.html

Willard, N. E. (2007). *Cyberbullying and cyberthreats: Responding to the challenge of online social aggression, threats, and distress.* Eugene, OR: Center for Safe and Responsible Internet Use.

Legal Citations

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

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

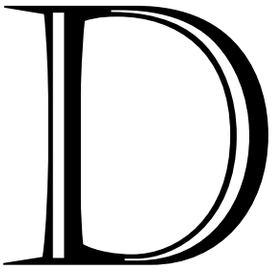
Morse v. Frederick, 127 S. Ct. 2618 (2007).

Pickering v. Board of Education of Township School District 205, Will County, 391 U.S. 563 (1968).

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

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

Further Readings

Cowan, G. (1993). *The people v. Clarence Darrow.* New York: Random House.

Tierney, K. (1979). *Darrow: A biography.* New York: Thomas Y. Crowell.

Weinberg, A. (Ed.) (1989/1957). *Attorney for the damned: Clarence Darrow in the courtroom.* Chicago: University of Chicago Press.

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

Further Readings

DeMitchell, T. A., & Cobb, C. D. (2006). Teachers: Their union and their profession: A tangled relationship. *West's Education Law Reporter, 212,* 1–18.

Legal Citations

Abood v. Detroit Board of Education, 431 U.S. 209 (1977).

Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), *on remand,* 922 F.2d 1306 (7th Cir. 1991), *cert. denied,* 501 U.S. 1230 (1991).

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

Further Readings

DeMitchell, T. A. (2000). Peer sexual harassment: More than teasing. *Davis v. Monroe County Board of Education. International Journal of Educational Reform, 9,* 180–186.

Morris, A. A. (1999). School board responsibility for student on student sexual harassment: *Davis v. Monroe County Board of Education. Education Law Reporter, 137,* 441–447.

Legal Citations

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999).

Doe v. Dallas Independent School District, 220 F.3d 380 (5th Cir. 2000).

Education Amendments of 1972, 20 U.S.C. § 1681(a).

Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).

Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).

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*

Further Readings

Dayton, J. (1993). Desegregation: Is the court preparing to say it is finished? *Education Law Reporter, 84,* 897–905.

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).
Columbus Board of Education v. Penick, 443 U.S. 449 (1979).
Dayton Board of Education v. Brinkman I, 443 U.S. 406 (1977).
Dayton Board of Education v. Brinkman II, 443 U.S. 526 (1979).
Green v. County School Board of New Kent County, 391 U.S. 430, 438 (1968).
Keyes v. School District No.1, Denver, Colorado, 413 U.S. 189 (1973).
Milliken v. Bradley, 418 U.S. 717 (1974).
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

Legal Citations

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

Further Readings

Kenyon, A. (2006). *Defamation: Comparative law and practice.* New York: Routledge-Cavendish.

Rossow, L. F., & Tate, J. O. (2003). *The law of teacher evaluation* (2nd ed.). Dayton, OH: Education Law Association.

Legal Citations

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).
New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
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*

Legal Citations

DeFunis v. Odegaard, 416 U.S. 312 (1974).
Grutter v. Bollinger, 539 U.S. 306 (2003).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

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

Further Readings

Brown, F. A., & Zucker, M. A. (2002). *Education law* (3rd ed.). Scarborough, ON, CA: Carswell.

The Sacred Congregation For Catholic Education. (1982). Lay Catholics in schools: Witnesses to faith. Retrieved September 11, 2007 from http://www.vatican.va/roman_curia/congregations/ccatheduc/documents/rc_con_ccatheduc_doc_19821015_lay-catholics_en.html

Sharpe, R. J., Swinton, K. E., & Roach, K. (2002). *The Charter of Rights and Freedoms* (2nd ed.). Toronto, ON, CA: Irwin Law.

Legal Citations

Alberta Act. 4–5 Edward VII Ch. 3 (Canada).

Canada Act 1982 Ch. 11 (U.K.).

Constitution Act, 1982, being Schedule B to the Canada Act 1982, Ch. 11 (U.K.).

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982, Ch. 11 (U.K.).

Hall (Litigation Guardian of) v. Powers (2002), 213 D.L.R. (4th) 308 (Ont. S.C.J.).

Ordinances of the Northwest Territories. Retrieved September 11, 2007, from http://www.ourfutureourpast.ca/law/browse.aspx?g=Law&p=Ordinances+of+the+Northwest+Territories&s=1870–1879

Saskatchewan Act. 4–5 Edward VII, Ch. 42 (Canada).

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

Further Readings

Black, H. C., & publisher's editorial staff (1990). *Black's Law Dictionary* (6th ed.). Saint Paul, MN: West.

Members of the firm of McCutchen, Doyle, Brown, & Enersen, et al. (1985). *Federal litigation guide.* New York: Mathew Bender.

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.

Patrick D. Pauken

See also Acceptable Use Policies; Copyright; Fair Use; Intellectual Property

Further Readings

Daniel, P. T. K., & Pauken, P. D. (1999). The impact of the electronic media on instructor creativity and institutional ownership within copyright law. *Education Law Reporter, 132,* 1–43.

Daniel, P. T. K., & Pauken, P. D. (2005). Copyright laws in the age of technology: Changes in legislation and their applicability to the K–12 environment. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 441–453). Dayton, OH: Education Law Association.

Daniel, P. T. K., & Pauken, P. D. (2005). Intellectual property. In J. Beckham & D. Dagley (Eds.), *Contemporary issues in higher education law* (pp. 347–393). Dayton, OH: Education Law Association.

Legal Citations

A&M Records v. Napster, 239 F.3d 1004 (9th Cir. 2001).

Copyright Act, 17 U.S.C. §§ 101 *et seq.*

In re Aimster Copyright Litigation, 334 F.3d 643 (7th Cir. 2003).

Online Copyright Infringement Liability Limitation Act, 17 U.S.C. § 512.

Universal City Studios, Inc. v. Corley, 273 F.3d 429 (2d Cir. 2001).

WIPO Copyright and Performances and Phonograms Implementation Act, 17 U.S.C. §§ 1201 *et seq.*

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.

Allan G. Osborne, Jr.

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

Legal Citations

Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*
Board of Education of Hendrick Hudson Central School District v. Rowley, 458 U.S. 176 (1982).
Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1999).
Civil Rights Act of 1964, 42 U.S.C. §§ 2000 *et seq.*
Doe v. Dolton Elementary School District No. 148, 694 F. Supp. 440 (N.D. Ill. 1988).
Education of the Handicapped Amendments of 1986, P.L. 99–457, 100 Stat. 1145.
Handicapped Children's Protection Act, P.L. 99–372, 100 Stat. 796.

Honig v. Doe, 484 U.S. 305 (1988).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Individuals with Disabilities Education Act Amendments of 1997, P.L. 105–17, 11 Stat. 37.
Individuals with Disabilities Education Improvement Act of 2004, P.L. 108–446, 118 Stat. 2647.
Irving Independent School District v. Tatro, 468 U.S. 883 (1984).
Pandazides v. Virginia Board of Education, 804 F. Supp. 794 (E.D. Va. 1992), *reversed on other grounds,* 13 F.3d 823 (4th Cir. 1994).
Rehabilitation Act of 1973, Section 504, 29 U.S.C. § 794(a).
Rothschild v. Grottenthaler, 725 F. Supp. 776 (S.D.N.Y. 1989), *aff'd in part, vacated and remanded in part,* 907 F.2d 286 (2nd Cir. 1990).
Sacramento City Unified School District, Board of Education v. Rachel H., 14 F.3d 1398 (9th Cir. 1994).
Schaffer ex rel. Schaffer v. Weast, 126 S. Ct. 528 (2005).
School Board of Nassau County v. Arline, 480 U.S. 273 (1987).
Southeastern Community College v. Davis, 442 U.S. 397 (1979).
Sullivan v. Vallejo City Unified School District, 731 F. Supp. 947 (E.D. Cal. 1990).

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

Further Readings

Hall, K. L. (1992). *The Oxford companion to the Supreme Court of the United States.* New York: Oxford University Press.

Perez, M. G. (2004). Fair and facially neutral higher educational admissions through disparate impact analysis. *Michigan Journal of Race and Law, 9,* 467–502.
Shoben, E. W. (1977a). Differential pass-fail rates in employment testing: Statistical proof under Title VII. *Harvard Law Review, 91,* 793–813.
Shoben, E. W. (1977b). Probing the discriminatory effects of employee selection procedures with disparate impact analysis under Title VII. *Texas Law Review, 73,* 677–710.
Shoben. E. W. (1979). In defense of disparate impact analysis under Title VII: A reply to Dr. Cohn. *Indiana Law Review, 55,* 515–536.
Shoben, E. W. (1980). Compound discrimination: The interaction of race and sex in employment discrimination. *New York Law Review, 55,* 793–835.
Shoben, E. W. (2004). Disparate impact theory in employment discrimination: What's Griggs still good for? What not? *Brandeis Law Journal, 42,* 597–622.

Legal Citations

Griggs v. Duke Power Company, 401 U.S. 424 (1971).
Washington v. Davis, 426 U.S. 229 (1976).

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

Further Readings

Bobby, C. L., & Capone, L. (2000). Understanding the implications of distance learning for accreditation and licensure of counselor preparation programs. In J. W. Bloom & G. R. Walz (Eds.), *Cybercounseling and cyberlearning: Strategies and resources for the millennium.* Alexandria, VA: American Counseling Association.

Heeger, G. A. (2007). A close look at distance learning. *USDLA Distance Learning Today, 1*(1), 1, 5, 11.

Johnson, L. (2006). Managing intellectual property for distance learning. *Educause Quarterly, 29*(2), 66–70.

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

Further Readings

Douglas, W. O. (1980). *The court years, 1939–1975: The autobiography of William O. Douglas.* New York: Random House.

Murphy, B. A. (2003). *Wild Bill: The legend and life of William O. Douglas.* New York: Random House.

Simon, J. F. (1980). *Independent journey: The life of William O. Douglas.* New York: Harper & Row.

Legal Citations

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

Board of Education. v. Allen, 392 U.S. 236 (1968).

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).

Cantwell v. Connecticut, 310 U.S. 296 (1940).

Cooper v. Aaron, 358 U.S. 1 (1958).

Dennis v. United States, 341 U.S. 494 (1951).

Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).

Griswold v. Connecticut, 381 U.S. 479 (1965).

Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).

Korematsu v. United States, 323 U.S. 214 (1944).

Lau v. Nichols, 483 F.2d 791 (9th Cir. 1973); 414 U.S. 563 (1974).

Milliken v. Bradley, 418 U.S. 717 (1974).

Minersville School District v. Gobitis, 310 U.S. 586 (1940).

Sherbert v. Verner, 374 U.S. 398 (1963).

West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).

Wisconsin v. Yoder, 406 U.S. 205 (1972).

Zorach v. Clauson, 343 U.S. 306 (1952).

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

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).
Dowell v. Board of Education of Oklahoma City, 396 U.S. 269 (1969); 328 F. Supp. 1256 (W.D. Okla. 1972a); *aff'd,* 465 F.2d 1012 (10th Cir. 1972b); *cert. denied,* 409 U.S. 1041 (1972c); 606 F. Supp. 1548 (W.D. Okla. 1985); 795 F.2d 1516 (10th Cir. 1986a); *cert. denied,* 479 U.S. 938 (1986b); *on remand,* 677 F. Supp. 1503 (W.D. Okla. 1987); *vacated,* 890 F.2d 1483 (10th Cir. 1989); *cert. granted,* 494 1055 (1990); 498 U.S. 237 (1991); *on remand,* 778 F. Supp. 1144 (W.D. Okla. 1991); *aff'd,* 8 F.3d 1501 (10th Cir. 1993).
Green v. County School Board of New Kent County, 391 U.S. 443 (1968).

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*

Further Readings

Salgado, R. (2005). Protecting student speech rights while increasing school safety: School jurisdiction and the search for warning signs in a post–Columbine/Red Lake environment. *Brigham Young University Law Review, 2005*(5), 1371–1412.

Uerling, D. (1997). *Student dress code* (EA028608). Lincoln, NE: Educational Management. (ERIC Document Reproduction Service No. ED411577)

Legal Citations

Canady v. Bossier Parish School Board, 240 F. 3d 437 (5th Cir. 2000).

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 School District, 393 U.S. 503 (1969)

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*

Legal Citations

B. C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999).

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).

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).

New Jersey v. T. L. O., 469 U.S. 325 (1985).

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*

Further Readings

Beckham, J. C. (2005). Searches in public schools. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 37–57). Dayton, OH: Education Law Association.

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).

Gutin v. Washington Township Board of Education, 467 F. Supp. 2d 414 (D.N.J. 2006).

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*

Further Readings

Beckham, J. C. (2005). Searches in public schools. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 37–57). Dayton, OH: Education Law Association.

Darden, E. C. (2007). Conduct unbecoming. A teacher's off-campus actions can have in-school consequences. Are you prepared to make a difficult judgment call? *American School Board Journal, 194*(10), 42–43.

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).

Chandler v. Miller, 520 U.S. 305 (1997).

Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir. 1998).

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

New Jersey v. T. L. O., 469 U.S. 325 (1985).

O'Connor v. Ortega, 480 U.S. 709 (1987).
Patchogue-Medford Congress of Teachers v. Board of Education of Patchogue-Medford Union Free School District, 517 N.Y.S.2d 456 (N.Y. 1987).
Skinner v. Railway Labor Executives Association, 489 U.S. 602 (1989).
United Teachers of New Orleans v. Orleans Parish School Board, 142 F.3d 853 (5th Cir. 1998).
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*

Further Readings

Orfield, G., & Eaton, S. E. (1996). *Dismantling desegregation: The quiet reversal of* Brown v. Board of Education. New York: New Press.

Rossell, C. H., Armor, D. J., & Walberg, H. J. (Eds.). (2002). *School desegregation in the 21st century.* Westport, CT: Praeger.

Wolters, R. (1996). *Right turn: William Bradford Reynolds, the Reagan administration, and Black civil rights.* New Brunswick, NJ: Transaction.

Legal Citations

Dowell v. Board of Education of Oklahoma City Public Schools, 498 U.S. 237 (1991), *on remand,* 778 F. Supp. 1144 (W.D. Okla. 1991), *aff'd sub nom. Dowell v. Board of Education of Oklahoma City Public Schools,* 8 F.3d 1501 (10th Cir. 1993).

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).

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

Legal Citations

Board of Regents v. Roth, 408 U.S. 564 (1972).
Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).
Dunn v. Fairfield Community High School District No. 225, 158 F.3d 962 (7th Cir. 1998).
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

Further Readings

Dickinson, R. J., & Schmitz, P. J. (2005). *Nonrenewing employees.* Columbus: Ohio School Boards Association.

Macy, N. (1988). A perspective on due process in teacher evaluation. *Journal of Personnel Evaluation in Education, 2,* 53–57.

Van Berkum, D. W., Richardson, M. D., Broe, K., & Lane, K. E. (2005). Teacher dismissal. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 289–300). Dayton, OH: Education Law Association.

Young, I. P. (2008). *The human resource function in educational administration* (9th ed.). Upper Saddle River NJ: Pearson Prentice Hall.

Legal Citations

Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985).

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

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

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).

Peter W. v. San Francisco Unified School District, 131 Cal.Rptr. 854 (Cal. Ct. App. 1976).

Ross v. Creighton University, 740 F. Supp. 1319 (N.D. Ill. 1990).

Simon v. Celebration Co., 883 So. 2d 826 (Fla. Dist. Ct. App. 2004).

Suriano v. Hyde Park Central School District, 611 N.Y.S.2d 20 (N.Y. App. Div.1994).

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

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).

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*

Legal Citations

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*

Further Readings

U.S. Senate. (2002). *Analysis and interpretation of the Constitution. Annotations of cases decided by the Supreme Court of the United States* (Senate Document No. 108–17, 2002). Retrieved March 30, 2007, from http://www.gpoaccess.gov/constitution/browse2002.html

Legal Citations

Atkins v. Virginia, 536 U.S. 304 (2002).
Austin v. United States, 509 U.S. 602 (1993).
Bail Reform Act of 1984, 18 U.S.C. §§ 3142 *et seq.*
Furman v. Georgia, 408 U.S. 238 (1972).
Ingraham v. Wright, 430 U.S. 651 (1977).
Roper v. Simmons, 543 U.S. 551 (2005).
Trop v. Dulles, 356 U.S. 86 (1958).
United States v. Bajakajian, 524 U.S. 321 (1998).
United States v. Salerno, 481 U.S. 739 (1988).

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

Further Readings

Devaney, L. (2007). *Poll: Schools aren't meeting data-storage rules.* Retrieved June 30, 2007, from http://www.eschoolnews.com/news/showstory.cfm?ArticleID=7123

Electronic Privacy Information Center. (n.d.). http://www.epic.org

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

Further Readings

French, P. (2004). Electronic document retention policies. *Law Practice Today.* Available from http://archscan.com/documents/Creating%20%20Document%20Retention%20Policies.pdf

Legal Citations

Freedom of Information Act, 5 U.S.C. § 552.
Sarbanes-Oxley Act, 15 U.S.C. § 7241, 18 U.S.C. §1350.

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

Further Readings

Noonan. J. T., Jr. (2002). *Narrowing the nation's power: The Supreme Court sides with the states.* Berkeley: University of California Press.

Snow, B. A., & Thro, W. E. (2001). The significance of Blackstone's understanding of sovereign immunity for America's public institutions of higher education. *Journal of College & University Law, 28,* 97–128.

Thro, W. E. (1999). The Eleventh Amendment revolution in the lower federal courts. *Journal of College & University Law, 25,* 501–526.

Thro, W. E. (2003). Immunity or intellectual property: The constitutionality of forcing the states to choose. *West's Education Law Reporter, 173,* 17–39.

Thro, W. E. (2007). The future of sovereign immunity. *West's Education Law Reporter, 215,* 1–31.

Thro, W. E. (2007). *Why you cannot sue State U: A guide to sovereign immunity* (2nd ed.). Washington, DC: National Association of College University Attorneys.

Legal Citations

Alden v. Maine, 527 U.S. 706 (1999).

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

Board of Trustees of University of Alabama v. Garrett, 531 U.S. 356 (2001).

Central Virginia Community College v. Katz, 126 S. Ct. 990 (2006).

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793).

City of Boerne v. Flores, 521 U.S. 507 (1997).

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002).

Florida Prepaid Postsecondary Education Expense Board v. College Savings Bank, 527 U.S. 627 (1999).

Kimel v. Florida Board of Regents, 528 U.S. 62 (2000).

Nevada Department of Human Resources v. Hibbs, 538 U.S. 721 (2003).

Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139 (1993).

Seminole Tribe of Florida v. Florida, 517 U.S. 44 (1996).

Tennessee Student Assistance Corporation v. Hood, 541 U.S. 440 (2004).

Tennessee v. Lane, 541 U.S. 509, 518 (2004).

United States v. Georgia, 546 U.S. 151 (2006).

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

Further Readings

Baum, L. (2006). *Judges and their audiences: A perspective on judicial behavior.* Princeton, NJ: Princeton University Press.

Feldman, N. (2005). *Divided by God: America's church-state problem—and what we should do about it.* New York: Farrar, Straus & Giroux.

Looney, S. D. (2004). *Education and the legal system: A guide to understanding the law.* Upper Saddle River, NJ: Pearson Education.

Legal Citations

Elk Grove Unified School District v. Newdow, 542 U.S. 104 (2004).

Newdow v. Congress of U.S., 383 F. Supp. 2d 1229 (E.D. Cal. 2005).

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*

Further Readings

Mawdsley, R. (1992). *Employment Division v. Smith* revisited: The constriction of Free Exercise rights under the United States Constitution. *Education Law Reporter, 76,* 1–16.

Legal Citations

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).
Civil Rights Act of 1964, 42 U.S.C. § 1983.
Employment Division Department of Human Resources of Oregon. v. Smith, 494 U.S. 872 (1990).
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 (1993).
Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995).
United States v. Lee, 455 U.S. 252 (1982).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

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*

Further Readings

Mawdsley, R. (2001). The equal access act and public schools: What are the legal issues related to recognizing gay student groups? *Brigham Young University Educational Law Journal, 1,* 1–33.

Legal Citations

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).
Boyd County High School Gay Straight Alliance v. Board of Education of Boyd County, 258 F. Supp. 2d 667 (E.D. Ky. 2003).
Brandon v. Board of Education of Guilderland Central School District, 635 F.2d 971 (2d Cir. 1980).
East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, 30 F.Supp. 2d 1356 (D. Utah 1998).
Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*
Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.
Gonzaga University v. Doe, 536 U.S. 273 (2002).
Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).
Lubbock Civil Liberties Union v. Lubbock Independent School District, 669 F.2d 1038 (5th Cir. 1982).
Prince v. Jacoby, 303 F.3d 1074 (9th Cir. 2002).
Student Coalition for Peace v. Lower Merion School District Board of School Directors, 776 F.2d 431 (3d Cir. 1985).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
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

Further Readings

Brown, M. C. (Ed.). (2007). *Still not equal: Expanding educational opportunity in society.* New York: Peter Lang.

Flicker, B. (Ed.). (1990). *Justice and school systems: The role of the courts in education litigation.* Philadelphia: Temple University Press.

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).

Castaneda v. Pickard, 648 F.2d 989 (5th Cir. 1981).

Keyes v. School District No. 1, Denver, Colorado, 413 U.S.189 (1973).

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

Further Readings

U.S. Equal Employment Opportunity Commission. (n.d.). http://www.eeoc.gov

Legal Citations

Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.*
Americans with Disabilities Act, 42 U.S.C. §§ 12101 *et seq.*
Civil Rights Act of 1964, 42 U.S.C. §§ 1971 *et seq.*
Equal Pay Act, 29 U.S.C. § 206(d).
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

Further Readings

Keohane, L. (1997). Universities, colleges and the Equal Pay Act: The Fourth Circuit analyzes a salary dispute in *Strag v. Board of Trustees. Campbell Law Review, 19,* 333–348.

Perez-Arrieta, A. (2005). Defenses to sex-based wage discrimination claims at educational institutions: Exploring "equal work" and "any other factor other than sex" in the faculty context. *Journal of College & University Law, 31,* 393–415.

Legal Citations

Equal Pay Act, 29 U.S.C. § 206(d).

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*

Legal Citations

Bolling v. Sharpe, 344 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).
Flores v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003).
Grutter v. Bollinger, 539 U.S. 306 (2003).
Mississippi University for Women v. Hogan, 458 U.S. 718 (1982).
Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).
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

Legal Citations

Alamo Heights Independent School District v. State Board of Education, 790 F.2d 1153 (5th Cir. 1986).
Anderson v. Thompson, 495 F. Supp. 1256 (E.D. Wis. 1980), *aff'd,* 658 F.2d 1205 (7th Cir. 1981).
Armstrong v. Kline, 476 F. Supp. 583 (E.D. Pa. 1979), *remanded sub nom. Battle v. Commonwealth of Pennsylvania,* 629 F.2d 269 (3d Cir. 1980), *on remand,* 513 F. Supp. 425 (E.D. Pa. 1981).
Cordrey v. Euckert, 917 F.2d 1460 (6th Cir. 1990).
Crawford v. Pittman, 708 F.2d 1028 (5th Cir. 1983).
Georgia Association of Retarded Citizens v. McDaniel, 511 F. Supp. 1263 (N.D. Ga. 1981), *aff'd,* 716 F.2d 1565 (11th Cir. 1983), *vacated and remanded,* 468 U.S. 1213 (1984) *(mem.), modified,* 740 F.2d 902 (11th Cir. 1984).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*
Johnson v. Independent School District No. 4 of Bixby, 921 F.2d 1022 (10th Cir. 1990).
J. P. ex rel. Popson v. West Clark Community Schools, 230 F. Supp.2d 910 (S.D. Ind. 2002)
McQueen v. Colorado Springs School District No. 11, 419 F. Supp.2d 1303 (D. Colo. 2006).
MM v. School District of Greenville County, 303 F.3d 523 (4th Cir. 2002).
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*

Further Readings

Russo, C. J. (2006). *Reutter's: The law of public education* (6th ed.). New York: Foundation Press.

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).
Palmer v. Merluzzi, 868 F.2d 90 (3rd Cir. 1989).
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).

F

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

Further Readings

Daniel, P. T. K., & Pauken, P. D. (2005). Copyright laws in the age of technology: Changes in legislation and their

applicability to the K–12 environment. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 441–453). Dayton, OH: Education Law Association.

Daniel, P. T. K., & Pauken, P. D. (2005). Intellectual property. In J. Beckham & D. Dagley (Eds.), *Contemporary issues in higher education law* (pp. 347–393). Dayton, OH: Education Law Association.

Legal Citations

Basic Books, Inc. v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S.D.N.Y. 1991).

Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

Copyright Act, 17 U.S.C. §§ 101 *et seq.*

Harper & Row Publishers, Inc. v. Nation Enterprises, 471 U.S. 539 (1985).

Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996).

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

Further Readings

Keeton, W. P., Dobbs, D. B., Keeton, R. E., & Owen, D. G. (1984). *Prosser & Keeton on the law of torts* (5th ed.). St. Paul, MN: West.

Legal Citations

Daniels v. Lutz, 407 F. Supp. 2d 1038 (E.D. Ark. 2005).
Escambia County School Board v. Bragg, 680 So. 2d 571 (Fla. Dist. Ct. App. 1996).
Ette v. Linn-Mar Community School District, 656 N.W.2d 62 (Iowa 2002).
Restatement (Second) of Torts §§ 35–45A (1965).
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*

Further Readings

United States Department of Education (2007). *Family Educational Rights and Privacy Act.* Retrieved January 20, 2007, from http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html

Van Dusen, M. (2007). *FERPA: basic guidelines for faculty and staff. A simple step-by-step approach for compliance.* Retrieved January 20, 2007, from http://www.nacada.ksu.edu/Resources/FERPA-Overview.htm

Legal Citations

Code of Federal Regulations, 34 C.F.R. §§ 99.1 *et seq.*

Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g.

Gonzaga University v. Doe, 536 U.S. 273 (2002).

Owasso Independent School District No. 1011 v. Falvo, 534 U.S. 426 (2002).

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

Legal Citations

Civil Rights Act of 1871, 42 U.S.C. § 1983.
Civil Rights Act of 1964, 42 U.S.C. §§ 1971 *et seq.*
Faragher v. City of Boca Raton, 524 U.S. 775 (1998).

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

Further Readings

Hurd, W. H., & Thro, W. E. (2004). Federalism and the separation of powers: The federalism aspect of the Establishment Clause. *Engage: The Journal of the Federalist Society's Practice Groups, 5*(2), 62–68.

Thro, W. E. (2003). A question of sovereignty: A review of John T. Noonan, Jr.'s *Narrowing the nation's power: The Supreme Court sides with the states. Journal of College & University Law, 29,* 745–765.

Thro, W. E. (2003). That those limits may not be forgotten: An explanation of dual sovereignty. *Widener Law Journal, 12,* 567–582.

Wilkinson, J. H., III (2001). Federalism for the future. *Southern California Law Review, 74,* 523–540.

Legal Citations

City of Boerne v. Flores, 521 U.S. 507 (1997).

Federal Maritime Commission v. South Carolina State Ports Authority, 535 U.S. 743 (2002).

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991).

Marbury v. Madison, 5 U.S. (1 Cranch) 137, (1803).

Printz v. United States, 521 U.S. 898 (1997).

South Carolina v. Baker, 485 U.S. 505, 533 (1988).

Texas v. White, 74 U.S. (7 Wall.) 700, 725 (1868).

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

Further Readings

Bernstein, H. T., & Merenda, D. W. (1981). Categorical programs: Past and present. In D. M. Miller (Ed.), *The federal role in education* (pp. 187). Washington DC: The Institute for Educational Leadership.

Carpenter, L. J., & Acosta, R. V. (2005). *Title IX.* Champaign, IL: Human Kinetics.

DeBray, E. (2006). *Politics, ideology and education: Federal policy during the Clinton and Bush administrations.* New York: Teachers College Press.

Elmore, R. F., & Fuhrman, S. (1990). The national interest and the federal role in education. *Publius, 20*(3), 149–162.

Elmore, R. F., & McLaughlin, M. W. (1982). Strategic choice in federal education policy: The compliance-assistance trade-off. In A. Lieberman & M. McLaughlin (Eds.), *Policy making in education* (pp. 159–194). Chicago, IL: University of Chicago Press.

Fischer, L. (1982). *The courts and educational policy.* In A. Lieberman & M. McLaughlin (Eds.), *Policy making in education* (pp. 56–79). Chicago, IL: University of Chicago Press.

HISD Connect. (2007). http://www.houstonisd.org

Institute of Education Sciences. (2007). *Digest of education statistics.* Retrieved August 4, 2007, from http://nces.ed.gov/programs/digest/d06/tables/dt06_105.asp

Jones, P. R. (1981). *A practical guide to federal special education law.* New York: CBS College Publishing.

Lapati, A. D. (1975). *Education and the federal government.* New York: Mason/Charter.

Manna, P. (2007). *School's in: Federalism and the national education agenda.* Washington, DC: Georgetown University Press.

NCEE. (1983). *A nation at risk.* Washington, DC: U.S. Department of Education.

Texas Education Agency, NCLB Program Coordination. (n.d.). *Questions about public school choice under NCLB school improvement programs.* Available from http://www.tea.state.tx.us/nclb/PDF/SchoolChoiceQNA.pdf

Sunderman, G. L., Kim, J., & Orfield, G. (2005). *NCLB meets school realities: Lessons from the field.* Thousand Oaks, CA: Corwin.

Wong, K. K. (1999). Political institutions and educational policy. In G. J. Cizek (Ed.), *Handbook of educational policy* (pp. 560). San Diego: Academic Press.

Wood, G. (2004). A view from the field: NCLB's effects on classrooms and schools. In D. W. Meier & G. Wood (Ed.), *Many children left behind: How the No Child Left Behind Act is damaging our children and our schools* (pp. 33–52). Boston: Beacon Press.

Legal Citations

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

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).

Cannon v. University of Chicago, 441 U.S. 667 (1979).

Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

Grove City College v. Bell, 465 U.S. 555 (1984).

North Haven Board of Education v. Bell, 456 U.S. 512 (1982).

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

Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971).

Pierce v. Society of Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510 (1925).

Plessy v. Ferguson, 163 U.S. 537 (1896).

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

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

Legal Citations

Abington Township School District v. Schempp and *Murray v. Curlett,* 374 U.S. 203 (1963).
Abood v. Detroit Board of Education, 431 U.S. 209 (1977).
Agostini v. Felton, 521 U.S. 203 (1997).
Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986).
Board of Education v. Allen, 392 U.S. 236 (1968).
Cantwell v. Connecticut, 310 U.S. 296 (1940).
Chicago Teachers Union, Local No. 1 v. Hudson, 475 U.S. 292 (1986), *on remand,* 922 F.2d 1306 (7th Cir.1991), *cert. denied,* 501 U.S. 1230 (1991).
Davenport v. Washington Education Association, 127 S. Ct. 2372 (2007).
Engle v. Vitale, 370 U.S. 421 (1962).
Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).
Gitlow v. New York, 268 U.S. 652 (1925).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Lee v. Weisman, 5050 U.S. 577 (1992).
Lehnert v. Ferris Faculty Association, 500 U.S. 507 (1991).
Lemon v. Kurtzman, 403 U.S. 602 (1971).
Morse v. Frederick, 127 S. Ct. 2618 (2007).
Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977).
Near v. Minnesota, 238 U.S. 697 (1931).
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37 (1983).
Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).
Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).
Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993).
Zorach v. Clauson, 343 U.S. 306 (1952).

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*

Further Readings

Fischer, L., Schimmel, D., & Stellman, L. (2007). *Teachers and the law* (9th Ed.) Boston: Allyn & Bacon.

Legal Citations

Bethel School District. No. 403 v. Fraser, 478 U.S. 675 (1986).
Garcetti v. Ceballos, 547 U.S. 410 (2006).
Connick v. Myers, 461 U.S. 138 (1983).
Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).
Morse v. Frederick, 127 S. Ct. 2618 (2007).
Pickering v. Board of Education of Township High School District 205, Will County, 391 U.S. 563 (1968).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).

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

Legal Citations

Burlington School Committee v. Department of Education, 471 U.S. 359 (1985).
Florence County School District Four v. Carter, 510 U.S. 7 (1993).
Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400 *et seq.*

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

Further Readings

Bickel, A. (1986). *The least dangerous branch: The Supreme Court at the bar of politics.* Indianapolis, IN: Bobbs-Merrill.

Hall, K. L. (1992). *The Oxford companion to the Supreme Court of the United States.* New York: Oxford University Press.

Kluger, R. (1975). *Simple justice: The history of* Brown v. Board of Education *and Black America's struggle for equality.* New York: Knopf.

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).
Dred Scott v. Sandford, 60 U.S. 393 (1857).
Gong Lum v. Rice, 275 78 (1927).
Plessy v. Ferguson, 163 U.S. 537 (1896).
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

Further Readings

O'Brien, D. M. (2003). *Storm center: The Supreme Court in American politics* (6th ed.). New York: Norton.

Simon, J. F. (1989). *The antagonists: Hugo Black, Felix Frankfurter & civil liberties in modern America.* New York: Simon & Schuster.

Urofsky, M. I. (1991). *Felix Frankfurter: Judicial restraint and individual liberties.* Boston: Twayne.

Legal Citations

Baker v. Carr, 369 U.S. 186 (1962).

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).

Colegrove v. Green, 328 U.S. 549 (1946).
Dennis v. United States, 341 U.S. 494 (1951).
Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 855 (1947).
Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948).
Korematsu v. United States, 323 U.S. 214 (1944), *reh'g denied,* 324 U.S. 885 (1945).
Minersville School District v. Gobitis, 310 U.S.586 (1940).
Railroad Commission of Texas v. Pullman Company, 312 U.S. 496 (1941).
West Virginia State Board of Education v. Barnette, 319 U.S. 624 (1943).
Zorach v. Clauson, 343 U.S. 306 (1952).

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).
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992).
Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998).
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

Legal Citations

California Education Code § 94850.
Mail Fraud Act, 18 U.S.C. §§ 1341 *et seq.*
Restatement (Second) of Torts §§ 525, 539 (1977).
Rodi v. Southern New England School of Law, 389 F.3d 5 (1st Cir. 2004).
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

Further Readings

Osborne, A. G. (1992). Legal standards for an appropriate education in the post-*Rowley* era. *Exceptional Children, 58,* 488–494.

Legal Citations

Board of Education of East Windsor Regional School District v. Diamond, 808 F.2d 987 (3d Cir. 1986).

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

Carter v. Florence County School District Four, 950 F.2d 156 (4th Cir. 1991), *aff'd on other grounds sub nom. Florence County School District Four v. Carter,* 510 U.S. 7 (1993).

Hall v. Vance County Board of Education, 774 F.2d 629 (4th Cir. 1985).

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

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*

Further Readings

Orfield, G., Eaton, S., & Harvard Project on School Desegregation. (1996). *Dismantling desegregation: The quiet reversal of* Brown v. Board of Education. New York: New Press.

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).
Freeman v. Pitts, 503 U.S. 467 (1992).
Green v. County School Board of New Kent County, 391 U.S. 430 (1968).

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.

Martha M. McCarthy

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*

Further Readings

Hannsepflug, A. (2005). The limits of freedom of speech for students in grades PK–8. *Education Law Reporter, 198,* 383–397.

Lavorato, C., & Saunders, J. (2006). Public high school students, T-shirts and free speech: Untangling the knots. *Education Law Reporter, 209,* 1–15.

McCarthy, M., Cambron-McCabe, N., & Thomas, S. (2004). *Legal rights of teachers and students.* Boston: Allyn & Bacon.

Legal Citations

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

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

Good News Club v. Milford Central School, 533 U.S. 98 (2002).

Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988).

Morse v. Frederick, 127 S. Ct. 2618 (2007).

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

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.

Patrick D. Pauken

See also Dress Codes; Drugs, Dog Searches for; Free Speech and Expression Rights of Students; Gun-Free Schools Act; Hazing; Zero Tolerance

Further Readings

Sperry, D. J., Daniel, P. T. K., Huefner, D. S., & Gee, E. G. (1998). *Education law and the public schools: A compendium* (pp. 525–538). Norwood, MA: Christopher-Gordon.

Legal Citations

Bethel School District No. 430 v. Fraser, 478 U.S. 675 (1986).
New Jersey v. T. L. O., 469 U.S. 325 (1985).
Olesen v. Board of Education, 676 F. Supp. 820 (N.D. Ill. 1987).
Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969).
United States v. White, No. 94–2575, 1995 U.S. App. LEXIS 2908 (7th Cir. Feb. 13, 1995) (unpublished order).

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.

Catherine A. Lugg

See also Equal Access Act; Gay, Lesbian and Straight Education Network (GLSEN)

Further Readings

Evans, C. (2006, December). *Equality: From state to state, 2006.* Human Rights Campaign. Available from http://www.hrc.org

Harbeck, K. M. (1997). *Gay and lesbian educators: Personal freedoms, public constraints.* Malden, MA: Amethyst.

Lugg, C. A. (2006, January/March). Thinking about sodomy: Public schools, legal panopticons, and queers. *Educational Policy, 20*(1–2), 35–58.

Legal Citations

Equal Access Act, 20 U.S.C. §§ 4071 *et seq*.

Lawrence v. Texas, 539 U.S. 558 (2003).

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.

Catherine A. Lugg

See also *Board of Education of Westside Community Schools v. Mergens;* Equal Access Act

Further Readings

Harris Interactive, Inc., & GLSEN. (2005). *From teasing to torment: School climate America, a survey of students and teachers.* New York: GLSEN.

Gay, Lesbian and Straight Educators Network. (n.d.). http://www.glsen.org

MacGillivray, I. K. (2004). *Sexual orientation & school policy: A practical guide for teachers, administrators, and community activists.* Lanham, MD: Rowman & Littlefield.

Legal Citations

Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990).

Colin ex rel. Colin v. Orange Unified School District, 83 F. Supp.2d 1135 (C.D. Cal. 2000).

East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District, x, 81 F. Supp.2d 1166 (D. Utah 1999a), 81 F. Supp.2d 1199 (D. Utah 1999b); *East High School Prism Club v. Seidel,* 95 F. Supp.2d 1239 (D. Utah 2000).

Equal Access Act, 20 U.S.C. §§ 4071 *et seq.*

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

Further Readings

Eckes, S. E., & Plucker, J. (2005). Charter schools and gifted education: Legal obligations. *Journal of Law and Education, 34,* 421–436.

Karnes, F. A., & Marquardt, R. (2000). *Gifted children and legal issues: An update.* Scottsdale, AZ: Gifted Psychology Press.

Marland, S. P., Jr. (1972). *Education of the gifted and talented: Report to the Congress of the United States by the U.S. Commissioner of Education and background papers submitted to the U.S. Office of Education* (2 vols.). Washington, DC: U.S. Government Printing Office. (Government Documents Y4.L 11/2: G36)

Russo, C. J., Harris, J. J., & Ford, D. Y. (1996). Gifted education and the Law: A right, privilege, or superfluous? *Roeper Review, 18,* 179–182.

U.S. Department of Education, Office of Educational Research and Improvement. (1993). *National excellence: A case for developing America's talent.* Washington, DC: U.S. Government Printing Office.

Zirkel, P. (2003). *The law on gifted education.* Storrs: University of Connecticut, National Research Center on the Gifted and Talented.

Legal Citations

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

No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).

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*

Further Readings

Campbell, A. L. (2004). *Raising the bar: Ruth Bader Ginsburg and the ACLU Women's Rights Project.* Philadelphia: Xlibris.

Perry, B. A. (1999). *The Supremes: Essays on the current justices of the Supreme Court of the United States.* New York: Peter Lang.

Legal Citations

Adarand Constructors v. Pena, 515 U.S. 200 (1995).
Agostini v. Felton, 521 U.S. 203 (1997).
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).
Frontiero v. Richardson, 411 U.S. 677 (1973).
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); 533 U.S. 98 (2001).
Gratz v. Bollinger, 539 U.S. 244 (2003).
Grutter v. Bollinger, 539 U.S. 306 (2003).
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).
Reed v. Reed, 404 U.S. 71 (1971).
Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995).
Sante Fe Independent School District v. Doe, 530 U.S. 290 (2002).
Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).
United States v. Virginia, 518 U.S. 515 (1996).
Zelman v. Simmons-Harris, 536 U.S. 639 (2002).

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).
Perry v. Sindermann, 408 U.S. 593 (1972).
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

Further Readings

Sovocool, D. R. (1999, April). *GPS: Charting new terrain: Legal issues related to GPS-based navigation and location systems.* Retrieved June 1, 2007, from http://library.findlaw.com/1999/Jul/2/130417.html

Legal Citations

Children's Online Privacy Protection Act, 15 U.S.C. § 6501.

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).
Plessy v. Ferguson, 163 U.S. 537 (1896).
Roberts v. City of Boston, 5 Cush. (Mass.) 198 (1849).

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

Further Readings

Mangrum, R. C. (2002). *Good News Club v. Milford Central School:* Teaching morality from a religious perspective on school premises after hours. *Creighton Law Review, 35,* 1023–1074.

Mawdsley, R. D. (2004). Access to public school facilities for religious expression by students, student groups, and community organizations: Extending the reach of the Free Speech Clause. *Brigham Young University Education and Law Journal, 2,* 269–299.

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); 533 U.S. 98 (2001).

Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

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

Hunter, R. C., & Donahoo, S. (2004). The implementation of *Brown* in achieving unitary status. *Education and Urban Society, 36,* 342–354.

Russo, C. J., Harris, J. J., III, & Sandridge, R. F. (1994). *Brown v. Board of Education* at 40: A legal history of equal educational opportunities in American public education. *Journal of Negro Education, 63,* 297–309.

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).
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

Pauken, P. D. (2005). Promotion, retention, and graduation. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *Principal's legal handbook* (pp. 69–91). Dayton, OH: Education Law Association.

Sperry, D. J., Daniel, P. T. K., Huefner, D. S., & Gee, E. G. (1998). *Education law and the public schools: A compendium* (pp. 577–579). Norwood, MA: Christopher-Gordon.

Legal Citations

Barno v. Crestwood Board of Education, 731 N.E.2d 701 (Ohio Ct. App. 1998).

Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978).

Hornstine v. Township of Moorsetown, 263 F. Supp.2d 887 (D.N.J. 2003).

Sandlin v. Johnson, 643 F.2d 1027 (4th Cir. 1981).

Shuman v. Cumberland Valley School District Board of Directors, 536 A.2d 490 (Pa. Commw. Ct. 1988).

South Gibson School Board v. Sollman, 728 N.E.2d 909 (Ind. Ct. App. 2000).

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

Further Readings

Dounay, J. (2006). *Standard high school graduation requirements (50 state).* Denver, CO: Education Commission of the States.

Hyman, R. T. (1997). Mandated community service in high school. *West's Education Law Reporter, 116,* 847–874.

Kober, N., Zabala, D., Chudowsky, N., Chudowsky, V., Gayler, K., & McMurrer, J. (2006). *State high school exit exams: A challenging year.* Washington, DC: Center on Education Policy.

O'Neill, P. T. (2001). Special education and high stakes testing for high school graduation: An analysis of current law and policy. *Journal of Law and Education, 30,* 185–222.

O'Neill, P. T. (2003). High stakes testing law and litigation. *Brigham Young University Education and Law Journal, 2,* 623–662.

Peterson, K. (2005, May 23). *High school exit exams on the rise.* Available from http://www.Stateline.org

Legal Citations

Debra P. v. Turlington, 730 F.2d 1405 (1984).

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

Legal Citations

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

Legal Citations

Gratz v. Bollinger, 539 U.S. 244 (2003).
Grutter v. Bollinger, 539 U.S. 306 (2003).
Regents of the University of California v. Bakke, 438 U.S. 265 (1978).

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

Further Readings

Brady, K. P. (2006). Collective bargaining. In C. J. Russo & R. D. Mawdsley (Eds.), *Education law* (Chap. 3). New York: Law Journal Press.

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

Strom, D. J., & Baxter, S. S. (2001). From the statehouse to the schoolhouse: How legislatures and courts shaped labor relations for public education employees during the last decade. *Journal of Law and Education, 30,* 275–303.

Legal Citations

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960).

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).

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

Edwards, L. (2000). *Freedom's college: The history of Grove City College.* Washington, DC: Regnery.

Ware, S. (2006). *Title IX: A brief history with documents.* New York: Bedford/St.Martin's.

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*

Further Readings

Eckes, S. (2004). Race-conscious admissions programs: Where do universities go from *Grutter* and *Gratz? Journal of Law and Education, 33,* 21–62.

Legal Citations

Gratz v. Bollinger, 529 U.S. 244 (2003).
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.

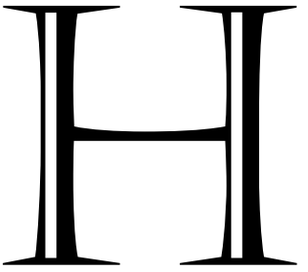
Jon E. Anderson

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*

Further Readings

Belt, S. W. (1988). *Hazelwood School District v. Kuhlmeier. Northern Kentucky Law Review, 16,* 191–204.

Bryks, H. (1989). A lesson in school censorship: *Hazelwood v. Kuhlmeier. Brooklyn Law Review, 55,* 291–325.

Lomkey, C. S. (2000). Analysis of high school newspaper editorials before and after *Hazelwood v. Kuhlmeier:* A content analysis. *Journal of Law & Education, 29,* 433–461.

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

Dixon, M. (2001). Hazing in high schools: Ending the hidden tradition. *Journal of Law and Education, 30,* 357–363.

Rosner, S. R., & Crow, R. B. (2002). Institutional liability for hazing in interscholastic sports. *Houston Law Review, 39,* 276–300.

Legal Citations

Caldwell v. Griffin Spalding County School Board, 503 S.E.2d 43 (Ga. Ct. App. 1998).

McMillan v. Broward County School Board, 834 So. 2d 903 (Fla. Dist. Ct. App. 2003).

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

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. West's Education Law Reporter, 208,* 705–717.

Zirkel, P. A. (2006). The remedial authority of hearing and review officers under IDEA. *Administrative Law Review, 58,* 401–427.

Legal Citations

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

Further Readings

Monnat, D. E. (2006, January/February). The kid gloves are off: Child hearsay after *Crawford v. Washington. NACDL News,* p. 18.

Legal Information Institute, Cornell Institute. (n.d.). *Federal rules of evidence* (LII 2006 ed.). Retrieved November 22, 2006, from http://www.law.cornell.edu/rules/fre/rules.htm

Legal Citations

Crawford v. Washington, 541 U.S. 36 (2004).
Pointer v. Texas, 380 U.S. 400 (1965).

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

Further Readings

Berry, B., Hoke, M., & Hirsch, E. (2004). The search for highly qualified teachers. *Phi Delta Kappan, 85,* 684–689.

Darling-Hammond, L., & Bransford, J. (Eds.). (2007). *Preparing teachers for a changing world: What teachers should learn and be able to do.* San Francisco: Jossey-Bass.

Legal Citations

Elementary and Secondary Education Act, 20 U.S.C. §§ 6301 *et seq.*

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

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

Further Readings

Dickman, D., & Lammel, J. A. (2000). Getting to the core of student athletic standards. *Principal Leadership, 1*(2), 30–32.

Morton, S., Richardson, B., & Vizoso, A. (1993). *Academic standards for interscholastic athletic participation.* Chapel Hill: University of North Carolina, Chapel Hill, Educational Policy Research Center. (ERIC Reproduction Service Document No. ED375116)

Missouri State High School Activities Association. (n.d.). http://www.mshsaa.org

National Federation of High School Athletic Associations. (n.d.). http://www.nfhs.org

National High School Athletic Coaches Associations. (n.d.). http://www.hscoaches.org

Sadker, D., & Sadker, M. (2005). *What is Title IX?* Retrieved March 27, 2007, from http://www.american.edu/sadker/titleix.htm

Alabama High School Athletic Association Web Site. (n.d.). http://www.ahsaa.org

Wolohan, J. T. (1996, July). The Americans with Disabilities Act and its effect on high school athletic associations' age restrictions. *West's Educational Law Quarterly, 5,* 389–398.

Legal Citations

Alexander v. Choate, 469 U.S. 287 (1985).

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

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

Title IX of the Educational Amendments of 1972, 20 U.S.C. § 1681.

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

Further Readings

Oakes, J. (2005). *Keeping track: How schools structure inequality* (2nd ed.). New Haven, CT: Yale University Press.

Welner, K. (2001). *Legal rights, local wrongs: When community control collides with educational equity.* Albany: State University Press of New York.

Legal Citations

Diaz v. San Jose Unified School District, 633 F. Supp. 808 (N.D. Cal. 1985).

Hobson v. Hansen, 269 F. Supp. 491 (D.D.C. 1967), *aff'd sub nom. Smuck v. Hobson,* 408 F.2d 175 (D.C. Cir. 1969).

McNeal v. Tate County School District, 508 F.2d 1017 (5th Cir. 1975).

People Who Care v. Rockford Board of Education School District, 851 F. Supp 905 (N.D. Ill. 1994), *aff'd in part, rev'd in part,* 111 F.3d 528 (7th Cir. 1997).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d.

Washington v. Davis, 426 U.S. 229 (1976).

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

Further Readings

Colwell, B., & Schwartz, B. (2002). Homeless and alien students: A duty to educate. *West's Education Law Reporter, 165,* 447–456.

Goedert, J. G. (2000). The education of homeless children: The McKinney Act and its implications. *West's Education Law Reporter, 140,* 9–19.

National Law Center on Homelessness and Poverty. (2005). *Educating homeless children and youth: The 2005 guide to their rights.* Washington, DC: Author.

U.S. Department of Education. (2004). *Education for Homeless Children and Youth Program, Title VII-B of the McKinney-Vento Homeless Assistance Act, Non-Regulatory Guidance.* Washington, DC: Author. Available from http://www.ed.gov/programs/homeless/guidance.doc

Legal Citations

Elementary and Secondary Education Act, 20 U.S.C. §§ 6301 *et seq.*

McKinney-Vento Homeless Assistance Act, 42 U.S.C §§ 11431 *et seq.*

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*

Further Readings

Boothe, J. W., Bradley, L. H., Flick, T. M., & Kirk, S. P. (1997). No place like home. *American School Board Journal, 184*(2)38–41.

Collom, E. (2005). The ins and outs of homeschooling: The determinants of parental motivation and student achievement. *Education and Urban Society, 37,* 307–335.

Dare, M. J. (2001). *The tensions of the homeschooling movement: A legal analysis.* Doctoral dissertation, Indiana University.

Gordon, W., Russo, C., & Miles, A. (1994). *The law of home schooling.* Topeka, KS: National Organization on Legal Problems of Education.

Princiotta, D., & Bielick, S. (2006, February). *Homeschooling in the United States: 2003.* Washington, DC: National Center for Educational Statistics.

Stevens, M. L. (2003). The normalization of homeschooling in the USA. *Evaluation and Research in Education, 17,* 90–100.

Legal Citations

No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq.* (2002).
Wisconsin v. Yoder, 406 U.S. 205 (1972).

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

Further Readings

Bunch, E. A. (1998). School discipline under the Individuals with Disabilities Education Act: How the stay-put provision limits schools in providing a safe learning environment. *Journal of Law & Education, 27,* 315–321.

Osborne, A. G. (2001). Discipline of special education students under the Individuals with Disabilities Education Act. *Fordham Urban Law Journal, 29,* 513–538.

Zykorie, L. (2003). Reauthorizing discipline for the disabled student: Will Congress create a better balance in the Individuals with Disabilities Education Act (IDEA)? *Connecticut Public Interest Law Journal, 3,* 101–190.

Legal Citations

Honig v. Doe, 484 U.S. 305 (1988).

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

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

Legal Citations

Board of Regents v. Roth, 408 U.S. 564 (1972).
Hortonville Joint School District No. 1 v. Hortonville Education Association, 426 U.S. 482 (1976).
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

Further Readings

Lewis, J. E., & Hastings, S. C. (1994). *Sexual harassment in education* (2nd ed.). Topeka, KS: National Organization on Legal Problems in Education (now Education Law Association).

Office for Civil Rights, U.S. Department of Education. (2001). *Revised sexual harassment guidance: Harassment of students by school employees, other students, or third parties.* Available from http://www.ed.gov

Legal Citations

Davis v. Monroe County Board of Education, 526 U.S. 629 (1999), *on remand,* 206 F.3d 1377 (11th Cir. 2000).

Harris v. Forklift Systems, 510 U.S. 17 (1993).

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (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.

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).

Illinois ex rel. McCollum v. Board of Education of School District No. 71, Champaign County, Illinois, 333 U.S. 203 (1948).

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

Further Readings

Keeton, W. P., Dobbs, D. B., Keeton, R. E., & Owen, D. G. (1984). *Prosser & Keeton on torts 1044* (5th ed.). St. Paul, MN: Thompson-West.

Oldaker, L. L., & Dagley, D. (1992). The Eleventh Amendment, Its history and current application to schools and universities. *Education Law Reporter, 72,* 479–501.

Thro, W. (2006). The future of sovereign immunity. *Education Law Reporter, 215,* 1–31.

Legal Citations

Alabama Code § 16–28A-1 (2001 Replacement).

Barr v. Bernhard, 562 S.W.2d 844 (Tex. 1978).

Bush v. Norwalk, 189 A. 608 (Conn. 1937).

C. M. Clark Insurance Agency v. Reed, 390 F. Supp. 1056, 1060 (D.Tex.1975).

Ferris v. Board of Education of Detroit, 81 N.W. 98 (Mich. 1899).

Haney v. Bradley County Board of Education, 160 S.W.3d 886 (Tenn. Ct. App. 2005).

Illinois Comp. Stat. 127/§1301(a) (1989).
Imbler v. Pachtman, 424 U.S. 409 (1976).
Leake v. Murphy, 617 S.E.2d 575 (Ga. Ct. App. 2005).
Linhart v. Lawson, 540 S.E.2d 875 (Va. 2001).
Lowe v. Letsinger, 772 F.2d 308 (7th Cir.1985).
Morris v. School District of Township of Mount Lebanon, 144 A.2d 737 (Pa. 1958).
Sawaya v. Tucson High School District, 281 P.2d 105 (Ariz. 1955).
Tenney v. Brandhove, 341 U.S. 367 (1951).
United States v. Ballin, 144 U.S. 1 (1892).
Watson v. Town of New Milford, 45 A. 167 (Conn. 1900).
Wood v. Strickland, 420 U.S. 308 (1975), *on remand, sub nom. Strickland v. Inlow,* 519 F.2d 744 (8th Cir. 1975).
Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

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

Further Readings

Brady, K. P. (2007). Bargaining. In C. J. Russo (Ed.), *The yearbook of education law: 2007* (pp. 101–110). Dayton, OH: Education Law Association.

Brady, K. P. (2006). Collective bargaining. In C. J. Russo & R. D. Mawdsley (Eds.), *Education law.* New York: Law Journal Press.

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

Legal Citations

United Steelworkers of America v. American Manufacturing Company, 363 U.S. 564 (1960).

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

Further Readings

Finn, C. E., Jr., Rotherham, A. J., & Hokanson, C. R., Jr. (2001). *Rethinking special education for a new century.* New York: Thomas B. Fordham Foundation.

Smith, T. E. C. (2005). IDEA 2004: Another round in the reauthorization process. *Remedial and Special Education, 26*(6), 314–319.

Turnbull, R., Huerta, N., & Stowe, M. (2006). *The Individuals with Disabilities Education Act as amended in 2004.* Upper Saddle River, NJ: Pearson Merrill Prentice Hall.

Legal Citations

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

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

Legal Citations

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*

Further Readings

DeMitchell, T. A. (2007). *Negligence: What principals need to know about avoiding liability.* Lanham, MD: Rowman & Littlefield Education.

Frels, K. (2000). Balancing students' rights and schools' responsibility. *Houston Law Review, 37,* 117–125.

Legal Citations

California Education Code, § 48907.

Garcia v. City of New York, 646 N.Y.S. 2d 508 (N.Y. App. Div. 1996).

Georgia Code Annotated, § 20–215.

In re Donaldson, 75 Cal. Rptr. 220 (Cal. Ct. App. 1969).

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

Further Readings

Bass, E. (2003). Missed opportunity in *Gault*. *University of Chicago Law Review, 70,* 39–53.

Wilkinson, J. H., III. (1975). *Goss v. Lopez*: The Supreme Court as superintendent. *The Supreme Court Review, 25,* 71–72.

Legal Citations

Goss v. Lopez, 419 U.S. 565 (1975).
In re Gault, 387 U.S. 1 (1967).

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

Daniel, P. T. K., & Pauken, P. D. (2005). Copyright laws in the age of technology: Changes in legislation and their applicability to the K–12 environment. In K. E. Lane, M. J. Connelly, J. F. Mead, M. A. Gooden, & S. Eckes (Eds.), *The principal's legal handbook* (3rd ed., pp. 441–453). Dayton, OH: Education Law Association.

Daniel, P. T. K., & Pauken, P. D. (2005). Intellectual property. In J. Beckham & D. Dagley (Eds.), *Contemporary issues in higher education law* (pp. 347–393). Dayton, OH: Education Law Association.

Sperry, D. J., Daniel, P. T. K., Huefner, D. S., & Gee, E. G. (Eds.). (1998). *Education law and the public schools: A compendium.* Norwood, MA: Christopher-Gordon.

Legal Citations

Copyright Act, 17 U.S.C. §§ 101 *et seq.*
Lanham Act, 15 U.S.C. §§ 1051 *et seq.*
Patent Act, 35 U.S.C. §§ 1 *et seq.*

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*

Further Readings

Ayre, L. B. (2004). History and development of filters. *Library Technology Reports, 40*(2), 8–25.

Legal Citations

American Library Association v. United States, 201 F. Supp.2d 401 (E.D. Pa. 2002).

Children's Internet Protection Act (CIPA) of 2000, P.L. 106–554, codified at 20 U.S.C. § 9134 and 47 U.S.C. § 254(h).

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

Further Readings

Garner, B. A. (Ed.). (1999). *Black's law dictionary* (7th ed.). St. Paul, MN: West.

Litigation. (2006). In H. S. Suskin, J. S. Solovy, J. Shaw, M. Neuemeier, B. Levenstam, J. C. Koch, et al. (2006). *Federal litigation guide.* New York: Mathew Bender.

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

Cedar Rapids Community School District v. Garret F., 526 U.S. 66 (1999).

Detsel v. Board of Education of Auburn Enlarged City School District, 637 F. Supp. 1022 (N.D.N.Y. 1986), *aff'd,* 820 F.2d 587 (2d Cir.), *cert. denied,* 484 U.S. 981 (1987).

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

Cannon v. University of Chicago, 441 U.S. 677 (1979).
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 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

Further Readings

Russo, C. (2001). Unequal educational opportunities for gifted students: Robbing Peter to pay Paul? *Fordham Urban Law Journal, 29*(2), 727–759.

Legal Citations

Jacob K. Javits Gifted and Talented Students Education Act of 1994, now codified at 20 U.S.C. §§ 8031 *et seq*.

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

Further Readings

Joseph, D. G. (2003). Uses of *Jacobson v. Massachusetts* in the age of bioterror. *Journal of the American Medical Association, 290,* 2331.

Legal Citations

Jacobson v. Commonwealth of Massachusetts, 197 U.S. 11 (1905).
Zucht v. King, 260 U.S. 174 (1922).

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*

Further Readings

Ellis, J. J. (1997). *American sphinx: The character of Thomas Jefferson.* New York: Knopf.
Malone, D. (2006). *Thomas Jefferson and his times* (Vols. 1–6). Charlottesville: University of Virginia Press.
Peterson, M. D. (Ed.). (1984). *Thomas Jefferson: Writings.* New York: Library of America.

Legal Citations

Cooper v. Aaron, 358 U.S. 1 (1958).
Everson v. Board of Education of Ewing Township, 330 U.S. 1 (1947), *reh'g denied,* 330 U.S. 885 (1947).
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).
McCulloch v. Maryland, 17 U.S. 316 (1819).
No Child Left Behind Act, 20 U.S.C. §§ 6301 *et seq*. (2002).
Wallace v. Jaffree, 472 U.S. 38 (1985).

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

Further Readings

Garfinkel, L. F., & Nelson, R. (2004). Promoting better interaction between juvenile court, schools, and parents. *Reclaiming Children and Youth, 13*(1), 26–28.

Sperry, D. J., Daniel, P. T. K., Huefner, D. S., & Gee, E. G. (1998). *Education law and the public schools: A compendium.* Norwood, MA: Christopher-Gordon.

Legal Citations

In re Winship, 397 U.S. 358 (1970).

McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

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

Legal Citations

Kadrmas v. Dickinson Public Schools, 487 U.S. 450 (1988).

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

Further Readings

Lazarus, E. (2005, November 14). The Court's new swing vote: Kennedy center. *The New Republic, 233,* 16–17.

Urofsky, M. I. (Ed.). (2006). *Biographical encyclopedia of the Supreme Court: The lives and legal philosophies of the justices.* Washington DC: C. Q. Press.

Legal Citations

Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995)

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).

Boy Scouts of America v. Dale, 530 U.S. 640 (2000).

Burlington Industries v. Ellerth, 524 U.S. 742 (1988).

City of Boerne v. Flores, 521 U.S. 507 (1997).

City of Richmond v. J. A. Croson Co., 488 U.S. 469 (1989).

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

Freeman v. Pitts, 503 U.S. 467 (1992).

Gratz v. Bollinger, 539 U.S. 244 (2003).

Grutter v. Bollinger, 539 U.S. 306 (2003).

Lawrence v. Texas, 539 U.S. 558 (2003).

Lee v. Weisman, 505 U.S. 577 (1992).

McCreary County, Kentucky v. American Civil Liberties Union of Kentucky, 545 U.S. 844 (2005).

Owasso Independent School District No. 1011 v. Falvo, 534 U.S. 426 (2002).

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

Romer v. Evans, 517 U.S. 620 (1996).

Rosenberger v. Rectors and Visitors of the University of Virginia, 515 U.S. 819 (1995).

Santa Fe Independent School District v. Doe, 530 U.S. 290 (2000).

Sherbert v. Verner, 374 U.S. 398 (1963).

Texas v. Johnson, 491 U.S. 397 (1989).

Van Orden v. Perry, 545 U.S. 677 (2005).

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

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

Further Readings

Clotfelter, C. (2004). *After Brown: The rise and retreat of school desegregation.* Princeton, NJ: Princeton University Press.

Frankenberg, E., & Orfield, G. (2007). *Lessons in integration: Realizing the promise of racial diversity in American schools.* Charlottesville: University of Virginia Press.

Legal Citations

Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189 (1973).

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

Legal Citations

Alder v. Board of Education, 342 U.S. 485 (1952).
De Jonge v. Oregon, 299 U.S. 353 (1937).
Elfbrandt v. Russell, 384 U.S. 11 (1966).
Keyishian v. Board of Regents, 385 U.S. 589 (1967).
Shelton v. Tucker, 364 U.S. 479 (1960).
Sweezy v. New Hampshire, 354 U.S. 234 (1957).
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

National Association of Early Childhood Specialists in State Departments of Education. (2000). *Still! Unacceptable trends in kindergarten entry and placement, a position paper.* Retrieved January 11, 2008, from http://naecs.crc.uiuc.edu/position/trends2000.html

Schimmel, D., & Fischer, L. (1977). *The rights of parents in the education of their children.* Columbia, MD: The National Committee for Citizens in 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).